

CWP No.15021 of 2020

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(PROCEEDINGS THROUGH V.C.)

CWP No.15021 of 2020

Date of Decision: 23rd December, 2020

M/s Dara Engineering and Infrastructure Private Limited

...Petitioner

Versus

State of Punjab & others

...Respondents

**CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Vivek Salathia, Advocate
for the petitioner.

Mr. Atul Nanda, Advocate General Punjab with
Mr. Vikas Mohan Gupta, Addl. Advocate General, Punjab and
Ms. Amanat Chahal, Asstt. Advocate General, Punjab.
for respondents No.1 to 3.

Mr. Rajiv Atma Ram, Senior Advocate with
Mr. G.S. Sullar, Advocate
for respondent No.4.

AUGUSTINE GEORGE MASIH, J.

M/s Dara Engineering and Infrastructure Private Limited
(hereinafter referred to as 'petitioner company') has approached this Court
praying for quashing of order dated 07.09.2020 (Annexure P-12), whereby,
the Committee of Chief Engineers, Department of Water Supplies and
Sanitation, under the Chairmanship of Chief Engineer (North), Punjab, vide
Agenda Item No.6.2, declared the technical bid of M/s Devendra

Constructions Company Private Limited (hereinafter referred to as 'respondent No.4 – company') as 'technically responsive' by wrongly and erroneously reviewing its earlier decision dated 20.08.2020 (Annexure P-8) declaring respondent No.4 – company as technically non-responsive. Prayer has also been made for quashing of the order dated 11.09.2020 (Annexure P-13) passed by the Committee of Chief Engineers under the Chairmanship of Chief Engineer (North), Department of Water Supplies and Sanitation, Punjab – respondent No.2, vide which the financial bid of respondent No.4 with regard to DNIT (Annexure P-1) has been accepted being lower than the petitioner making it eligible for undertaking the work of design and building of drinking water supply system at village Bhuchhad Kalan, Operation and maintenance of the same as well as supply of treated surface water to various villages of Blocks Gandiwind, Tarn Taran, Bhikhiwind, Valtoha and Patti, District Tarn Taran. *Mandamus* has also been prayed for directing the respondents to award the contract to the petitioner – company.

2. Government of India started the National Water Quality Sub Mission (for short 'NWQSM') and for the purpose of providing access of drinking water in rural areas, for which the National Rural Drinking Water Program (for short 'NRDWP') has been initiated. For implementation of the program in the State, the cost of project is to be shared equally between the Center and the State Government in the ratio of 50-50. To give effect to these programs, a decision was taken by the State of Punjab to carry out the work on a Public Private Partnership mode (PPP mode), for which purpose

the said work would be carried out on Designed, Build, Operate and Transfer (DBOT) basis.

3. For the purpose of design and build drinking water supply system based on surface water and all appurtenant structures and allied works at village Bhuchhad Kalan, and operation & maintenance of the same and supply of treated surface water to various villages of Blocks Gandiwind, Tarn Taran, Bhikhiwind, Valtoha and Patti, District Tarn Taran, for a period of ten years on DBOT basis. Invitation for bid was issued by the Superintending Engineer, Water Supplies and Sanitation Circle, Amritsar – respondent No.3 vide Bid No.PRWSS-W-DIV09-6483-I (Annexure P-1).

The bid process was divided in two parts i.e. 'technical part' and 'financial part'. Documents comprising the bid for bid parts were to be submitted simultaneously with the technical bid to be open first followed by the opening of the financial bid of the entities declared to be eligible in the technical bid. The entity having the lowest bid was to be declared eligible for awarding the work of the contract. The evaluation and qualification criteria was contained in DNIT (Annexure P-1). It was mentioned therein that no other factors, methods or criteria shall be used other than specified in this bidding document. The bidder was also required to provide all the information requested in the forms included in Section IV, the bidding forms etc. The experience required for technical bid is that the entity should have a minimum number of one contract for the design of water supply scheme based on surface water from source to

OHSR/UGSR/GLSR including treatment, pumping and transmission for a capacity of minimum 30 MLD undertaken between 1st April, 2013 and 31st March, 2020, as prime contractor or sub-contractor; it should have also done one similar work satisfactorily and substantially as a prime contractor, joint venture member, management contractor or sub-contractor between 1st April, 2013 and 31st March, 2020, costing not less than the amount equal to Rs.8172 lakhs Or two similar works should have been done satisfactorily and substantially as a prime contractor, joint venture member, management contractor or sub-contractor between 1st April, 2013 and 31st March, 2020, costing not less than the amount equal to Rs.5108 lakhs Or three similar works as a prime contractor, joint venture member, management contractor or sub-contractor between 1st April, 2013 and 31st March, 2020, costing not less than the amount equal to Rs.4086 lakhs. The definition of similar work was mentioned as construction work of any water supply system involving Water Treatment Plants/Pumping reservoirs/transmission lines/Distribution lines. The specific construction experience, for contracts successfully completed between 1st March, 2013 and bid submission deadline, a minimum construction experience in the following key activities as prime contractor or JV member, required is execution and successful commissioning of at least 15 MLD water treatment plant under single contract and laying and joint of DI/CI/MS pipes of 80 mm id and above for minimum length of 20 KM in single contract. The operations experience required is of operating any water supply system from source of OHSR/UGSR/GLSR including treatment, pumping and transmission for a

