Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3244 OF 2022

1. **FERRO-CONCRETE CONSTRUCTION (INDIA) PVT LTD,**
   a company incorporated under the Companies Act 1956, and having its office at 5-A, Industrial Area, Bhagirathpura, Indore 452003, Madhya Pradesh.

2. **DYNASOURE CONCRETE TREATMENT PVT LTD,**
   a company incorporated under the Companies Act 1956 and having its office at 316, Raheja Tesla Industrial Estate, TTC MID, Juinagar 400 705.
3. **FCCI-DCTPL JV,**
   a Joint-Venture company formed by Ferro-concrete Construction (India) Pvt Ltd and Dynasoure Concrete Treatment Pvt Ltd, having its office at 5-A, Industrial Area, Bhagirathpura, Indore 452 003, Madhya Pradesh

…PETITIONERS

~ VERSUS ~

1. **STATE OF MAHARASHTRA,**
   through The Principal Secretary, Water Resources Department, having office at

Madame Cama Marg, Hutatma Rajguru Chowk, Mantralaya, Mumbai 400 032.

2. **THE CHIEF ENGINEER,**
Water Resource Department, Konkan Region, having office at 4th Floor, Hongkong Bank Building, Hutatma Chowk, Mumbai 400 001.

3. **THE EXECUTIVE ENGINEER,**
Bhatsa Dam Management Division, Bhatsa Nagar, Tal: Shahapur, District: Thane, Pin Code: 421 603 ...**RESPONDENTS**

APPEARANCES

FOR THE PETITIONERS	**Dr Veerendra Tulzapurkar, Senior Advocate**, *with Sanjay Kadam, Bhushan Deshmukh, Sanjeel Kadam, Sayali Rajpurkar & Nitisha lad, i/b Kadam & Co.*
FOR RESPONDENT NO.1	**Mr SU Kamdar, Senior Advocate**, *with Milind More, Addl. GP (OS).*
FOR RESPONDENT NOS. 2 TO 4	**Ms Shakuntala Wadekar**, *with Bhavana Punalekar.*

CORAM : G.S.Patel & Gauri Godse, JJ

DATED : 15th November 2022

ORAL JUDGMENT (*Per GS Patel J*):-

1. This Writ Petition under Article 226 of the Constitution of India challenges a communication dated 25th May 2022 by the Government of Maharashtra through its Water Resources Department. A copy of this communication is at Exhibit "K" at page 172 with a translation at page 177. The communication is of a decision taken at a meeting held at Mantralaya on 25th April 2022 under the chairmanship of the Additional Principal Secretary Finance.

2. The controversy relates to the acceptance of the Petitioners' tender for repairs to the Bhatsa project under a World Bank Aided Dams Rehabilitation and Improvement Project, also called *DRIP-II*.

3. A few dates will provide the necessary context. The Government of Maharashtra invited tenders for repairs of the Bhatsa Dam. Construction of this dam began in 1965 in Taluka Shahapur, District Thane at the confluence of the Bhatsa and Chorana rivers. The purpose was to provide the water supply to the Mumbai–Thane area. The project took two decades: It was finally constructed in 1985. It is one of the tallest masonry dams in Maharashtra and has a substantial storage capacity. There is also a hydro-electric installation, and water supply for irrigation.

4. In April 2012, the Government of India through its Ministry of Water Resources, River Development and Ganga Rejuvenation, acting through the Central Water Commission, proposed a rehabilitation and improvement project for several dams. This initiative was to receive financial aid from the World Bank. It was intended to improve safety, efficiency, and operational performance for many dams. The project was in two phases. Phase II (the one known as Drip–II) includes 300 dams in 18 States. Bhatsa is one of these. There is also a Central Project Monitoring Unit under the supervision of the Central Water of Commission in New Delhi. The Government of Maharashtra in turn set up a Strategic Project Management Unit ("**SPMU**") to oversee projects within the state. The Petition asserts that, since the project was to receive financial aid from the World Bank, for projects of more than INR Rs. 70 crores, prior approval of the Central Project Monitoring Unit was required, and thereafter of the World Bank.

