

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.28020 OF 2018

Date: 21.02.2019

Between:

Megha Engineering & Infrastructures Limited,
A company incorporated under the Companies
Act,1956, having its registered office at S-2,
T.I.E, Balanagar, Hyderabad, rep.by its
Associate Vice President, T.Ashok Reddy.

....Petitioner

and

Union of India, rep.by its Secretary, Ministry
of Petroleum & Natural Gas, Shastri Bhavan,
New Delhi and two others.

.....Respondents

The Court made the following:



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ORDER:

On 12.04.2018 Petroleum and Natural Gas Regulatory Board (PNGRB) (2nd respondent) issued public notice announcing 9th round of City Gas Distribution (CGD) bidding for development of CGD projects in 86 Geographical Areas (Gas) covering 156 districts and 18 part districts, spread over several states including geographical areas of Srikakulam, Visakhapatnam and Vizianagaram districts forming part of State of Andhra Pradesh. Separate numbers are assigned to the geographical areas. Insofar as the three districts mentioned above, it is called as GA No.1. The last date for submission of bids was 10.07.2018. The scope of work includes laying, building, operating or expanding the CGD networks to meet the requirement of natural gas in domestic, commercial and industrial segments including natural gas in vehicular segments. Petitioner participated in the 13 bids of various geographical areas including GA No.1. As per the schedule prescribed, technical bids were opened on 12.07.2018. According to the petitioner, on 02.08.2018 he received information through e-mail declaring him as qualified in technical bid evaluation for GA-1 and that financial bid opening was scheduled on 03.08.2018. This e-mail was generated at 3.50 PM on 02.08.2018. However, at 4.18 PM on the same day, e-mail was sent to the petitioner informing that he should ignore the e-mail sent earlier. There was correspondence between the petitioner and the 2nd respondent, requesting the 2nd respondent to elicit opinion as to why the earlier e-mail was sought to be ignored. On 03.08.2018 at 3.09 PM petitioner was informed that on 03.08.2018 first e-mail was sent

inadvertently and in the second e-mail, petitioner was informed to ignore the first e-mail and that petitioner was asked to check the details about his bid for GA-I at Telecommunications Consultants India Limited (TCIL) website. On 03.08.2018 at 5.09 PM petitioner was informed that due to incomplete offline evaluation, his bid was not evaluated. The said decision is impugned in this writ petition.

2. To complete the narration, as per the bidding process, the bidders have to submit their bids along with supporting documents online and they should also furnish the documents offline. What are the documents required to be submitted in offline is mentioned in paragraph-3.5 of the bid document. Though the impugned communication is not elaborate on the reasons for rejecting the bid, though cryptic but discloses that offline submission was incomplete. Ignoring bid submitted by the petitioner, the financial bids were opened and Indian Oil Corporation Limited is identified as successful bidder to award CGD for GA-I.

3. This Court by order dated 09.08.2018, granted interim direction as prayed for a limited period and the same is extended from time to time. The successful bidder is impleaded as 3rd respondent. Counter-affidavits, reply affidavits and voluminous documents are placed on record by the respective parties.

4. Heard learned senior counsel Sri D.Prakash Reddy for petitioner, learned senior counsel Sri R.Raghunandan Rao for 3rd respondent and learned senior counsel Sri A.Sudarshan Reddy for 2nd respondent.

5. Learned senior counsel for petitioner made the following submissions:

5.1. As per the schedule the technical bids were opened, evaluated and on such evaluation, petitioner's technical bid was declared as qualified and placed for opening of financial bid. Thus, once the technical bid was processed and declared as qualified, it is not open to the 2nd respondent to review the said decision and declare him as not qualified and the same is *ex facie* illegal.

5.2. It is further contended that no reasons are assigned in the order impugned and the order is liable to be set aside on that ground alone. The statement that there was incomplete offline evaluation is a vague statement to reject the technical bid of the petitioner.

5.3. It is further contended that material on record would disclose that petitioner's technical bid is declared as not qualified on the ground that petitioner has not submitted the original copy of letter of authorization indicated by the written power of attorney as required by paragraph-3.5, whereas the clause is very vague and on reading of the clause, it does not require clearly that the bidder should submit the original copy of power of attorney authorizing a person to submit the bids on behalf of petitioner and, therefore, by referring to the said clause and alleging that petitioner did not submit the original power of attorney in the offline mode, the technical bid could not have been rejected.