capacity of minimum 5 MLD which should have been in successful operation for at least one year between 1st April 2013 and 31st March, 2020.

On 03.07.2020, a corrigendum/addendum (Annexure P-5) was issued by respondent No.3, vide which the criteria of execution as successful commissioning of at least 15 million liters per day (MLD) water treatment plant under single contract was amended and reduced to 12 MLD.

4. Four parties in all, including the petitioner – company as well as respondent No.4 – company, applied in pursuance to the DNIT, Bhuchhad Kalan tender. Petitioner – company asserts that the experience certificate dated 09.01.2020 (Annexure P-6) submitted by respondent No.4 – company is bogus, ambiguous and false certificate as in the original technical bid documents dated 08.01.2020 (Annexure P-7) submitted by respondent No.4 – company at Sr. No.10 clearly specified that the design and construction of rapid gravity filter plant net output capacity was 521.875 Kilo liter per hour (KLH). Further 8.35 MLD at Indolal Head Works is reiterated, which related to the experience of respondent No.4 – company. Assertion has, thus, been made that the experience of respondent No.4 - company was for design and construction of the plant with a capacity of 8.35 MLD and not 12.525 MLD, as projected in the experience certificate dated 09.01.2020 (Annexure P-6).

5. Technical bids of DNIT, Bhuchhad Kalan were opened on 31.07.2020. A meeting of the Committee of Chief Engineers under the Chairmanship of respondent No.2 was convened through Video Conferencing, where out of four technical bids received, three technical bids

including that of the petitioner – company were found to be 'responsive', whereas the technical bid of respondent No.4 – company was declared as 'non-responsive'. Copy of the proceedings dated 20.08.2020 is Annexure P-8. The list of selected companies as well as the declaration that bid of respondent No.4 – company being 'non-responsive' was issued on 24.08.2020 (Annexure P-9).

6. Instead of opening the financial bid on 31.08.2020, the date already fixed for that purpose, a recommendation was made by the Committee of Chief Engineers in a meeting held on 02.09.2020 declaring the technical bid of respondent No.4 – company as 'responsive' by adopting the criteria not mentioned in the bid document (Annexure P-1). It is asserted that this is despite the fact that Section III of DNIT specified that no other factors, methods or criteria shall be used other than the specified in the bidding document. This recommendation was communicated on 07.09.2020 (Annexure P-12). According to the petitioner, a new method was adopted by the Committee to declare the technical bid of respondent No.4 – company as 'responsive' taking into consideration the bogus experience certificate dated 09.01.2020 (Annexure P-6) as respondent No.4 – company has itself, in the original technical bid document dated 08.01.2020, (Annexure P-7) in the experience mentioned the capacity of the net output capacity of the plant as 8.35 MLD, meaning thereby the company did not possess the minimum qualification criteria for constructing the plant with capacity of 12 MLD as required. The Committee had adopted a new criteria, wherein they determined the capacity of Kilo

liters per hour basis and ultimately recorded a finding that if the measurement is based on a MLD basis, then output on daily basis exceeds to 12 MLD, leading to declaring the technical bid of respondent No.4 being responsive. All this exercise has been done by the Committee of Chief Engineers without there being any condition/clause for review of the order declaring a bidder 'non-responsive'. The entire exercise of review was undertaken to grant undue, illegal and arbitrary benefits to respondent No.4 – company in order to grant them the contract for undertaking work specified in DNIT, Bhuchhad Kalan (Annexure P-1).