5. By February 2021, the State Government perceived a need for urgent repairs to the Bhatsa Dam. Administrative approval was accorded for the rehabilitation, repairs and improvement project with an overall sanction of Rs. 2.66 crores. In April 2021, the Executive Engineer invited bids. This was a public tender for the rehabilitation improvement and basic facilities of Bhatsa Dam. There was a national open competition which used specifications set by the World Bank. The tender document was in three parts. The first part dealt with bidding procedures. Of this, Section 1 had instructions to bidders. Then there was Section 2 with a bid data sheet, Section 3 specifying evaluations and qualifications criteria, Section 4 with the bidding forms, Section 5 for eligible countries and Section 6 dealing with other subjects. Part II had Section 7, and this dealt with the requirement of the works. Part III had Sections 8, 9 and 10 and these had conditions of contract, contract firms, General Conditions of Contract or ("**GCC**") and Particular Conditions of Contract or ("**PCC**").

6. On 22nd June 2021, Petitioner No. 3, a joint venture of Petitioners Nos. 1 and 2, put in its bid. There were three other bidders. But, and this will be of some consequence, it was only the Petitioners' bid that was found to be substantially compliant or responsive. This means that the other three bidders in the fray stood eliminated at the technical bid stage itself. Consequently, no question arose of their financial bids being opened.

7. For some reason that remains unexplained, and which is also of some consequence, the financial bid of the Petitioners was not opened until 1st February 2022. At this time, it was noticed that the Petitioners' bid — as noted above, the only bid present before the Government — was 25.56% higher then the tendered estimates. At page 141 of the Petition paper book is a communication from the Water Resources Department of the Government of Maharashtra to Petitioners Nos. 1 and 2 seeking a clarification as to why the Petitioners had quoted Rs. 149.93 crores for the project in their bid against an estimated cost of Rs. 120.36 crores. An explanation was sought for each item.

8. The 3rd Petitioner Joint Venture responded on 10th March 2022 (copy at page 142), submitting a detailed rate analysis of the major items of the work saying that these constituted 80% of the contract value. The document annexed to the Petition is without the annexures. The covering letter itself provided three or four separate reasons that, according to the Petitioners, justified the higher quotation.

9. The next document in question is a communication of 11th March 2022. According to Dr Tulzapurkar for Petitioners, this is an acceptance of the Petitioners' explanation. We will return to this document a little later.

10. On 29th March 2022, there came a crucial document. This is a Letter of Acceptance. A copy is at Exhibit "E" from pages 147 to 148. Dr Tulzapurkar says that on the basis of Letter of Acceptance the Petitioners took several steps in furtherance of the contract. They gave guarantees, they claim to have mobilised, there were Powers of Attorney and there was a security guarantee. On 22nd April 2022, the Petitioners wrote to the Executive Engineer of the Bhatsa Dam Management Division asking that the signing of the formal contract be expedited. This was reiterated on 3rd May 2022.

11. On 9th May 2022, the Government of Maharashtra through its Water Resources Department wrote to the Petitioners saying that the contract agreement had not yet been received by that office.

12. On 18th May 2022, the Petitioners replied claiming that there was a delay on the part of the government but contending that the Letter of Acceptance of 29th March 2022 constituted a binding contract.

13. On 25th May 2022 came the impugned letter from the Respondents.

14. We will first turn to the Letter of Acceptance and the impugned letter before we proceed to the relevant contractual provisions and other documents. The Letter of Acceptance is captioned as such. The subject line says it is "Notification of Award Contract No. 1". At the foot of the letter at page 148 we find that it was copied to the Chief Engineer Water Resources Department for information with an endorsement that reads thus:

> "Sir, above letter of acceptance is subjected to WRD, GoM approval sought vide region office letter No. 692 dtd. 17th February 2022."

15. The impugned communication at Exhibit "K" speaks of a meeting held on 25th April 2022 at Mantralaya. It was chaired by the Additional Principal Secretary Finance. It was specifically for approving a proposal for acceptance of a tender for repairs to the Bhatsa project under DRIPs. The others present included representatives of the Principal Secretary Planning, the Additional Principal Secretary, PWD, the Water Resources Department, the Konkan Irrigation Development Board and so forth.