5.4. He would further submit that as per the last sentence appended to paragraph-3.5, failure to submit any of the mentioned

documents would result in non-opening of technical bid. Thus, if the 2nd respondent was of the view that petitioner did not submit the original power of attorney along with offline submission of bid bond, the technical bid could not have been opened, whereas technical bid was opened. This is also clear from the resolution of the Board dated 16.07.2018. A reading of the resolution itself would show that technical bid was already opened. Once technical bid was opened, the question of re-evaluation and rejecting the technical bid does not arise.

5.5. Learned senior counsel would point out that petitioner participated in the CGD tenders for other Geographical Areas and in none of the tenders, he has submitted the original power of attorney. However, as an abundant caution, though according to petitioner it is not necessary, he has submitted the original copy of power of attorney. For ten Geographical Areas, his technical bids were declared as valid, were subjected to evaluation of his financial bids and was also awarded contracts for 4 GAs.

5.6. He would further submit that certain parameters are prescribed in evaluating the offer given in the financial bid by the bidders. On comparing the offer given by the petitioner vis-à-vis third respondent, with reference to various parameters, the petitioner's composite score stands at 84.06 as compared to third respondent's score of 73.23 and, therefore, the financial bid offered by the petitioner is far superior, and meets the parameters to a greater extent as compared to third respondent. He therefore submits that by looking into the issue more particularly in view of

vagueness of clause in paragraph 3.5.2, the technical bid of petitioner ought to have been evaluated.

6. Learned senior counsel Sri R.Raghunandan Rao appearing for 3rd respondent would submit that tenders were called for 86 GAs spread over various parts of the country. In all, 400 bids were received by the 2nd respondent. Except for the petitioner, all other bidders submitted the original power of attorneys in the offline process. He would further submit that initially petitioner did not submit the original power of attorney in any of the bids submitted by him, but having realized the mistake, with reference to 10 other bids, petitioner submitted the original power of attorneys. As the technical bids were not open by the time he filed original power of attorney, with reference to the other GAs, the original Power of attorneys furnished by the petitioner were accepted, and bids were evaluated. He would also submit that this fact would make it clear that the petitioner was aware that he would require to submit the original power of attorney and, therefore, with reference to all other GAs he has submitted the original power of attorneys.

6.1. By referring to the clause 3.5.2, he would submit that clause is not vague. Reading of the clause makes it clear that power of attorney holder has to submit the original copy of the letter of authorization. He would submit that even assuming what is contended by the learned senior counsel for petitioner is true, in the case on hand, the person in whose favour, power of attorney is granted, did not file a letter of authorization, but he issued letter of authorization in the name of petitioner-company to third person, whereas the bids were submitted on behalf of the petitioner -

company by Mr. Doraiah Palimpati. Therefore, even that document is not valid and, therefore, the bid was not properly submitted by the petitioner and earned disqualification.

6.2. According to the learned senior counsel, clause-6 of the opening part of invitation for bids makes it clear that any deviation as per the required procedure would earn disqualification.

6.3. He further points out that Annexure-7 of the bid document is a proforma giving a declaration of 'No Deviation Confirmation' and the authorized signatory has to give declaration that there is no deviation in the document submitted. He further points out that Annexure-3 of the bid document deals with check-list and item-4 is power of attorney issued in favour of signatory of application-cum-bid and the bidder is required to confirm the check-list. Therefore assuming that what is contended by the learned senior counsel for petitioner is true that there is no clarity in paragraph- 3.5.2, it cannot be seen in isolation for the petitioner to contend that there was a *bona fide* mistake in not enclosing the original power of attorney in the offline submission process, when other clauses of bid document make it clear that original power of attorney has to be filed.

