

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.Nos.16435, 12012, 18107,
31919 and 31991 of 2018

COMMON ORDER:

Since these writ petitions are interrelated, they are being disposed of by way of a common order.

WP.No.16435 of 2018

In response to bid notice No.CGM(T)/HGCL/ORR/UFC/38/2017-18, dated 20.03.2018, issued by the first respondent notifying tenders for collection of User Fee through an agency on the basis of competitive bidding on E-Procurement basis for Hyderabad Outer Ring Road for a length of 158 Kms in the State of Telangana, petitioner herein and the respondents 4 and 5 offered their bids. They got through the process of technical evaluation. The first respondent herein opened the financial bids on 24.04.2018. The first respondent fixed the minimum amount as 21.25 crores on which the bidders have to quote the minimum premium amount and as per the procedure they have to submit a scanned copy of the Section IV Format of the Financial Bid. The Format prescribed under Section IV i.e., Format of Financial Bid is as follows:

“

S.No.	Period	Minimum Amount payable per month by the bidder to the HGCL (HYDERABAD) for the period mentioned in the column B	Premium Amount to be paid per month to be quoted by the bidder on eProcurement platform in addition to minimum monthly remittance	Total Amount payable by the bidder to the HGCL (HYDERABAD) including premium amount per month (C+D)
A	B	C	D	E
1	9 MONTHS	Rs 2125.00 (Lakhs) (Rs. Two Thousand One Hundred and Twenty Five Lakhs Only)*	Rs...../- (Rs. in words)*	Rs...../- (Rs. in words)*

“

2. The fourth respondent herein quoted the total monthly remittance of Rs.26.10 crores on the E-Platform and indicated the same as against Column 'E' of the above said column whereas the fifth respondent quoted the monthly remittance of Rs.23.59 Crores on the E-Platform as against column "E" of the above said Format. On the other hand, petitioner herein quoted premium amount of Rs.78,89,979/- apart from minimum monthly remittance of Rs.21.25 Crores i.e., aggregate sum of Rs.2,23,89,979/-.

3. The principal contention advanced in the present writ petition by the learned Senior Counsel appearing for the petitioners Sri Vedula Venkata Ramana is that it is obligatory and mandatory on the part of the intending bidders to furnish the particulars strictly in accordance with the format prescribed under Section IV of the Bid Documents, but the respondents 4 and 5 did not show the particulars of the break-up separately i.e., premium amount and instead showed the total amount as against the Column 'E' as such the bids offered by the respondents 4 and 5 are liable to be rejected and the bid submitted by the petitioner herein is required to be accepted by the respondent authorities.

In support of his contention, learned Senior Counsel takes the support of a Judgment of the Hon'ble Apex Court in *W.B.ELECTRICITY BOARD v. PATEL ENGINEERING CO. LTD. AND OTHERS*¹.

4. Per contra, it is contended by the learned Advocate General appearing for Standing Counsel for the respondents 1 and 2 Sri Y.Rama Rao that the very writ petition filed by the petitioner herein is not maintainable in the absence of any public interest and in the absence of any illegality in the impugned action. It is also his submission that in view of Clauses 27.1, 29.4 and 38.2 of the bid documents there is absolutely no

¹ AIR 2001 SC 682

irregularity in the course adopted by the respondents herein while dealing with the financial bids. It is the further submission of the learned Advocate General that in the absence of any malafides attributed to the respondents, the present writ petitions, arising out of contractual issues cannot be maintained.

In support of his contentions and submissions, learned Advocate General places reliance on the judgments of the Hon'ble Apex Court in *JSW INFRASTRUCTURE LTD v. KAKINADA SEAPORTS LTD.*², *RAUNAW INTERNATIONAL LTD. V. I.V.R. CONSTRUCTION LTD. AND OTHERS*³, *TATA CELLULAR v. UNION OF INDIA*⁴ and *AIR INDIA LTD v. COCHIN INTERNATIONAL AIRPORT LTD*⁵.