16. The Minutes of the Meeting note some of the background. Then the Minutes note that three bids received pursuant to the tender were disqualified at the technical scrutiny stage and it was only the bid of the Petitioners that was found to be responsive. The Minutes then go on to note that the Petitioner's bid was 24.57% higher than the estimates. The Minutes note that an explanation was sought but that the regional office was persuaded to accept the explanation. Thereafter the Regional Chief Engineer submitted the explanation to the Central Government Monitoring Unit

("**CPMU**") through the State Government Monitoring Unit ("**SPMU**") so that it could be sent on to the World Bank for approval. The Minutes note that on 28th March 2022 the World Bank communicated its approval to the explanation. The Minutes then note that that on the strength of this acceptance by the World Bank, the Regional Executive Engineer had issued a Letter of Acceptance to the contractor in question.

17. It is at this point that the Minutes note a further document. There is a specific reference here to a Government Resolution No. Tender-0418/prkr.232/mopr-1 of 30th August 2018 and another Government Resolution of 30th November 2018. These apparently say that the authority to accept tender exceeding a value of Rs. 1 crore is only with a special Tender Acceptance Committee ("**TAC**") compromising the Additional Principal Secretary (Finance), the Additional Principal Secretary (Planning), the Additional Principal Secretary (PWD) and the Additional Principal Secretary (Water Resources). For this reason, a presentation was given to the present committee seeking a decision.

18. The TAC decided after the presentation that a re-tender should be called for. It gave three distinct reasons, and these are set out in the impugned communication itself. We reproduce the translated portions from pages 184 to 185.

> **"Decision of the Tender Acceptance Committee:-**
>
> After submission of the complete information in respect of the tender in the meeting, the committee rejected the proposal of accepting the tender for the following reasons:

> 1) Though 4 contractors had participated in the tender process, as 3 contractors were technically disqualified only one contractor has qualified.
>
> 2) Bid given by the only contractor who was qualified, is 24.57% more than the estimated rate. As this percentage is excessively high, it will not be appropriate to accept the said bid.
>
> 3) Appox. 6 months' time was consumed between opening the technical proposal (envelope) and financial proposal (envelope) which is excessively high.
>
> Therefore re-tender be issued for the said work."

19. It is this that is assailed in the present Writ Petition. A copy of the 30th August 2018 GR is at Exhibit "J" from pages 166 to page 171. The operative portion of the GR says that certain protocols are being established to expedite the procedure of acceptance of tenders. There is then a tabulation below. The first item in the list is the committee mentioned above and it is said that this committee has full authority within existing and revised limits. It is apparent from the other entries in the table that item No. 1 relates to projects exceeding Rs. 100 crores in expenditure/cost.

20. Dr Tulzapurkar for the Petitioners points out that in the Affidavit in Reply, but not in the impugned communication, there is a *fourth* reason given for not accepting the Petitioners' tender or bid. It is contended in the Affidavit in Reply that what was issued was only a Letter of Acceptance and this was specifically subject to the approval of the TAC following the 30th August 2018 GR. The

Affidavit asserts, and this supported by Mr Kamdar, learned Senior Counsel for the Respondent, that the Letter of Acceptance creates no rights whatsoever.

21. Finally, Dr Tulzapurkar draws attention to a communication of 16th June 2022 at Exhibit "O" at pages 193 to 194. By this, the Water Resources Department of the Government of Maharashtra inform the Petitioners of the decision of the TAC. The Petitioners were informed that there proposal had been rejected and there were instructions to cancel the ongoing tender *inter alia* because the quote was 24.57% higher. For these reasons, the Executive Engineer said that the Letter of Acceptance issued to the Petitioners was being cancelled and the bid securities were being returned.

22. A few clauses of the tender documents will be relevant at this stage. Clauses 43 and 46 at page 110 read thus:

43. Employer's Right to Accept Any Bid, and to Reject Any or All Bids	**43.1**	The *Employer* reserves the right to accept or reject any Bid, and to annul the Bidding process and reject all Bids at any time prior to Contract Award, without thereby incurring any liability to Bidders. In case of annulment, all documents submitted

		and specifically, Bid securities, shall be promptly returned to the Bidders.
46. Award Criteria	**46.1**	Subject to ITB 43, the Employer shall award the Contract to the successful Bidder. This is the Bider whose Bid has been determined to be the Most Advantageous Bid as specified in ITB 42.