6.4. By placing reliance on the judgment of the Supreme Court, in the case of **Central Coalfields Limited and others vs. SLL-SML (Joint Venture Consortium) and others**¹, learned senior counsel would submit that there is no distinction between the essential and non-essential conditions. Even in the case of non-compliance of non-essential condition, the tender document can be

¹ 2016 (8) SCC 622

rejected. In case of non-essential condition, it is permissible for the competent authority to relax such condition, but in the absence of such relaxation, Court cannot mandate to ignore any of the tender conditions, whether it is essential or non-essential. He would further submit that in **KRANS-TVSR (Joint Venture), Secunderabad Vs. South Central Railway, Secunderabad and others²**, learned single Judge of this Court following the above decision of the Hon'ble Supreme Court, rejected the similar contention that non-essential condition should not be relied upon to reject the tender document. He would submit that firstly as per the clause-6 of invitation for application-cum-bid, no deviation is permissible as the clause imposes the restriction of evaluation of tender documents with 'zero deviation' and in any case as per law laid down by the Supreme Court in the above said decision, even non-essential condition cannot be relaxed to accept the tender document if the document has not complied all the required parameters.

6.5. He would further submit that Addendum-2 was issued to the tender bids. As per the clause 11.0 of Addendum-2, all offline submissions, such as application fee, bid bond and power of attorney should be kept in a single sealed envelop with subscription "Bid for concerned GA". This clause also makes it clear that bidder has to submit power of attorney and, therefore, it is no more open for the petitioner to contend that there was ambiguity and that it was a *bona fide* mistake on his part.

² 2017 (6) ALT 587

7. Learned senior counsel appearing for 2nd respondent Sri A.Sudarshan Reddy would submit that power of attorney is essential document as can be seen from the paragraph-2.1.1 of the bid document. According to this clause, failure to furnish any information would result in rejection of application-cum-bid. As per the various clauses and check-list, it is necessary to submit power of attorney. He would therefore submit that as per clause-6 of invitation for application-cum-bid, the bids have to be 'zero deviation'. It clearly means any deviation would result in disqualification. By referring to various paragraphs in the counter-affidavit, learned senior counsel points out that in these paragraphs, requirement to submit the bid document and the procedure of evaluation is explained and it is self-speaking. As per the stand in the 2nd respondent counter-affidavit, it is clear that bid document submitted by the petitioner was not in compliance with the terms of invitation to submit the bids. Petitioner has not qualified at technical bid stage to be considered for opening of financial bid. Learned senior counsel would submit that petitioner was informed of disqualification on 3rd August, 2018 and within four days, the present Writ Petition is filed and, therefore, there was no occasion for the 2nd respondent to inform the petitioner by a reasoned order.

7.1. Learned senior counsel further submitted that as seen from the letter of the petitioner dated 16.07.2018, petitioner did not submit the power of attorney earlier along with 13 GA bid documents submitted by him and on that day, he submitted the power of attorneys. In the letter, he has referred to 10 bids offered by the petitioner. Therefore, power of attorneys submitted are

valid only for those 10 bids. Petitioner has excluded three bids offered by him to three other GAs. Petitioner tenders were evaluated for 10 bids, to which he has submitted power of attorneys and was awarded contract for four GAs. He, therefore, submitted that petitioner was aware of the requirement to submit power of attorney as mandatory and having realized that he did not submit the power of attorney, he submitted power of attorneys for 10 GAs only on 10.07.2018 and, therefore, it is no more open to petitioner to contend that clause 3.5.2 is vague and, therefore, he did not submit the power of attorney under the mistake of fact.

7.2. Learned senior counsel further submitted that clause 2.3.2 of invitation to bid enables the competent authority to notify the amendments to the tender conditions and accordingly, Addendum-2 notification was issued. Clauses 3.0 and 11.5 require the bidder to submit Board Resolution or power of attorney in favour of signatory to submit the bids, offline submissions, applications, fee, bid bond and power of attorney should be kept in a single sealed envelop. Thus, it is no more open to petitioner to contend that he was not aware to submit power of attorney. He would further submit that power of attorney is essential condition and non-submission of power of attorney is crucial to the validity of the document and, therefore, bid document was validly rejected. Learned senior counsel also submitted that the successful bidder is the Indian Oil Corporation Limited and tender was awarded to the best person and, therefore, merely because tender offered by the petitioner is better, cannot be a ground to declare the tender offered, and the contract awarded to the Indian Oil Corporation Limited is illegal.

