

ORISSA HIGH COURT: CUTTACK

AFR

W.P(C) NO. 11159 OF 2022

In the matter of an application under Articles 226 and 227 of the Constitution of India.

M/s. Radheshyam Agrawal Petitioner

-Versus-

State of Odisha and others Opp. Parties

For Petitioner : Mr. Pradipta Kumar Mohanty,
Sr. Advocate along with
M/s. P. Mohanty, P.K. Nayak,
P.K. Pasayat and S.N. Dash,
Advocates.

For Opp. Parties : Mr P.P. Mohanty,
Addl. Government Advocate

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR JUSTICE S.K. MISHRA**

Date of Hearing: 20.10.2022 :: Date of Judgment : 27.10.2022

DR. B.R. SARANGI, J. The Petitioner, which is a registered Partnership Firm and an 'A' Class Contractor (which was earlier "A-5" Class) registered in the State of Chhatisgarh

and being equivalent and/or at par with Super Class Contractor of the State of Odisha, has filed this Writ Petition seeking to quash rejection of its Technical Bid pursuant to proceeding of the Tender Committee-Cum-Empowered Committee Meeting of Water Resources Department held on 27.04.2022.

2. The factual matrix of the case, in brief, is that Opposite Party No.4 issued an "e" Procurement Notice No. CE & BM, MBBS 03 of 2021-22, vide Bid Identification No. CE&BM, MBBS (JPD-EPC) 02 of 2021-22, inviting online tenders from the qualified shortlisted Bidders for *“Construction of Integrated Barrage across river Kochila near Village Kuturia in Bhadrak District and across river Baitarani near Village Dhobabil of Jajpur District in the State of Odisha including Hydro-Mechanical Works, Power Connectivity Works, Road Connectivity, Staff Quarters including design and estimate of all components with operation and maintenance of the project for a period of five year or five flood seasons whichever is more after successful commissioning of the project.”* on

EPC contract. Pursuant to such notice, the Petitioner submitted its bid in double cover as per the specification given in the tender notice. One is Technical Bid and other is Financial Bid within the last date of submission, i.e. 23.12.2021. The Online bid submitted by the Petitioner was duly acknowledged by the Opposite Parties with a receipt of confirmation. Including the Petitioner, 12 bidders had participated in the tender. Out of 12 bidders, 10 bidders had satisfied all the criteria as per Clauses-15.8 (1), 15.8 (2) b & 15.8 (3) of File-I, File-II and File-III. Consequentially, the Project Level Tender Committee Meeting at the level of Chief Engineer, Basin Manager, MBBS, Chandikhole, held on 07.03.2022, unanimously recommended the Technical Bids of 10 Bidders for approval by the competent authority and to allow them for opening of their Financial Bids, where the name of the Petitioner was found place at Sl. No. 9. In the proceeding of the Procurement Committee Meeting held on 25.03.2022, the recommendation made by the Project Level Tender Committee dated 07.03.2022 on the

technical evaluation submitted by CE & BM, MBBS, Chandikhole, was scrutinized, where the Petitioner's name found place at Sl. No.11 was considered to be qualified as he satisfied all the minimum eligibility and qualifying criteria of Section-II, Clause No.15.8 (1), 15.8 (2) a & 15.8 (2) b, 15.8 (3), File-II and File-III of the DTCN and, as such, the Bidder was found responsive.

2.1 On 25.03.2022, a clarification regarding execution of work, i.e. "Raising of 4th Stage Training Dam from existing RL-135 M to RL-143 M. (2nd Phase of 1st State Tailing Dam) and other related civil jobs at Jadugada Tailing Pond" by the Petitioner, was sought for making certain queries. In response to letter dated 25.03.2022, the DGM (Civil)/HOD, Uranium Corporation of India Limited, on 05.04.2022, answered the query stating that Tailing Dam was not constructed over river and appropriate decision may be taken at the end of the querist regarding definition of hydraulic structure and purpose of the dam was to retain tailing slurry, which is reject material of Uranium Processing Plant. On receipt