7. The technical bid of respondent No.4 – company having been declared responsive, financial bids were opened of all the four companies, which were communicated on 11.09.2020 (Annexure P-13), wherein respondent No.4 – company was found to be the lowest bidder and therefore, was declared 'successful'. This allocation of tender of DNIT, Bhuchhad Kalan (Annexure P-1) in favour of respondent No.4 – company has been challenged by the petitioner on the grounds that the terms and conditions as mentioned in the evaluation and qualification criteria as laid down in DNIT, Bhuchhad Kalan in part III thereof, has been arbitrarily changed despite the fact that there is no such power vested with the respondents especially in the light of the clear mention in the said tender notice that no other factors, methods or criteria shall be used other than specified in this bid document. No revised corrigendum/addendum has been informed or issued by respondents No.2 and 3, wherein any new criteria of evaluation was introduced. In the absence of any additional/new

criteria/factor/method being informed or issued, the original evaluation criteria (Annexure P-4) remained unchanged and binding. The Committee of Chief Engineers could not have, on their own, adopted a new un-notified criteria/method for declaring respondent No.4 – company as 'responsive' vide impugned order dated 07.09.2020 (Annexure P-12). Action of the official respondents declaring respondent No.4 – company as 'responsive' is clearly arbitrary, illegal and thus, unsustainable in the eyes of law.

8. It is asserted that although in law, it is settled that the scope of interference in tender or contractual matters is very limited but exercise of powers of judicial review is not completely barred, where essential conditions mentioned in the tender documents are not adhered to or the relaxation is not given in the document requiring strict adherence to the condition as laid down therein, if violated, the same would be open for judicial review and therefore, interference of the Court is called for.

9. The authenticity of the experience certificate dated 09.01.2020 (Annexure P-6) submitted by respondent No.4 – company has been challenged by the petitioner in the light of the original technical bid document dated 08.01.2020 (Annexure P-7), which was submitted by respondent No.4 – company itself, where the experience of the design and construction of the plant with net output capacity was mentioned as 521.875 KLH (8.35 MLD). When it is itself accepted by a party relating to the capacity of the plant constructed and commissioned by it, the said experience certificate could not have been taken into consideration especially when the same Committee, vide order dated 24.08.2020 had

declared the technical bid of respondent No.4 – company as 'non-responsive'. Ignoring the document (Annexure P-7), which has been submitted by respondent No.4, the same Committee for extraneous consideration and for granting undue favour and benefit to respondent No.4 – company in an illegal and arbitrary manner reviewed their own decision wrongly and erroneously declared respondent No.4 – company 'responsive'. Respondent No.4 – company has suppressed the actual fact and produced a bogus certificate dated 09.01.2020 (Annexure P-6) projecting the capacity of the constructed and operational plant by it to be of more than 12 MLD, whereas the actual capacity of the said plant is 8.35 MLD.

10. Another ground which has been taken is that the criteria adopted by respondent No.2 – Committee in the impugned order dated 07.09.2020 (Annexure P-12) is not specified in the DNIT (Annexure P-1). Therefore, the same could not have been adopted especially in the light of the clear mention in the said DNIT regarding no deviation from the factors, methods or criteria to be used other than specified in the bid document in the garb of clarification of monetary condition, respondent No.2 could not declare the technical bid of respondent No.4 – company to be 'responsive' especially when there was no such power. Respondent No.2 – Committee has, with an ulterior and oblique manner with an intention to confer undue and unreasonable benefits to respondent No.4 – company, acted in a biased and partial manner showing favouratism for extraneous consideration twisted eligibility criteria in such a manner that respondent No.4 – company could participate in the financial bid. When the process adopted and

decision made by the authority is *mala fide* and intended to favour someone, judicial interference is permissible.

11. Violation of Article 19 (1) (g) of the Constitution of India has also been pressed into service to contend that the doctrine of providing level playing field, which is the basis of every tender process, has been blatantly violated by the official respondents. The larger public interest requires that all the bidders must be equally placed and therefore, level playing field must be provided in order to ensure the process of issuance and finalization of tender is not opaque and is not a colourable exercise of administrative power. On this basis, prayer has been made for setting aside the impugned order/decision of respondent No.2 – Committee dated 07.09.2020 (Annexure P-12) and order/communication dated 11.09.2020 (Annexure P-13), whereby the financial bid of respondent No.4 – company has been accepted being lower than that of the petitioner – company, with a consequential prayer of issuance of *mandamus* directing official respondents to award the contract for DNIT, Bhuchhad Kalan to the petitioner – company being the second lowest tender.

12. Reply on behalf of respondents No.1 to 3, the official respondents, has been filed, wherein it has been asserted that the grounds which have been taken by the petitioner – company would not require the exercise of discretion of judicial review as the essential conditions of tender have been adhered to as is apparent from the face of record. The decision making process has been transparent and in consonance with the essential conditions of the bid document. Petitioner – company has challenged the

decision of the respondents on hypothetical assumptions by misrepresenting the facts. The impugned order dated 07.09.2020 (Annexure P-12) had been passed by the Committee of Chief Engineers, who had evaluated the bid from a technical point of view. In addition to four Chief Engineers, the Committee also comprised of Senior Design Advisor, an official of the Finance and Accounts Department and the concerned Superintending Engineer. The decision was taken by the High Powered Committee, which had proceeded to consult the experts of various other fields, which lends credibility and authenticity of the decision making process.