7.3. Learned senior counsel placed reliance on the following judgments:

- i) **Jagdish Mandal v. State of Orissa and others**³;
- ii) **Michigan Rubber (India) Limited v. State of Karnataka and others**⁴;
- iii) **State of Jharkhand and others v. CWE-Soma Consortium**⁵;
- iv) **Judgment in W.P.No.39813 of 2018, confirmed in W.A.No.1595 of 2018.**

8. In reply, learned senior counsel Sri D.Prakash Reddy would submit that if second respondent thought that Indian Oil Corporation Limited is a better person and being the public sector organization, it could have awarded the contract by nomination. Once tenders are called, all participants stand on par and there can be no discrimination or special treatment, merely because one of the participants is public sector organization. On comparative assessment of petitioner and 3rd respondent, it is clear that the offer given by the petitioner is far better than the 3rd respondent and, therefore, contract could not have been awarded to the 3rd respondent if only the technical bid of the petitioner was not rejected.

8.1. By way of clarification, he would state that though initially he participated in all 13 GAs and his tender document was rejected for three bids on the ground that he did not enclose the power of attorneys, having regard to the offer given by the petitioner vis-à-vis successful bidder, as petitioner was not matching the said offer

³ (2007) 14 SCC 517

⁴ (2012) 8 SCC 216

⁵ (2016) 14 SCC 172

with reference to two other bids, but offer given by the petitioner in GA-1 is better than the 3rd respondent, petitioner chosen to contest only the rejection of the petitioner bid in GA-1. Merely because petitioner did not contest non-consideration of the technical bid in two other bids cannot be a ground to reject the claim of petitioner in the present Writ Petition. He would further submit that though according to the understanding of the petitioner, there was no requirement to submit power of attorney as abundant caution, he has submitted single power of attorney on 10.7.2018 to all bids and the same was accepted. He would further submit that only Mr. Doraiah was authorized to act on behalf of petitioner in filing bids and there was only one power of attorney executed by the competent authority. The single power of attorney was accepted for 10 bids. Thus, there is no justification to ignore the said power of attorney for GA-1 bid and not accepting the same amounts to arbitrary exercise of power and authority. He would submit that by the time he submitted the power of attorney vide his letter dated 16.07.2018, the process of evaluation of technical bids were not finalized. As a matter of clarity, he would also state that petitioner was under the impression that by 16.07.2018, GA-1 bid was already opened and, therefore, in the letter he did not mention GA-1 bid also. But, since bid for GA-I was not opened by then, as is evident from the resolution of the 2nd respondent Board, they ought to have considered the power of attorney submitted on 16.7.2018 while evaluating the bid submitted for GA-1 bid also.

8.2. At any rate, he would submit, rejection is on a hyper-technical ground and it is not an essential condition. He would submit that public interest is affected by ignoring the offer given by

the petitioner as offer of the petitioner is far superior compared to the 3rd respondent.

9. The issue for consideration is whether rejection of petitioner bid document for GA-I is valid ?

10. The relevant facts are not in dispute. In response to the tender notification issued by the 2nd respondent calling for bids to award contracts for laying, building, operating or extending city or local Natural Gas Distribution network in various Geographical Areas in several States, petitioner submitted for 13 Geographical Areas including GA-1 located in State of Andhra Pradesh. While submitting the bids in the physical form, petitioner did not enclose copy of power of attorney showing authorization to Power of attorney holder to submit bids on behalf of petitioner-company. Subsequently, petitioner submitted original power of attorney with a covering letter containing list of GAs, ten bids out of 13, but that letter does not include GA-1. The technical bid submitted by petitioner for GA-1 was rejected on the ground that petitioner did not submit the original power of attorney in the physical form and thus earned disqualification.

11. In the light of admitted facts and the stand of petitioner, it is necessary to consider various clauses of public notification calling for bids.

12. Part-A of bid document deals with instructions to the bidders. Clause 2.1 of Part-A deals with 'Documentation'. According to the paragraph 2.1.1, failure to furnish any information or submission of application-cum-bid, not complete in

every respect would result in rejection of application-cum-bid. Clause 2.1.2 lists out the 'Annexures' enclosed to the notification and require the bidder to note the aspects concerning various annexures. According to the entry against annexure-3 in para 2.1.2, bidder is required to confirm the check-list in the given format duly signed by the bidder or authorized signatory along with the official seal. Para 2.3 deals with 'Amendment of bidding documents'. Para 2.3.2 enables the competent authority to amend various clauses of the notification.