of such clarification, the Procurement Committee Meeting held on 07.04.2022 decided that the Petitioner does not satisfy the qualifying criteria as per Clause-15.8 (2)(a), File-I of the DTCN and as the similar nature of work considered for annual turnover i.e. the raising of 4th stage tailing dam not be considered as similar work as per DTCN and, as such, the bid of the Petitioner was found non-responsive. Therefore, the Petitioner was declared disqualified, as the required annual turnover was Rs.188.70 Cr and available turnover of the Petitioner was Rs.121.96 Cr. Such decision of the Procurement Committee dated 07.04.2022 was considered in the Tender Committee-Cum-Empowered Committee meeting of Water Resources Department held on 27.04.2022, where the decision taken by the Procurement Committee dated 07.04.2022 was confirmed and it was held that the Petitioner does not satisfy the qualifying criteria as per Clause-15.8 (2) (a), File-I of the DTCN, as the similar nature of work considered for annual turnover (i.e. the raising of 4th stage tailing dam) cannot be considered as

similar work as per the DTCN and, as such, the bid of the Petitioner was found non-responsive. Therefore, the Petitioner was declared disqualified, as its available annual turnover was Rs.121.96 Cr. as against the required annual turnover of Rs.188.70 Cr. Against such rejection of its Technical Bid, on the ground mentioned above, the Petitioner has approached this Court by way of filing the present Writ Petition.

3. Mr. P.K. Mohanty, learned Senior Advocate appearing along with Mr. P. Mohanty, learned Counsel for the Petitioner contended that as per the qualification criteria prescribed in Cover-1 of Clause-15.8 of the DTCN, when the Technical Bid of the Petitioner was examined and found to be qualified by Project Level Tender Committee, the same should not have been altered by the Procurement Committee in its meeting held on 07.04.2022 and confirmed by the Tender Committee-Cum-Empowered Committee in its meeting held on 27.04.2022 by incurring disqualification under Clause-15.8(2)(a), File-I of the DTCN. He further

contended that the disqualification was made on the ground that as against the required annual turnover of Rs.188.70 Cr, the available turnover of the Petitioner was Rs.121.96 Cr.. According to him, the same was done without taking into consideration the calculation of the amount provided pursuant to the certificates issued by the Uranium Corporation, the Executive Engineer, Water Resources Division, Kota, Dist-Bilaspur, (C.G.) and the Executive Engineer, PWD National Highway Division, Bilaspur, dated 30.10.2020, 15.10.2020 and 18.02.2022 under Annexures-5, 6 and 7 respectively. The calculation of annual turnover of the Petitioner was to be made taking into consideration the turnover mentioned in those certificates and if the same is taken into consideration, the total annual turnover of the Petitioner would be Rs.193.15 Cr. Mr. P. Mohanty, learned Senior Counsel submitted that to substantiate such calculation, it has been explained in details in Paragraph-6 of the Writ Petition. It is further contended that with regard to the authenticity of the experience certificate vide

Annexure-5, issued by the Uranium Corporation of India Ltd., Opposite Party No.4, vide letters dated 14.03.2022 and 16.03.2022, sought clarification from the General Manager, Uranium Corporation of India Ltd., who replied in the affirmative, affirming the experience certificate issued in support of execution of similar work. Therefore, the determination made to the effect that the Petitioner has not gained the experience of similar nature of work, which is required for the purpose of execution of present work, cannot sustain. As such, he seeks for quashing of the decision rejecting the Technical Bid submitted by the Petitioner. It is further contended that in the matter of disqualification of a tenderer by rejecting Technical Bid, the said decision being taken without giving opportunity to the Tenderer to explain the shortcomings pointed out by the Technical Committee, is construed to be arbitrary, violative of Article 14 of the Constitution and even though it is a contractual matter, the Writ Petition is maintainable. To substantiate the said submission, he relied on the judgment of this Court in the case of

Hemogenomics Private Limited v. State of Odisha and others, AIR 2016 Orissa 178.

4. Mr. P.P. Mohanty, learned Additional Government Advocate, appearing for the State-Opposite Parties, contended that since the Petitioner had not satisfied the conditions stipulated in the tender documents with regard to the experience of executing similar nature of work, its Technical Bid was rejected, as the Annual Turnover required was Rs.188.70 Cr, but the available turnover of the Petitioner was Rs.121.96 Cr. Though reliance was placed by the Petitioner on the experience certificates furnished vide Annexures-5, 6 and 7, but, as per reply given to the clarification sought by the Opposite Parties in respect of the experience certificate issued by Uranium Corporation of India Limited, the same cannot be considered that the Petitioner has got experience of executing the similar nature of work. Therefore, the same having been excluded, there was shortage in required annual turnover. Thereby, the Petitioner did not satisfy the

requirement of Technical Bid submitted by it. Though recommendation was made by the Project Level Tender Committee, but the same was turned down by the Procurement Committee in its meeting held on 07.04.2022, which was confirmed by the Tender Committee-cum-Empowered Committee of Water Resources Department in its meeting held on 27.04.2022. Thereby, no illegality or irregularity has been committed by the Authority in rejecting the Technical Bid of the Petitioner as it did not satisfy the requirement of the DTCN. Thereby, the Writ Petition should be dismissed.