It has been explained with regard to the initial decision taken by respondent No.2 – Committee on 20.08.2020, when the technical bid of respondent No.4 – company was rejected on the ground that the said respondent does not fulfill the specific construction experience, as provided in Clause 1.3 of the 'Qualification Criteria' sub clause 4.2 A of the DNIT. During the proceedings, it is apparent that the capacity of the plant which was constructed and commissioned by respondent No.4 – company was taken as 8.35 MLD as was filled by the said respondent. The decision of the Committee of the Chief Engineers was uploaded on the website on 24.08.2020, wherein technical bid of respondent No.4 – company was mentioned as 'non-responsive'.

Respondent No.4 – company submitted a representation dated 25.08.2020 in terms of the Complaint Handling Protocol, which permitted the bidders to raise any issue or submit a complaint/representation in

respect of result of evaluation of Part-I bid within five working days from the date of publication of the result of evaluation, which had to be considered for resolution before opening of Part-II bid (financial bid). In the said representation, respondent No.4 – company had pointed out that it had the required experience of commissioning the capacity of water treatment plant which is more than 12 MLD as required. It is, on the basis of this representation that the technical bid was reevaluated and it was found that respondent No.4 – company had the requisite experience duly satisfying the qualification criteria. There was an error in calculation while applying the conversion factor and evaluating the capacity of water treatment plant executed by respondent No.4 – company. With reference to Sr. No.10 in the bid document (Annexure P-7) submitted by respondent No.4 – company, the said company represented that if the conversion factor is applied and the unit 'KLH' is converted to 'MLD', it duly satisfied the qualification criteria. Applying the conversion factor, it was found that the capacity of water treatment plant executed by respondent No.4 worked out to 12.525 MLD fulfilling the qualification criteria laid down in the bidding documents read with the corrigendum. The Committee of Chief Engineers cannot be said to have acted in a *mala fide* manner or exhibited any bias by applying the standard conversion factors while evaluating the bid of respondent No.4 – company. When the Kilo liters per hour are converted to million liters per day, obviously kilo liters had to be multiplied by 24 to make it a day and by dividing it by one thousand, the figure would come out to be million liters per day. When the capacity is mentioned as 521.875

KLH or 12.575 MLD, there is no difference whatsoever as it is only a conversion factor.

13. Response to the assertion of the petitioner – company that the Committee of Chief Engineers had no power to review its decision, it has been stated that the same is devoid of merit as the Complaint Handling Protocol gave a right to a bidder to raise any issue or complaint/representation in respect to the result of evaluation of Part-I bids within a period of five working days of such publication of the result. The Committee, therefore, was bound to consider the representation/complaint, if any, submitted by any bidder and in consideration thereof, if something of worth is found therein, the power was very much there with the Committee of Chief Engineers to rectify an inadvertent oversight such as conversion factors when the same has not been rightly applied. The Committee of Chief Engineers has only rectified an error made earlier while evaluating the bid, which was apparent on the face of the record. Similar is the position with regard to the *suo motu* review alleged to have been resorted to by the Committee of Chief Engineers while dealing with the case of respondent No.4 - company with the same explanation. It has further been clarified that the capacity of the water treatment plant executed by respondent No.4 – company remains the same whether it is treated as 521.875 KLH or 12.575 MLD, as they are mathematical equivalence.

14. With regard to the veracity and authenticity of the experience certificate dated 09.01.2020 (Annexure P-6), it has been mentioned that the said certificate was got verified from the authority, which had issued the

same. The said authority has acknowledged the factum of issuance of the said certificate and also clarified that the capacity of the water treatment plant, which was constructed and is running has been designed to deliver 12.525 MLD in 24 hours operation. It has further been averred that the official respondents have fairly and impartially proceeded to evaluate the tenders submitted by the parties without any *mala fides* or bias. By rectifying a mistake, as a matter of fact, equal playing field has been provided to all the tenderers.

An objection has been raised by the official respondents that the petitioner did not challenge the decision of the Chief Engineers' Committee, dated 07.09.2020 (Annexure P-12), vide which technical bid of respondent No.4 – company was declared 'responsive' and waited for the opening of the financial bids and when the petitioner – company found itself unsuccessful, it had chosen to approach this Court and that too, without any basis. Prayer has, thus, been made for dismissal of the writ petition.