5. In view of the above contentions, the following issue arises for consideration of this Court in the present writ petition:

“Whether the contention raised by the learned Senior Counsel with regard to strict non-adherence to the particulars shown in Section IV Format of Finance Bid would render the entire process of tenders untenable and unsustainable and whether the petitioner is entitled for any relief from this Court under Article 226 of the Constitution of India?

6. It is beyond the pale of controversy that as against Column ‘E’ of Section IV Format the respondents 4 and 5 did furnish the total amount payable by the bidder including the premium amount per month. As per the documents annexed to the counter affidavit of the first respondent, the first respondent organisation on 18.05.2018 sought clarification from the respondents 4 and 5 as to the particulars mentioned in Section IV Format of Financial Bid. In response to the said letters on (18.05.2018 and 21.05.2018 – P.231) they have given clarification as to the break-up of the amounts. It is significant to note in this context that there is absolutely no

² (2017) 4 SCC 170

³ (1999) 1 SCC 492

⁴ (1994) 6 SCC 651

⁵ (2000) 2 SCC 617

subsequent variation with regard to the amounts shown by the respondents 4 and 5 as against Column 'E' of Section IV Financial Bid Format.

7. Clauses 27.1, 29.4 and 38.2 of the Bid Documents are relevant and they are extracted hereunder:

“27. The bid opening authority may call upon any bidder for clarification on the statements, documentary proof relating to the technical bid. The request for clarification and response thereto shall be in writing and it shall be only on the qualification information furnished by the bidder. The clarification called for from the bidders shall be furnished within the stipulated time, which shall not be more than a week.

29.4. Bids shall be scrutinized in accordance with the conditions stipulated in the Bid document. In case of any discrepancy of non-adherence conditions the HGCL shall communicate the same which will be binding both on the HGCL and the Bidder. In case of any ambiguity, the decision taken by the HGCL on bids shall be final.

38.2. The HGCL, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to; a) Suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto; b) Consult with any Bidder in order to receive clarification or further information; c) Retain any information and/ or evidence submitted to the HGCL by, on behalf of, and/ or in relation to any Bidder; and/ or d) Independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Bidder.”

8. A reading of the contents of the above Clauses of the Bid Documents show, in vivid and crystal clear manner, the jurisdiction power and discretion of the first respondent to call for the clarification from the bidders as has been done by the first respondent vide letters dated 18.05.2018. In view of the same, the impugned action cannot be faulted by any stretch of imagination.

9. In the considered opinion of this Court, the Judgment of the Hon'ble Apex Court in the case of *W.B.ELECTRICITY BOARD (supra 1)*, relied upon by the learned Senior Counsel, appearing for the petitioner would not render any assistance to the petitioner herein.

10. Coming to the judgments cited by the learned Advocate General, in *JSW INFRASTRUCTURE LTD (supra 2)*, the Hon'ble Apex Court after reviewing the entire case law on the issue pertaining to contractual matters, ruled that in contractual matters the Writ Courts should not interfere unless the decision taken is totally arbitrary, perverse or malafide.

11. In *RAUNAQ INTERNATIONAL LTD. (supra 3)*, the Hon'ble Apex Court at paragraphs 22 to 24, held as under:

22. In *Tata Cellular v. Union of India*. [1994] 6 SCC 651, this Court again examined the scope of judicial review in the case of a tender awarded by a public authority for carrying out certain work. This Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of that power of judicial review. The Court also observed that the right to choose cannot be considered as an arbitrary power. Of course, if this power is exercised for any collateral purpose, the exercise of that power will be struck down.

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters and the need to remedy any unfairness. Such an unfairness is set right by judicial review." After examining a number of authorities, the Court concluded (at page 687) as follows ;-

(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.

(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 or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should 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 arid unbudgeted expenditure.