5. This Court heard Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. P. Mohanty, learned Counsel for the Petitioner, Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-Opposite Parties in hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned Counsel for the parties, the Writ Petition is being disposed of finally at the stage of admission.

6. Admittedly, Opposite Party No.4 issued “e” Procurement Notice No.: CE&BM,MBBS 03 of 2021-22, Bid Identification No. CE& BM, MBBS (JPD-EPC) 02 of 2021-22 through online inviting tenders from the prospective Bidders on EPC Contract for “Construction of Integrated Barrage across River Kochila near Village Kuturia of Bhadrak District and across river Baitarani near Village Dhobabil of Jajpur district in the State of Odisha including Hydro-mechanical works, Power connectivity works, Road connectivity, Staff quarters including Survey, Investigation, Planning, Designing and Estimate of all components with operation and maintenance of the project for a period of five years or five flood seasons whichever is more, after successful commissioning of the project.” The period of completion of work was 30 calendar months including rainy seasons and the date of submission of bid was 23.12.2021. Section II of the DTCN deals with instruction to the Bidders. For a just and proper adjudication of the case, the relevant provision of the DTCN is referred below:-

“Cover -1: Qualification criteria:

Technical bid: This will contain the following documents **in three PDF files.**

File-I

The intending bidders can submit bid as an individual.

- I. The intending bidders should have satisfactorily completed not less than 80% of the original contract Value as a prime contractor of at least one **similar work** of value not less than **Rs. 125.80 Crore** at financial year 2020-21 price level in last 10(ten) years prior to the FY of invitation of tender & including current financial year i.e. from **2010-11 to 2019-20.**

The self-attested copy of certificate of authenticity is to be enclosed from the concerned **Superintending Engineer/ Executive Engineer/ Competent officer in charge of execution.** The detailed correspondence address/ e-mail of the authority issuing certificate shall be furnished. Weightage of 10% per year shall be given on cost of the satisfactory completed works of previous years to bring them to the current price level. **Failure to submit the proof in support will result in non-consideration of the tender.**

Similar work means:

Similar work means execution of Dams/Barrages/Weirs/ Major Irrigation Structures/ Major Bridge over river.

2. (a) The intending bidder in its name should have in the last five year (from FY 2015-16 FY 2019-20) achieved minimum annual turnover (in similar nature of work only) of **Rs.188.70 Crore** at FY 2020-21.

Attested copy of certificate of authenticity is to be enclosed from the Superintending Engineer/ Executive Engineer /Competent Officer in charge of execution. Weightage of 10% per year shall be given on financial turnover of previous years to bring them to the current price level.

Example: If the estimated value put to tender is RS.6.00 Crore and period of execution is fifteen (15) months, then the financial turnover should be 7.20 crore. i.e, Rs.(6.00 Crore/ 15)x12x1.5=Rs.7.20Crore .

(b) Audited profit and loss account certified by a practicing Chartered Accountant for the year indicated above should be furnished.

3. Credit facilities:

*The intending bidders must possess credit facilities of not less than **Rs.62.90 Crore** and furnished the credentials from any Nationalized/Scheduled Commercial Bank located anywhere in the country with branch at Bhubaneswar along with the bid against the specific work by mentioning the name of the work and tender identification number in prescribed proforma as mentioned in (Annexure-VI(A)).”*

7. From the aforementioned provision, it is made clear that the intending Bidders should have satisfactorily completed (not less than 80% of the original contract value) as a prime Contractor of at least, one similar work of value not less than Rs.125.80 Crore at financial year 2020-21 and price level in last 10 (ten) years prior to the financial year of invitation of tender and including current financial year i.e. from 2010-11 to 2019-20. “Similar work” has also been defined therein, which means execution of Dams/Barrages/Weirs/Major

Irrigation Structures/ Major Bridges over river. Therefore, it is made clear that the Bidder should have executed the work of Dams/Barrages/Weirs/Major Irrigation Structures/ Major Bridges over river and should have achieved minimum annual turnover (in similar nature of work only) of Rs.188.70 Crore at FY 2020-21. The same are the eligibility criteria to qualify in the Technical Bid of the tender itself. Pursuant to such Tender Notice, the following 12 Bidders participated in the bidding process.