15. Respondent No.4 has taken preliminary objections to the effect that the petitioner – company has not approached this Court with clean hands and is not only guilty of suppressing the facts but has misstated the same and that too falsely. It has mis-interpreted the bid documents and levelled false allegations against the officials respondents as well as the answering respondent. Although the decision is said to have been influenced by *mala fides* but none has been impleaded as a party to the writ petition by name. On merits, the stand as taken by the State has been

reiterated. In addition thereto, a reference has been made to Clauses 27, 29, 31, 32 and 36 of the DNIT, which deal with determination of responsiveness and qualification of bidder, to assert that as per the terms and conditions of the bid document, the employee *inter alia* may, in order to assist in the examination, evaluation and qualification of the bidders, at its discretion, ask any bidder for clarification of its bid provided the bid is substantially responsive. Employer has a power to waive any non-conformities in the bid provided the bid is substantially responsive. Employer can also call upon the bidder to submit necessary information and documentation within a reasonable period of time to rectify non-material, non-conformities in the bid related to documentation information or documentation requirement provided that a bid is substantially responsive.

16. Learned senior counsel for the petitioner has vehemently asserted that the decision of the Committee of Chief Engineers is baseless especially in the light of the fact that respondent No.4 – company had itself mentioned its experience to be of a water treatment plant with the net output capacity of 8.35 MLD. Once the tenderer/bidder itself acknowledges the fact, the same had to be believed as it was clearly mentioned in the bid document that no other factors, method or criteria shall be used other than specified in the bid document. The capacity was required to be mentioned in million liters per day and in accordance thereto, respondent No.4 – company has rightly given the capacity of its constructed and operational water treatment plant. The Committee of Chief Engineers could not have changed its earlier decision, whereby they had declared the

technical bid of respondent No.4 – company as 'non-responsive' especially when there was no provision of review in the DNIT. Referring to various documents especially the proceedings of the Committee, where the technical bid of respondent No.4 was considered and rejected, it is asserted that the Committee has rightly proceeded to reject the technical bid of respondent No.4 – company. Reliance has been placed upon the Division Bench judgment of this Court in CWP No.6473 of 2019, titled as '**Ceigall Gawar (JV) A-898, Tagore Nagar, Ludhiana Vs. State of Punjab & others**', decided on 22.05.2019, to contend that although the powers of judicial review of the Court is limited and restricted in tender and commercial matters but in the given facts and circumstances of this case, where the decision has been taken by the Committee of Chief Engineers arbitrarily and without any authority, with a *mala fide* intention of conferring an undue benefit upon respondent No.4 – company, the impugned decision of the Committee of Chief Engineers cannot sustain and deserves to be set aside. Learned senior counsel has referred to the pleadings as well as the documents to support his contentions. Assertion has also been made that the Committee of Chief Engineers has provided and laid down a fresh criteria for the evaluation and qualification, whereas they were required to strictly adhered to the one which has been given in the DNIT especially in the light of the language used in the same, which stated that no other factors, method or criteria shall be used other than the one specified in the bidding document. Prayer has, thus, been made for allowing the writ petition by setting aside the impugned order, declaring the

petitioner – company successful bidder.

17. On the other hand, learned Advocate General, Punjab, having referred to the pleadings, has explained with reference to the Complaint Handling Protocol, as provided in the DNIT. He has explained and asserted that the employer is required to evaluate the technical bids with the criteria laid down in the bid documents and addendum, if any. The result of evaluation of Part-I bids i.e. technical bids, qualification part of bid is to be made public at e-procurement portal soon after the completion of the evaluation. In case any bidder wants to raise any issue or submit any complaint/representation in respect of the result of such evaluation, the same will be allowed within five working days of the publication of the result of evaluation. These complaints/representations have to be considered for resolution before the opening of Part-II bids (financial bids). In case no complaint/representation is received within a period of five days, the bidders are to be informed about the date and time of online applications opening of financial bids but in case, there is some complaint/representation by the bidder, till the same is not satisfactorily resolved, second part of the bid is not to be opened. He, on this basis, contends that the petitioner – company has not disclosed this aspect in the writ petition and therefore, the writ petition deserves to be dismissed on this score as the main thrust of the petitioner is the non-availability of any power with the Committee to reconsider the decision taken on Part-I bid (technical bid). He has pointed out that a representation was received from respondent No.4 – company, which, on consideration, was found to be

having force therein and the explanation, which has been submitted, was accepted as it related to the calculation made by using conversion factor. The capacity remains the same of the water treatment plant. The only issue is that earlier the capacity was mentioned in kilo liters per hour, whereas it was required to be mentioned as million liters per day. This correction which has been carried out by the Committee of Chief Engineers falls well within the purview of the terms of the DNIT and therefore, impugned decision declaring the technical bid of respondent No.4 – company 'responsive' cannot be faulted with. The calculations as made have also been highlighted by the learned Advocate General. Reliance has also been placed upon the judgments of the Hon'ble Supreme Court in **Raunaq Internation Ltd. Vs. I.V.R. Construction Ltd & others**, {(1999) 1 Supreme Court Cases 492}, **Tata Cellular Vs. Union of India**, {(1994) 6 Supreme Court Cases 651} and **Jagdish Mandal Vs. State of Irrissa & others** {(2007) 14 Supreme Court Cases 517}, to assert that no interference is called for in this case as there has been no violation of the parameters as laid down by this Court as well as the Hon'ble Supreme Court in the judgments referred to above.