23. The same view has been reiterated in *Asia Foundation & Construction Ltd v. Trafalgar House Construction (I) Ltd and Ors.*, [1997] 1 SCC 738, the court observing that judicial review of contractual transactions by Government bodies is permissible to prevent arbitrariness, favouritism or use of power for collateral purposes. This Court added a further dimension to the undesirability of intervention by pointing out that where the project is a high cost project for which loans from the World Bank or other international bodies have been obtained after following the specifications and procedure of such a body, it would be detrimental to public interest to interfere. The same principles have been also reaffirmed in *New Horizons Limited and Anr. v. Union of India and Ors.*, [1995] 1 SCC 478 with this Court again emphasising the need to allow for certain flexibility in administrative decision-making, observing that the decision can be challenged only On the Wednesbury principle of unreasonableness i.e. unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset. In *Delhi Science Forum and Ors. v. Union of India and Anr.*, [1996] 2 SCC 405, this Court once again observed that if a reasonable procedure has been followed, the decision should not be challenged except on the Wednesbury principle of unreasonableness.

24. Dealing with interim orders, this Court observed in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and Ors.*, [1985] 2 SCR 190 at page 196 that an interim order should not be granted without considering balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in *Ramniklal N. Bhutto and Anr: v. State of Maharashtra and Ors.*, [1997] 1 SCC 134, the Court said that while granting a Stay the court should arrive at a proper balancing of competing interests and grant a Stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a Stay. Therefore, in granting an Injunction or Stay order against the award of a contract by the Government or a Government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost."

12. In *TATA CELLULAR (supra 4)*, the Hon'ble Apex Court at paragraph 77, held as under:

"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 fulfillment 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:

24 (1987) 1 All ER 564 25 (1989) 2 All ER 609 26 *Amin v. Entry Clearance Officer*, (1983) 2 All ER 864 27 (1990) 1 QB 146: (1989) 1 All ER 509

(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, *Wednesday* 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 Brind²⁸, 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".

13. In *AIR INDIA LTD (supra 5)*, the Hon'ble Apex Court at paragraph 7, held as under:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *R.D. Shetty v. International Airport Authority*, 1979 (3) SCC 488; *Fertilizer Corporation Kamgar Union v. Union of India*, ; *Asstt. Collector, Central Excise v. Dunlop India Ltd*, , *Tata Cellular v. Union of India*, ;. *Ramniklal N. Bhutta v. State of Maharashtra*, and *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, . The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not

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

14. It is very much evident from the principles laid down by the Hon'ble Apex Court that only when there is arbitrariness, perversity and malafide in exercise of power and involvement of public interest, there can be interference of the constitutional Court under Article 226 of the Constitution of India in contractual matters. In the instant case, the said contingencies, in the considered opinion of this Court, are totally lacking and conspicuously absent. Therefore, the petitioner herein has not made out any case, warranting interference of this Court under Article 226 of the Constitution of India nor he is successful in pointing out involvement of any public interest and malafide exercise of power by the respondents in the case on hand. Therefore, this Court has absolutely no scintilla of hesitation to hold that there are absolutely no merits in the present writ petitions.

15. It is submitted by the learned Senior Counsel that W.P.No.12012 of 2018 and W.P.No.18107 of 2018 have become infructuous.

16. Coming to W.P.Nos.31919 of 2018 and 31991 of 2018, these two writ petitions have been filed with a pleading that pending litigation before this Court in the above referred writ petitions, the respondents are pressurising the petitioner to accept the letter of acceptance and to submit the performance guarantee and this Court protected the petitioners'

interest pending the writ petition by directing not to take any coercive action. In view of the disposal of W.P.No.16435 of 2018 by this order, adjudication on these two writ petitions is not necessary.

17. Accordingly, W.P.No.16435 of 2018 is dismissed so also W.P.Nos.12012 of 2018 and 18107 of 2018 are dismissed as infructuous and W.P.Nos.31919 of 2018 and 31991 of 2018 are also closed as a consequence of the order in W.P.No.16435 of 2018. As a sequel, the miscellaneous petitions, if any in these writ petitions, shall stand closed. There shall be no order as to costs.

Date:02.11.2018
grk



A.V.SESHA SAI, J



THE HON'BLE SRI JUSTICE A.V.SESHA SAI



W.P.Nos.16435, 12012, 18107,
31919 and 31991 of 2018

Dated:02.11.2018

grk