23. Then comes the critical Clause 47. This has four sub-clauses. It is to be found at pages 110 to 111 and it reads thus:

47. Notification of Award	47.1	**Prior to the expiration of the Bid Validity Period, the Employer shall transmit the letter of Acceptance to the successful Bidder The Letter of Acceptance shall specify the sum that the Employer will pay the Contractor in consideration of the execution o the contract (hereinafter and in the Conditions of Contract and Contract Forms called "the contract Price").**

47.2 Within ten (10) Business Days after the date of transmission of the letter of Acceptance, the Employer shall publish the Contract Award Notice which shall contain, at a minimum, the following information:

(a) Name and address of the Employer;

(b) Name and reference number of the contract being awarded and the selection method used;

(c) Names of all Bidders that submitted Bids, and their Bid prices as read out at Bid opening, and as evaluated;

(d) Names of all Bidders whose Bids were rejected either as nonresponsive or as not meeting qualification criteria, or were not evaluated, with the reasons therefore; and

(e) The name of the successful Bidder, the final total contract price, the contract duration and a summary of its scope.

47.3 The contract Award Notice shall be published on al National website (GoI website http://tenders.gov.in or GoI Central Public Procurement Portal https://eprocure.gov.in/cppp/) or on the Employer's website, and on the e-procurement system.

47.4 **Until a formal contract is prepared and executed, the notification of award shall constitute a binding Contract**.

(*Emphasis added*)

24. Dr Tulzapurkar also draw attention for completeness to Clause 49.2 at page 111 but we need not trouble with the details of that as they do not appear to us to carry the matter much further.

25. Then Dr Tulzapurkar references Section 4 of the tendered document from page 131. The format of the letter of bid (technical part) is set out at pages 132 to 134. Clause (i) at page 133 reads thus:

> "(i) **Binding Contract:** We understand that this Bid, together with your written acceptance thereof included in your Letter of Acceptance, shall constitute a binding

> contract between us, until a formal contract is prepared and executed."

26. Dr Tulzapurkar submits that it is thus clear from the Letter of Acceptance that a binding contract was arrived at the moment the Letter of Acceptance was communicated to the Petitioners. He places reliance on Sections 5 and 6 of the Indian Contract Act 1872. These are set out below along with the illustrations to Section 5.

> **5. Revocation of proposals and acceptances.**—A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
>
> An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.
>
> *Illustrations*
>
> A proposes, by a letter sent by post, to sell his house to B.
>
> B accepts the proposal by a letter sent by post.
>
> A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.
>
> B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.
>
> **6. Revocation how made.**—A proposal is revoked—
>
> (1) by the communication of notice of revocation by the proposer to the other party;

> (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
>
> (3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or
>
> (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance."

27. Dr Tulzapurkar further points out that the Letter of Acceptance of 29th March 2022 is not only captioned as such but is relatable by virtue of the endorsement against the subject to Clause 47 of the tendered documents. Nowhere in the Letter of Acceptance, Dr Tulzapurkar argues, is it said that the acceptance of contract is subject to the 30th August 2018 GR or any other GR. If there was to be any such conditionality, in his submission, it ought to have been stated in the Letter of Acceptance itself.

28. He addresses the point taken in the Affidavit in Reply by saying that an endorsement to a person copied on the letter does not make letter conditional as against the Petitioners. In any case, in his submission, even the endorsement to the Chief Engineer is not with respect to the GRs of 2018 but in regard to some other document being a letter No. 692 of 17th February 2022.

29. This document of 17th February 2022 is not part of the Petition or the Affidavits in Reply or Rejoinder. It was tendered to us separately and is part of the compilation. It is a communication from the Assistant Chief Engineer Water Resources Department to the Secretary, Water Resources at Mantralaya. The letter says that the Petitioners' bid was substantially responsive on technical grounds. It clarifies that there was only one technically responsive bidder, i.e., the Petitioners' joint venture. It also points out that the quotation by the Petitioners was 24.57% higher then the estimates. Finally, this 17th February 2022 communication says that although the Bhatsa Dam under Drip-II has administrative approval of Rs. 2.66 crores, an approval was sought for the Petitioners' quote of Rs. 149.93 crores. This is, therefore, the relevant reference in the Letter of Acceptance.