1. Afcons Infrastructure Limited, "Super" Class Contractor.
2. Sri Raja Rajeswari Constructions India Pvt. Ltd, "Super" Class Contractor.
3. VARKS Engineering Private Limited, Special Class Contractor.
4. Larsen and Toubro Limited, "Super" Class Contractor.
5. Om Infra Limited, "Super" Class Contractor.
6. Odisha Construction Corporation Ltd. "Super" Class Contractor of Odisha State.
7. M/s. D.D. builders Limited, 'Super' Class Contractor of Odisha State (DDBL-RITWIK) (JV).
8. Ranjit Buildcon Ltd., "Super" Class.
9. Bekem Infra Projects Private Limited & Rockeira Engineering LPP (JV)
10. PLR Projects Private Limited & Rockeira Engineering LPP (JV).
11. M/S Radheshyam Agrawal, 'A' Class Contractor.
12. LCC Projects Private Limited, Super Class Contractor."

8. The Technical Bid of the work in question was opened/downloaded in the office of C.E & B.M, MBBS, Chandikhole, on the scheduled date, i.e., on 24.12.2021 at 11.00 AM. On 19.01.2022, at 11.30 A.M., the meeting of Project Level Tender Committee was held in the Office of CE & BM, MBBS, Chandikhole, under the Chairmanship of Opposite Party No.4, wherein Technical Bids of eleven Bidders, except the Technical Bid of L.C.C. Projects Pvt. Ltd, Super Class Contractor, whose bid was found non-responsive as per Clause-15.8(1), 15.8(2) of file-I of DTCN, were recommended. The Technical Bid along with Technical Evaluation Report, Template for Technical Evaluation, Proceedings of Tender Committee and all other required documents were submitted to the Engineer-in-Chief, Procurement, Odisha, vide Office Letter No. 132 /WE dated 24.01.2022. After necessary examination, on 07.02.2022, the Engineer-in-Chief Procurement returned the documents with an advice to re-submit the same after proper re-evaluation. Accordingly, the Technical Bid submitted by the

Petitioner-M/s Radheshyam Agrawal was re-evaluated as follows:

“The bidder was awarded to execute the following 02 (two) nos. of works, which include both Road work and Bridge work, which are follows:

- (i) Two tanning with paved shoulder of Sakri-Ganiyari-Kota Road including Bridge Section from Km 0.00 to Km 21.794 length in the state of Chhattisgarh on EPC mode.*
- (ii) Rehabilitation and up gradation of NI1-200 (New NH-49) from KM 241.553 to Km 312.600 (Massania Kala village-Rengapalii village / Odisha Boarder Section) to two lane with paved shoulder including Major Bridges & ROB in the state of Chhattisgarh under NI IDP-1V on EPC basis. It may be noted that the work awarded to M/s.Ramk ay Infrastructure Ltd., Hyderabad, wherein fifty eight percentage of work of the project has been awarded to the Petitioner being a sub-contractor.”*

9. As above two works were mixed works, namely road, bridge etc. to determine the amount covered under similar nature of work, the Bidder was requested vide Letter No. 246 dated 18.02.2022 through E-mail to furnish the financial year-wise executed amount break up for bridge work only for above two works from the concerned Executing Authority, i.e., concerned Superintending Engineer / Competent Officer in charge of execution, for calculating the annual turnover in

similar nature of works. On 31.01.2022, the Petitioner submitted an E-mail in respect to the financial year wise executed amount and break up for bridge work only, i.e. for bridge at Sl.No.II, but not submitted any break up of bridge work at Sl. No. I. On 07.03.2022, the meeting of Project Level Tender Committee was held in the Office Chamber of Chief Engineer & Basin Manager, Chandikhole, wherein the Technical Bids of two Bidders, namely, M/s. VARKS Engineers Pvt. Ltd. and M/s. Bekam Infra Projects Pvt. Ltd. were rejected by the Committee. The Technical Bids of 10 Bidders, including the Petitioner, were unanimously recommended for approval by the Competent Authority. On 14.03.2022, the Chief Engineer, Basin Manager, MBBS, Chandikhole, was asked to furnish point-wise clarification with supporting documents on the down-loaded documents of the Petitioner. In response to the same, on 21.03.2022, Opposite Party No.4 submitted clarifications to the observations on the document received from the Executing Authorities.