13. Para-3.0 deals with 'Special instructions to Bidders for e-Tendering'. Under this heading, Para-3.1 deals with general terms. In this para, special instructions are given to the bidders for e-tendering and requires bidder to submit offline bids. In para-3.2 instructions are issued to the bidders as to what are the parameters to be fulfilled to submit e-tender. Para-3.5 deals with 'offline submissions'. This stage is after the bidder submits the e-tender document as required by paras-3.1 to 3.4. It requires to submit Bid Bond in the form of RTGS/NEFT/Demand Draft /Bank Guarantee and application fee in the form of Demand Draft, which should be kept in a sealed envelope in the name of GA name, the tender search code and should inscribe on the cover 'do not open before' (due date and time). The cover should contain, 1) original copy of the Bid Bond/Bid Security/Earned Money Deposit (EMD) in the form of a Demand Draft/ Bank Guarantee; 2) original copy of the letter of authorization shall be indicated by written power of attorney; and 3) application fee. At the end of these paragraphs, it is also stated that 'failure to submit any of the above mentioned shall result in non-opening of technical bid'.

Paragraph 4.2 deals with 'Evaluation and comparison of application-cum-bids'. Clause 4.2.1 deals with Technical Bid. As per clause 4.2.1.1, bidder has to submit all the forms and formats mentioned in the Application-cum-bid document duly filled-in, failing which the application-cum-bid would be liable to be rejected.

14. Annexure-3 provides for the check-list in tabulated form. There are 12 items mentioned in the check-list. Against each item, 'Yes/No' is provided and the bidder has to strike-off which is not applicable. Item no.4 in this check-list is 'power of attorney issued in favour of signatory of application-cum-bid'. Bidder is required to confirm the check-list duly signed by the bidder or authorized signatory and should be submitted separately as part of technical bid. Clause-4 is clear. It requires whether power of attorney issued in favour of signatory of application-cum-bid is enclosed. In the first limb of invitation for application-cum-bid, clause-6 talks about 'zero deviation', which implies any amount of non-compliance of required parameters would result disqualification of consideration of bid document. Annexure-7 is the format of 'zero deviation confirmation'. It requires the bidder to state that bidder has not deviated anywhere in the application-cum-bid. In the event of any deviation, his bid would be rejected. According to petitioner, he has submitted no deviation confirmation certificate.

15. In the normal commercial activity, a body corporate has to specify a person as representing the company. Without specific authorisation no person can claim to represent a body corporate. Thus, if the company intend to participate in any tender process, it

has to authorize a person to sign on its behalf and it must express clearly as to who is authorized to sign on behalf of the company. Therefore, it cannot be said that petitioner was not aware of the requirement of company authorizing a person to represent the company. On going through tender conditions, it is seen that employer requires the juristic person to certify the name of person authorized to file bid document, and original document of power of attorney has to be filed in physical form. Petitioner has to satisfy that there was valid authorization to Mr. Doraiah to represent petitioner and such authorization was filed in physical form. Petitioner filed copies of Annexures enclosed to bid document for GA.I from page numbers 75 to 175 of writ petition paper book. Page 79 is bid forwarding letter dated 10.07.2018 enclosing documents mentioned therein. At item (i), it reads, 'power of attorney issued in favour of signatory of application-cum-bid'. Page 80 is the check list. Against item 4 – 'power of attorney issued in favour of signatory of application-cum-bid' typed as 'YES'. At page 86 is 'no deviation certificate', signed by Mr. Doraiah.

16. Thus, signatory to the document was conscious that as per clause 3.5, in the offline submission cover, he must enclose copy of letter of authorization in the form of power of attorney. Accordingly, he disclosed that he has enclosed power of attorney. However, admittedly, the power of attorney was not enclosed in the offline submission. This is clear from the letter written by the petitioner company on 16.07.2018 to the Secretary, Petroleum and Natural Gas Regulatory Board and as asserted in the pleadings in this writ petition. To this letter, petitioner encloses original power of attorney and requests to accept the same as part of submission

of documents in physical form against ten bids submitted by the petitioner, which does not include GA-I. Having regard to declarations filed online and offline and subsequent conduct, assertion of petitioner that he was under the *bona fide* impression that he need not submit the power of attorney is stated to be rejected.