30. Dr Tulzapurkar submits that there are only three reasons for purportedly rejecting the Petitioners' bid and for ordering a re-tender. According to him none of these three reasons are valid. Each of them is irrational and arbitrary. There is, therefore, in his submission a straightforward case under Article 14 of the Constitution of India to set aside the impugned communication rejecting the Petitioners' tender and ordering a re-tender of the project. The first reason was that the Petitioners' bid was the only responsive bid. According to Dr Tulzapurkar this was not only known to the government but is not even in law a essential requirement, that is to say there is no law that says that if only one bid is found to be responsive from among the bids received, a re-tender must always follow. As regards the higher quotation, this, Dr Tulzapurkar says, was also known to the government. An explanation was sought. It was given. That explanation was accepted, and approval was obtained by the government itself from the funding agency namely the World Bank. It is not possible, he submits, for the government to now take this as a ground for ordering a re-tender. Finally, the third ground that there was a gap of more than six months between a technical bid and the financial bid is not one that can be attributed to the Petitioners. This can never be a ground according to him for ordering a re-tender.

31. Dr Tulzapurkar invites attention to a decision of a Division Bench of this Court in *GMR Airports Ltd v MIHAN India Ltd.*[1] This was according to him, this was also a case where an attempt was made to effect a re-tender after a contract had come into existence. The Division Bench of this Court did not permit that and it made Rule absolute. The facts in that case were that the petitioners' bid was the highest. There were some negotiations. A revised offer came to be made. There was a Letter of Acceptance, and it was argued that the Letter of Acceptance had resulted into a concluded contract between the parties.

32. Dr Tulzapurkar adopts the very same argument. The delay in executing the final contract, Dr Tulzapurkar submits cannot be held against the Petitioners. The respondents before the Division Bench argued that there was no concluded contract and that the letter in question was only a communication of an acceptance of the revised bid for the purposes of further considering the revised offer. In paragraph 11 of the judgment, the submission by the Petitioners was noted that the Letter of Acceptance was actually a Letter of Award going by its tenor and the terms and conditions of the Request for Proposals or RFP. The stand of the respondents before the Division

1 2021 SCC OnLine Bom 2132.

Bench was based on an audit report and on financial viability. There was also a question of prior approval being required. In paragraph 25, the Division Bench set out the questions to be addressed. One of these was whether a Letter of Acceptance constituted a Letter of Award. Another was whether there was a concluded contract between the parties. A third was whether the annulment of the bidding process by the Respondent in that matter was arbitrary unreasonable and unfair. The Division Bench went on to consider the factual conspectus on the record as it stood before it, including referring to the relevant contractual provisions. The Division Bench found that there was no provision that the acceptance of the bid or the issuance of the LOA would be subject to further approval from the Government of India. The Division Bench finally concluded in paragraph 51 that the Letter of Acceptance was indeed a Letter of Award and had resulted in a concluded contract between the parties. This was reiterated in paragraph 65. The Division Bench also repelled the submissions by the respondents justifying the cancellation of the Letter of Acceptance. The Division Bench found these reasons to be arbitrary (paragraphs 85 and 86).

33. We note however that the Division Bench also considered the decisions of the Supreme Court in *Jagdish Mandal v State of Orissa*,[2] which held that evaluating tenders and awarding contracts are essentially commercial decisions. Principles of equity and natural justice are at some distance from these matters. If the decision relating to an award of contract is bona fide and in the public interest, the Courts are not to exercise the power of judicial review.

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2 (2007) 14 SCC 517.

In *Municipal Council Neemuch v Mahadeo Real Estate & Ors*,[3] the Supreme Court held that the scope of judicial review of administrative action is indeed limited. This is of some importance because it reiterates the long settled principle that in such cases a Court addresses itself not to the decision but to the decision-making process. The principle of Wednesbury unreasonableness will be invoked. If there is a procedural impropriety in the decision-making process, that would certainly be considered by the Court.

34. *Mihaan India* was carried to the Supreme Court. The resultant decision is of 9th May 2022 in *Mihan India Ltd v GMR Airports Ltd & Ors*.[4] The dismissal is by a considered judgment. The Supreme Court set out the relevant principles *inter alia* in paragraphs 49 and 50. Some of the observations in paragraph 50 of the Supreme Court decision are important for our purposes today. We reproduce paragraph 50 of the Supreme Court decision in *Mihan India*.

> "**50.** In view of the above, it is apparent that in government contracts, if granted by the government bodies, it is expected to uphold fairness, equality and rule of law while dealing with contractual matters. Right to equality under Article 14 of the Constitution of India abhors arbitrariness. The transparent bidding process is favoured by the Court to ensure that constitutional requirements are satisfied. It is said that the constitutional guarantee as provided under Article 14 of the Constitution of India demands the State to act in a fair and reasonable manner unless public interest demands otherwise. It is expedient

3 (2019) 10 SCC 738.