10. The meeting of the Procurement Committee was held on 25.03.2022 in the Office Chamber of EIC Procurement for finalization of Technical Bids. In the said meeting, it was directed to Opposite Party No.4 to obtain further clarification on the following points:-

- “(i) Specifications and purpose of tailing dam to be furnished and on which river and mention whether this is hydraulic structure.*
- (ii) Detail specifications of the major bridge to be furnished and on which river.”*

11. In response to the same, on 25.03.2022, clarification was sought by the Opposite Party No.4 from the General Manager, Uranium Corporation of India Ltd., Jaduguda Mines, Singhbhum (East), Jharkhand, to the following effect:-

“With reference to the subject cited above, you are requested to further clarify that,

- (1) Whether the Tailing dam has been constructed over any river or not ?*
- (2) Whether it is a hydraulic structure or not ?*
- (3) What is the purpose of this Dam? Whether it retains water or any thing else ?”*

Therefore, you are requested to submit your compliance as soon as possible to enable this office for finalization of Tender evaluation process of a work.”

12. Similarly, clarification was also sought by Opposite Party no.4, vide letter dated 25.03.2022, from

the Executive Engineer, P.W.D, N.H. Division, Bilaspur,
to the following effect:-

- “1. Whether the bridge works are new constructions or renovation to existing bridges.*
- 2. If new bridges, then the number of bridges and their length may be mentioned.*
- 3. Whether the new bridges have been constructed over rivers/nallahs, if yes, then the width of the rivers/ nallahs with their names may be furnished.*

Therefore, you are requested to submit the compliances to the above queries at an early date for finalization of a tender.”

13. In response to the clarification sought on 25.03.2022, the DGM, Uranium Corporation of India Limited, wrote a letter on 05.04.2022 clarifying the nature of work, as follows:

- “1. Trailing dam has not been constructed over river.*
- 2. Appropriate decision may be taken from your end regarding definition of hydraulic structure.*
- 3. Purpose of the dam is to retain tailing slurry which is reject material of Uranium processing plant.”*

14. In the meeting of the Procurement Committee dated 07.04.2022, the above clarification was placed for consideration and after detailed discussion on the point-

wise compliance, the Committee opined that one of the work, i.e. raising 4th stage tailing dam (as specified by the Uranium Corporation Ltd.) has been considered for annual turnover, which cannot be taken as similar work as per DTCN Clause-15.8 (2) (a), File-I. In the letter dated 05.04.2022 of Uranium Corporation of India Limited, it was clarified and also admitted that the tailing dam has not been constructed over river, on the other hand, tailing has been constructed by Uranium Corporation of India Limited to retain tailing and slurry (rejected material) of the processing plant. Thereby, the Petitioner's bid is not covered as similar nature of work. Further, sufficient documents regarding specifications of the bridge have not been received in respect of Major Bridge (Rehabilitation and Up-gradation of NH-200), for which the Technical Bid of the Petitioner does not satisfy the qualifying criteria as per Clause-8(ii)(a) File-1 of the DTCN. As a result, the Procurement Committee came to a definite finding that the bid submitted by the Petitioner was non-responsive. In the said meeting, it was decided

that except the bid of the Petitioner, the bids of other nine Bidders were responsive, for which their cases should have been considered for opening of the Financial Bid. On 27.04.2022, the meeting of Tender Committee - Cum- Empowered Committee of Water Resources Department, after examining the Technical Bid, evaluation statement, recommendations of the Project Level Tender Committee and the Procurement Committee, clarified as follows:-

"The Procurement Committee on 07.04.2022 discussed the compliance report submitted by CE&BM, MBBS, Chandikhole and decided that the work "Raising of 4th stage tailing dam (as specified by UCIL) considered for annual turnover by the PLTC at the level of CE & BM, MBBS, cannot be taken as similar work as per DTCN Clause No.15.8(2)(a), File-I and report of CE & BM, MBBS. Similarly, another work "Major bridges (Rehabilitation and up-gradation of NH-200)" also cannot be considered as similar work as supporting documents regarding specification of the bridge wasn't received. As a result, the bidder M/s. Radheshyam Agrawal, "A" Class Contractor did not satisfy the qualifying criteria as per Clause No.15.8(2)(a), File-I of the DTCN and found to be non-responsive".