18. Learned senior counsel for respondent No.4 – company has pressed upon the plea that although *mala fides* have been alleged but no specific *mala fides* have been alleged against any person, whereas the case is based upon the said aspect. None has been impleaded by name nor has it been specified as to who was the person, who had acted in a biased or partisan manner while conferring the benefit upon respondent No.4 –

company and that too, with a *mala fide* intention. Referring to the written statement filed by respondent No.4 and Clauses 27, 29, 31, 32 and 36 of the DNIT, it is asserted that the power which has been exercised by the Committee of Chief Engineers was well within the purview of DNIT. Reliance has been placed upon the judgments of the Supreme Court in M/s Siemens Aktiengesellschaft & S. Ltd. Vs. DMRC Ltd. {2015 (7) RCR (Civil)} 425 and Montecarlo Ltd. Vs. NTPC Ltd. {2016 (15) SCC 272} as well as the judgment of Full Bench judgment of this Court in Chiranjilal & others Vs. Financial Commissioner Haryana & others {1978 PLR 582} to assert that the writ petition deserves dismissal and the action of the petitioner – company is an afterthought.

19. We have considered the submissions made by the learned counsel for the parties and with their assistance have gone through the pleadings and the documents attached and placed on record.

20. Before proceeding to consider the present case on the basis of the pleadings of the parties, the scope of the Writ Court to interfere in the tender matters needs to be looked at. Various judgments, which have been cited by the learned counsel for the parties, point out that the tendering authority is bound to adhere to the norms, standards and procedure laid down in the bidding document and any arbitrary departure from the said norms would permit the Writ Court to interfere. In *Tata Cellular's* case (supra), the Hon'ble Supreme Court has, after referring to the various judgments passed by the said Court, proceeded to mention the principles in para 94 thereof, which reads as follows:-

“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 unbudgeted expenditure.”

21. Similarly, in para 22 of the judgment of *Jagdish Mandal's* case (supra), the Hon'ble Supreme Court has held as follows:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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 black-listing 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.”

With these principles, as being a guiding force, we would now proceed to consider the present case.

22. The foremost ground which has been projected by the petitioner – company challenging the order dated 07.09.2020 (Annexure P-12) declaring the technical bid of respondent No.4 – company as 'technically responsive' is the alleged non-availability of the power to review, recall or modify the earlier decision taken on a particular aspect.

This plea is unsustainable in the light of the Complaint Handling Protocol provided for in the DNIT itself, which reads as follows:-

COMPLAINT HANDLING PROTOCOL

“1. Post submission of Bids after opening of Part I bids

Part I Bids (Technical Qualification Part of Bid) will be

evaluated by the Employer in accordance with the criteria laid down in the bidding documents and the Addenda, if any. The result of evaluation of the Part I Bids shall be made public on e-procurement port (<https://eprc.punjab.gov.in>) soon after completion of the evaluation.

In case any bidder wants to raise any issue or submit a complaint/representation in respect of the result of such evaluation, it will be allowed to do so within 5 working days from the date of publishing of the result of evaluation. Such complaint/representation shall be considered for resolution before opening of Part II bids. At the end of the specified period of 5 working days, or satisfactory resolution of complaint/representation, if any, the Employer shall inform the bidders, who have qualified in evaluation of Part I bids, of the date & time of online opening of Part II bids.

2. Evaluation of the Part II bids and selection of successful bidder

After opening the Part II bids (Financial Part of Bid), the Employer will evaluate such bids in accordance with the criteria laid down in the bidding documents and the Addenda, if any.

The result of evaluation indicating the name of the successful bidder will be published on the e-procurement portal (<https://eprc.punjab.gov.in>). Within 3 weeks of issue of notification of award, the Employer will publish the following information on the e-procurement portal:

- (i) name of each bidder who submitted the bid;
- (ii) bid prices as read out at bid opening;
- (iii) name and evaluated price of each bid that was evaluated;

(iv) names of bidders whose bids were rejected and the reasons for their rejection; and

(v) name of the winning bidder, and the price it offered, as well as the duration and summary scope of the contract awarded.

If, after notification of award, a bidder wishes to ascertain the grounds on which its bid was not selected, it should address its request to email id <cedwss.north@gmail.com>. The Employer will promptly provide in writing an explanation of why such bid was not selected. If a bidder requests a debriefing meeting, they shall bear all their costs of attending such a debriefing meeting.”