17. Letter dated 16.07.2018 does not say that according to him, there was no requirement to submit the power of attorney, but as an abundant caution, he was submitting the power of attorney. Further, letter dated 16.07.2018 conspicuously excludes consideration of power of attorney document enclosed to the said letter as part of submission of document to GA-I. Learned senior counsel sought to explain, petitioner was under the impression that by the time the said letter was filed, the bids were already opened for GA-I and, therefore, he did not mention, but as it later turned out bids were not finalized as on 16.07.2018, and the same ought to have been considered. The stand of the petitioner that he was under the impression that technical bid was already opened to this GA-1 is contrary to his own stand that technical bid of GA-1 was finalized only on 18.07.2018.

18. As per clause 3.5 after filing of bid document through online web portal, the bidder was required to submit documents offline in a sealed envelop. Para 3.5 requires enclosure of three documents listed therein in addition to other documents. Emphasis is laid on vagueness in clause 3.5.2 to contend that petitioner was under the *bona fide* impression that there was no need to submit the written power of attorney. As noted above, in the letter dated 16.07.2018

(at page 79 of writ petition paper book), the first item noted was the enclosure of power of attorney. Similarly, the check-list at page-80 authenticates filing of power of attorney. Thus, petitioner was aware that he needs to enclose original power of attorney in offline submission and stated as enclosed. Thus, contending, *post facto*, that clause 3.5.2 is vague is a weak defence and made only to cover up blatant mistake in not complying with the bid notification conditions.

19. It is also appropriate to note the conduct of petitioner with respect to submission of original power of attorney. Admittedly, original power of attorney was not submitted by the petitioner to GA-1 bid. Petitioner generated the correspondence, which is the authorization given by Doraiah, to some third person, authorizing to present the bid. This is not in conformity with the bid notification and, therefore, is not valid.

20. Further, the stand of petitioner that technical bid document was not opened is also not correct. As can be seen from the resolution of the committee, the technical bid of petitioner was opened and processed on 16.07.2018 only. Few members of committee signed resolution on 17.07.2018 and 18.07.2018, as the case may be.

21. In addition to the contention that petitioner was under *bona fide* impression that there was no requirement of submission of original copy of power of attorney executed in favour of Mr. Doraiah, it is also vehemently contended that in fact the technical bid was opened and the competent authority was satisfied with the technical bid and bid was processed further for

opening of financial bid. Having informed the petitioner that technical bid was accepted and processed further, it is no more open to the 2nd respondent to intimate the petitioner that technical bid is not accepted and the same is not valid in law. In support of this contention, heavy reliance is placed on communication given to the petitioner through e-mail generated at 3.50 PM on 02.08.2018.

22. The first mail was sent on 02.08.2018 at 3.50 PM informing that his bid was qualified in the technical bid evaluation. However, within 28 minutes thereafter, another mail was sent informing him to ignore the earlier mail sent. This makes clear that there was error in sending the mail at 3.50 PM and, therefore, immediately the competent authority realized and generated another mail within few minutes. In the facts of this case, it cannot be said that *bona fide* impression was created in the mind of the petitioner that his tender was already processed to the stage of evaluation of financial bid and he has legitimate expectation of consideration of his financial bid offer. In the background facts noted above, the tender conditions and the conduct of petitioner, it cannot be assumed that petitioner had legitimate expectation for further processing of his document merely because wrong mail was sent. Petitioner is also guilty of making wrong statements while submitting bid document online.

23. Clause-6 of the opening part of the bid notification is clear that there should not be deviation and application should be 'zero deviation application-cum-bid'. The clause clearly brings out that any deviation would make the bid liable for rejection. To that effect,

petitioner has also filed declaration at page 86 of writ petition paper book. Admittedly, original power of attorney was not enclosed in the offline bid document submission. This would amount to deviation in complying the requirements.

24. Though petitioner did not enclose the power of attorney along with the bids submitted against 13 GAs, the respondent authority seemed to have accepted the subsequent letter dated 16.07.2018 enclosing copy of power of attorney and, therefore, initial infirmity in complying with the requirements was fulfilled, his 10 bids as mentioned in the said letter were accepted and he was awarded contracts for four GAs. But, this decision of competent authority do not enure to the benefit of petitioner for GA-I bid for the reasons noted above.