It is of relevance to note that in the said meeting Engineer-in-Chief, Water Resources, apprised the Committee that earlier in the tender evaluation process

of various similar works of Rs.100 Crore and above under different Controlling Officers, this similar nature work, i.e., "Raising of 4th stage tailing darn" was not taken into consideration for calculation of annual turnover and the Petitioner did not qualify for the same reason as per Clause-15.8 (2) (a), File-1 of the DTCN. After due deliberations and discussions, the Committee unanimously approved the Technical Bids of nine responsive Bidders, excluding the bid of the Petitioner, and further recommended for opening of the Financial Bid.

14. So far as annual turnover requirement is concerned, the DTCN specifically requires that the Bidder should have achieved the minimum annual turnover of Rs.188.70 Crore. Since the Petitioner had only achieved Rs.121.96 Crore, it was disqualified. The determination of such turnover has been made taking into account the highest value for the F.Y 2018-19 calculated as Rs. 91.70 Crore, which is updated to Rs.121.96 Cr at 2011-22 Price level, which is less than

the requirement of Rs. 188.70 Crore.

15. The contention raised that the certificates furnished under Annexures-5, 6 and 7 for the work undertaken and the calculation made in Paragraph-6 of the Writ Petition have not been taken into consideration. This fact is not correct, in view of the fact that the certificate furnished in Annexure-5 with regard to the work undertaken under Uranium Corporation of India Ltd. was not the similar nature of the work and, therefore, the annual turnover on that account should not be taken into consideration. Excluding such turnover, if other two works are taken into consideration, the same do not satisfy the requirement. Even though it was stated that no specific reply was given to the calculation made by the Petitioner in Paragraph-6 of the Writ Petition, that itself cannot sustain in view of the fact that the certificate so furnished cannot be construed to be the similar nature of work. Therefore, the Petitioner does not satisfy the requirement.

16. The reliance placed on the judgment of this Court in **Hemogenomics Private Limited** (supra), is totally different factually from the instant case, in view of the fact that in the said case the Court held that the grounds of rejection of the Technical Bid of the Petitioner, as mentioned in Clauses (d), (e) and (f), cannot sustain in view of the fact that the Petitioner's equipment being the latest version without testing the same or without examining the same or without giving any opportunity to the Petitioner the conclusion arrived at by the technical committee seems there was non-application of mind and arbitrary exercise of powers.

17. In **Air India Ltd. v. Cochin International Airport Ltd. and others**, (2000) 2 SCC 617, the apex Court held as follows:

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

18. In **Jagdish Mandal v. State of Orissa and others**, (2007) 14 SCC 517, considering the scope of the Court to interfere in tender and contractual matters in exercise of powers of judicial review, the apex Court held as follows :

“(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

19. Taking into consideration the law laid down by the Apex Court in ***Air India Ltd.*** (supra) as well as ***Jagdish Mandal*** (supra), this Court is conscious of the fact that its jurisdiction to interfere with the decision making process in exercise of powers under judicial review is very very limited in nature. But certainly this Court is of the considered view that when in a decision making process, there is arbitrary and unreasonable exercise of power, this Court has got jurisdiction to interfere with the same under Article 226 of the Constitution of India.

20. Applying the above principles, as enunciated by the apex Court in the judgments discussed above, to the present case, this Court is of the considered view that the award of contract by the State is essentially a commercial transaction and in arriving at a commercial decision considerations which are paramount are commercial considerations. Therefore, 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 and price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its Corporations, instrumentalities and Agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily.

21. In view of such position, the decision dated 27.04.2022, which has been taken by the Tender Committee-Cum-Empowered Committee, does not suffer from any *mala fide* or intend to favour someone. The process which has been adopted and the decision which has been taken, cannot be construed to be arbitrary and irrational. Thereby, the decision making process followed by the authority in arriving at a conclusion for determination of the Technical Bid does not require any judicial scrutiny as the same has been done in adherence to the terms and conditions of the DTCN issued by the Authority.

22. In view of the above principles enunciated by the apex Court and applying the same to the factual matrix involved in this case, this Court is of the considered view that Tender Committee-Cum-Empowered Committee of Water Resources Department, in its meeting held on 27.04.2022, while evaluating the Technical Bid of the Petitioner, has not committed any

error or acted arbitrarily, in violation of Article 14 of the Constitution.

23. Resultantly, this Court does not find any merit in this Writ Petition, which is accordingly dismissed. However, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

S.K. MISHRA, J. I agree.

(S.K. MISHRA)
JUDGE

Orissa High Court, Cuttack
The 27th October, 2022, Arun/GDS