23. A perusal of the above would show that after the evaluation by the employer of Part-I bids (technical qualification part of bid), the result of the same is to be made public on e-procurement portal of the Government of Punjab soon after the completion of the evaluation. Any of the bidders, who wants to raise any issue or submit a complaint/representation in respect of the result of such evaluation, could do so within a period of five working days from the date of publishing of the result of evaluation. In case of receipt of such complaint/representation within the time specified, the same is required to be considered for resolution prior to proceeding with the opening of Part-II bids (financial qualification part of bid). This makes it amply clear that on evaluation of Part-I bid by the employer, the result has to be made public but the same is not final at least for a period of five days since an option has been given to the bidders to approach the employer by way of a complaint/representation relating to the result of such

evaluation. In case no such complaint/representation is received, the obvious conclusion is a finality to the evaluation by the employer of Part-I bid, however, in case of receipt of any complaint/representation from any bidder, the same is mandated to be considered for resolution before opening of Part-II bid (financial qualification part of bid). It is only after the satisfactory resolution of the complaint/representation by the employer, the bidders, who have qualified in evaluation of Part-I bids, would be informed about the date and time of online opening of Part-II bids.

The fact which has come to light and not disputed by the petitioner – company, as highlighted by the respondents in the reply is that initially, decision was taken by respondent No.2 – Committee on 20.08.2020, when the technical bid of respondent No.4 – company was rejected on the ground that the said respondent does not fulfill the specified construction experience and the said decision was uploaded on the e-procurement portal on 24.08.2020. Representation dated 25.08.2020, in terms of the Complaint Handling Protocol, was received from respondent No.4 – company. In the said representation, respondent No.4 – company had put forth its explanation with regard to fulfillment of the requisite experience certificate criteria as mandated by the DNIT. The said representation of respondent No.4 – company was considered by respondent No.2 – Committee. Accepting the explanation as put forth and realizing that it was only an error in the mode of calculation in Column No.10 of original technical bid document, respondent No.2 – Committee proceeded to accept the said representation. What was pointed out by

respondent No.4 – company was that evaluations have been mentioned in kilo liters per hour instead of million liters per day. As per capacity of the water treatment plant which was constructed and executed by respondent No.4 – company, the value was mentioned as 521.875 KLH but when converted into million liters per day, it would come to 12.575 MLD, which is higher than the minimum required capacity of 12 MLD. It has been explained that the error with regard to inadvertent and oversight such as the conversion factor had been corrected as the figures are only mathematical calculations, meaning thereby that the capacity of the water treatment plant had been converted as per the specified method and criteria for calculation. There has been no change in the original evaluation criteria and the same has been strictly followed. Thus, the plea of the petitioner – company with regard to framing of additional/new criteria and applying different factor or method for evaluating the technical bid of respondent No.4 – company is misplaced and without any merit.

With reference to the above, it could be safely said that the procedure which has been followed by respondent No.2 – Committee is well within the jurisdiction and power in accordance with the provided terms and conditions of the DNIT.

24. However, it needs to be pointed out at this very stage that the petitioner – company has not intentionally, in the pleadings, referred to the Complaints Handling Protocol, which, if would have been so mentioned, would have rendered the basic stand of the petitioner – company relating to there being no power to review, recall or reconsider the decision taken by

respondent No.2 – Committee while evaluating the technical bid ineffective and thus, would have fallen flat at the very outset. Effort, in any case, made by the petitioner – company to not disclose the complete facts and intentionally avoiding reference to the Complaints Handling Protocol, in itself dis-entitles the petitioner – company to the equitable relief which has been prayed through the present writ petition. The action of the petitioner – company would fall within the ambit of and purview of calculated suppression of material facts, thus, this dis-entitles it to the relief which has been sought and claimed. Reference to the Full Bench judgment of this Court in *Chiranji Lal's* case (supra) relied upon by respondent No.4 - company would suffice, where this has been so held rather the Court has further proceeded to hold that if there is any suppression of material facts on the basis of which the writ is sought to be claimed, the Court would refuse to grant the same without going into the merits.

25. Learned counsel for the petitioner – company has relied upon Section III, Evaluation and Qualification Criteria, as provided for in the DNIT, appended as Annexure P-4, which reads as follows:

“This section contains all the criteria and the Employer shall use to evaluate Bids and qualify Bidders when qualification in the evaluation of the Technical Part is applied. No other factors, methods or criteria shall be used other than specified in this bidding document. The Bidder shall provide all the information requested in the forms included in Section IV, Bidding Forms.”

Counsel referred the above section to contend that the employer was required to use factors, methods or criteria as specified in the

bid document only and no other to evaluate bids and qualify bidders when qualification in evaluation of the technical part of the bids is applied. The bidder was mandated to supply all the information requested in forms including in Section IV of the bid forms, obviously as per the said criteria. On this basis, it is asserted that the criteria has been changed by respondent No.2 – Committee to give advantage to respondent No.4 – company, thus, acted with bias and *mala fides*.