25. Finally, learned senior counsel for petitioner sought to contend that as per the tabulated statement of the financial bid offered by the petitioner and the successful bidder, it is clear that petitioner's offer is more advantageous to the respondent authority and, therefore, it is in public interest to accept the bid submitted by the petitioner and subject the financial bid evaluation of petitioner for consideration for awarding of contract and if the contract is awarded to the petitioner, large amount of public money would be saved.

26. Consideration of financial bid offer would depend on the valid submission of the bid document by the participant in the tender process. If the participant does not clear the first stage and if his tender document is not evaluated, the question of assessment of his offer with other participants does not arise.

27. At this stage, it is pertinent to note the scope of judicial review in such matters.

27.1. In **Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.**⁶, while referring to guidelines laid down in **Tata Cellular v. Union of India** [(1994) 6 SCC 651], Supreme Court held as under:

“9. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant. In *Tata Cellular v. Union of India* [(1994) 6 SCC 651] this Court has held that:

“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.” (emphasis supplied)

⁶ (1997) 1 SCC 738

27.2. In **Reliance Airport Developers (P) Ltd. v. Airports Authority of India**⁷, Supreme Court elaborated on these three parameters. Supreme Court observed:

“65. In other words, to characterise a decision of the administrator as “irrational” the court has to hold, on material, that it is a decision “so outrageous” as to be in total defiance of logic or moral standards. Adoption of “proportionality” into administrative law was left for the future.

27.3. In **Directorate of Education and others v. Educomp Datamatics Ltd and Others**⁸, Supreme Court held as under:

“9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in *Tata Cellular v. Union of India* [(1994) 6 SCC 651] . After examining the entire case-law the following principles have been deduced: (SCC pp. 687-88, para 94)

“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

⁷ (2006) 10 SCC 1

⁸ AIR 2004 SC 1962

administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.” (Emphasis supplied)

10. In *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617] this Court observed: (SCC p. 623, para 7)

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are **paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.** It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure 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.”

11. This principle was again restated by this Court in *Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar Municipal Corpn.* [(2000) 5 SCC 287] It was held that **the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge** to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. **The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.** The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

13. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-03, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 crores, the competent authority took a decision after consulting the Technical Advisory Committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs. 40-45 crores. The Government introduced the criterion of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender, particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went up to Rs. 40-50 crores. The total cost of the project was more than Rs. 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy the Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. ***The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them,*** unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.

14. This apart SSI having a turnover of more than Rs. 20 crores was the lowest bidder. Faced with the situation that the bids given by the respondents were not competitive with the bid given by SSI Limited, learned counsel for the respondents contended that because of the fall in price in the computer hardware and lowering of duty on the imports of the computers or its components the Government should invite fresh bids. It is not for us to comment as to what course is to be adopted by the appellants, in the changed circumstances attributed to lapse of time. It is for them to decide whether to continue with the tenders already floated, if necessary, by making negotiations so as to bring down the rates quoted or to invite fresh tenders.

(Emphasis supplied)

28. Guided by above proposition of law, it is seen that petitioner failed to comply bid notification terms. Therefore, it cannot be said that the decision to reject the bid of petitioner for GA-I amounts to arbitrary exercise of power, without application of mind, and reason assigned to reject is contrary to record. There is no 'illegality' or 'irrationality' or 'procedural impropriety' warranting interference by this Court.

29. I see no illegality in the information to the petitioner that his bid document for GA-1 was not evaluated. In the information given to the petitioner on 03.08.2018, the relevant portion read as, 'due to incomplete offline evaluation, your bid has not been evaluated'. Reading of the extracted portion would make it clear that the reasons for not evaluating was on account of incomplete offline evaluation, which is referable to clause-6 of the opening part of the tender notification. Thus, it cannot be said that reason assigned is not clear/vague and, therefore, not amounting to a valid decision. A decision need not be elaborate, but the reasons for rejection of bid has to be clear.

30. The Writ Petition fails and is accordingly dismissed. Pending miscellaneous petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 21.02.2019
kkm

HONOURABLE SRI JUSTICE P.NAVEEN RAO



WRIT PETITION NO.28020 OF 2018

Date: 21.02.2019

kkm