As regards these allegations of the petitioner - company that the Committee of Chief Engineers have acted with *mala fides* and bias in favour of respondent No.4 – company conferring undue benefit on it illegally and the terms and conditions as mentioned in the evaluation and qualification criteria as laid down in DNIT has been changed so as to make respondent No.4 – company eligible, the said grounds would not sustain firstly in the light of the fact that none by name has been impleaded as a party nor has the petitioner – company been able to establish any type of bias in the approach or action of respondent No.2 – company. As is apparent from the reply which has been filed as also the documents placed on record, the official respondents have proceeded to act in accordance with the DNIT. With respondent No.2 – Committee having only applied the standard conversion factor while evaluating the bid of respondent No.4 – company, where the capacity was shown in kilo liters per hour, which had to be converted to million liters per day for evaluation of the eligibility of the bidders. As a matter of fact, there is no change in the capacity of the water treatment plant as earlier it was mentioned in Kilo Liters per Hour as

521.875 KLH, which when converted into Million Liters per Day, comes to 12.575 MLD. Reference in this regard can be made to Clauses 27, 29, 31, 32 and 36 of the DNIT, which deal with the determination of the responsiveness and qualification of the bidder permitting the employer to clarify the position with regard to the terms and conditions of the bid document and to assess in the examination, evaluation and qualification of the bidders provided the bid is substantially responsive. The employer can even call for submission of necessary information and documentation for rectifying non-material, non-conformities in the bid relating to documentation information or documentation requirement. It, therefore, cannot be said that there was no authority or power conferred upon the employer to seek any information nor can it be said that the bidder could not supply further documents or explain matter(s) relating to any evaluation and calculation of the bidder.

26. It may be added here that respondent No.2 – Committee consists not only of four Chief Engineers but also comprising of Senior Design Advisor, an official of the Finance and Accounts Department and the concerned Superintending Engineer. The said Committee, therefore, can be taken as a High Powered Committee, which has taken a decision, which cannot be lightly brushed aside. Credibility and authenticity of such decision and the decision making process by the High Powered Committee comprising of experts in their field with the Court having no expertise in the technical matters, interference of the Court is not called for as the same is required to be respected unless the petitioner – company is able to

establish any bias or *mala fide* action on the part of the Committee, which in the present case, the petitioner – company has failed to do so.

27. As regards the question raised by the petitioner – company with regard to the authenticity of the experience certificate dated 09.01.2020 (Annexure P-6) submitted by respondent No.4 – company, viz-a-viz the original technical bid document dated 08.01.2020 (Annexure P-7) on the plea that in the original technical bid document, at Column No.10, which relates to the experience of design and construction of the plant with net output capacity, the mention of the same is 521.875 KLH (8.35 MLD), whereas the experience certificate dated 09.01.2020 (Annexure P-6) although mentions net output capacity of the plant as 521.875 KLH but in million liters per day, it is mentioned as 12.525 MLD, meaning thereby there is conflict of figures with regard to the conversion of KLH and MLD. The authenticity of the document stands duly established with the confirmation of the said document from the Competent Authority, which has issued the same. The authenticity of the experience certificate dated 09.01.2020 (Annexure P-6), therefore, cannot be doubted or faulted with. The comparison which has been done by asserting that in the original technical bid, the million liters per day capacity is mentioned as 8.35 MLD and therefore, being an admission on the part of respondent No.4 – company with regard to the capacity of the water treatment plant would not render the certificate as bogus, forged or manipulated. When the Competent Authority, which is the Government official and that too, where respondent No.4 – company had constructed, executed and commissioned

the water treatment plant, itself is issuing the experience certificate, which has been confirmed and verified by the official respondents relating to its authenticity, the stand of the petitioner – company cannot be accepted. In any case, applying the conversion table, it could not be disputed by the petitioner – company that a water treatment plant with capacity of 521.875 KLH would have the capacity as 12.525 MLD as the 'per hour water treatment capacity' has been converted to 'per day water treatment capacity'.

28. In view of the above, we do not find any reason to exercise our writ jurisdiction to grant the relief to the petitioner – company as prayed for as none of the principles laid down by the Hon'ble Supreme Court in the cases of *Tata Cellular* (supra) and *Jagdish Mandal* (supra) as referred to above have been found to be applicable in the present case mandating/permitting interference by this Court. The writ petition, therefore, stands dismissed.

(AUGUSTINE GEORGE MASIH)
JUDGE

(ASHOK KUMAR VERMA)
JUDGE

23rd December, 2020
Harish

Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No