4 2022 SCC OnLine SC 574.

> that the degree of compromise of any private legitimate interest must correspond proportionately to the public interest. It is specified that using a ground of public interest or loss to the treasury cannot undo the work already undertaken by the authority. Analysing the facts of this case in the light of the judgments in Dinesh Engineering (Supra) and Shishir Realty (Supra), after issuing the LoA in terms of Clause 3.3.5 of RFP and declaring GAL as concessionaire as per Clause 3.3.6, issuing letter of annulment of bidding process on the basis of the meeting of PMIC on 14.10.2019, which directed for re-tendering of the bid, is completely an arbitrary exercise of power, contrary to the provisions of RFP and violative of Article 14 of the Constitution of India."

35. Mr Kamdar for the Respondent submits that, to begin with, an applicable GR cannot simply be ignored in this fashion. Every contract does not have to specifically mention a GR. It certainly does not need to be mentioned in a Letter of Acceptance. A Government Resolution controls the manner in which decision making is done. The purpose is to ensure transparency, accountability and even-handedness in administrative making. The GR is not meant to introduce arbitrariness. It is, on the contrary, a safeguard *against* arbitrariness as also against needless delay. It aims to promote both efficiency and fairness. Administrative actions cannot, he submits, be straitjacketed and there must, as the Supreme Court says, always be some play in the joints and some elbow room. Every decision for every project of more than 100 crores is subject to a decision by the TAC. There is no exemption that is pointed out by the Petitioners. An exemption from an applicable GR cannot simply be inferred in this fashion. In the

Mihan India case, there was no invocation of an applicable controlling GR.

36. It is for this reason that he submits that the Letter of Acceptance was always subject to approval by the TAC. Whether that approval was prior or after makes no difference. That the Letter of Acceptance was in itself conditional and subject to some approval is clear from the letter itself. The letter must be read as a whole, and page 148 is a clear request by the Executive Engineer to the Chief Engineer of the same department saying that whatever the Executive Engineer was doing in issuing the Letter of Acceptance, it was subject to Government of Maharashtra approval and which had been sought by 17th February 2022 letter to which we have referred above. Now this letter is an internal communication of the Government of Maharashtra. Mr Kamdar's submission is that no contract could have been executed contrary to an existing GR. Whatever be the opinion of the World Bank consultant, this cannot overwrite an applicable GR.

37. Mr Kamdar says that the *Mihan India* case is clearly distinguishable on crucial facts. More applicable, in his submission is the decision of the Supreme Court in *PSA Mumbai Investments PTE Ltd v Board of Trustees JNPT & Anr.*[5] The emphasis in this judgment is that to constitute a contract, the Letter of Acceptance of the bid must be absolute and unqualified. Once it is shown that the Letter of Acceptance is bona fide in whatever manner and is subject to some other approval, then no question arises of a contract

5 (2018) 10 SCC 525.

coming into existence merely on the issuance of the Letter of Acceptance.

38. It is in this context that he invites us to consider Clause 47 of the tender conditions which we have extracted above. The issuance of Letter of Acceptance is, he submits, only one part of the process. Clauses 47.2, 47.3, and 47.4 cannot simply be ignored. Perhaps Clause 47.3 is indeed a ministerial or administrative action. But Clause 47.2 requires the publication of a Contract Award notice containing a minimum amount of information and Clause 47.4 then says that until the formal contract is drawn and executed it is the notification of Award (as contemplated by Clause 47) that constitutes a binding contract. In his submission, when the two facets are put together, namely (1) that the Letter of Acceptance is not unqualified and not unconditional; and (2) Clause 47 requires the fulfilment of other conditions, then there is no scope for the argument that a binding contract came into existence merely on the issue of the Letter of Acceptance.

39. Turning to a defence of the impugned action, Mr Kamdar submits that all three reasons are in fact sustainable. As a matter of public policy, where there is only one responsive bidder, they cannot be said to be a properly competitive and open process. He places emphasis *inter alia* on the Supreme Court decision in *Municipal Council Neemuch* to argue that there is no procedural impropriety in the decision-making process. He points out that neither the Executive Engineer nor the Chief Engineer are decision-making authorities in themselves. They are executive authorities. The only decision-making authority for accepting a tender is the TAC formed under the applicable GR. Once the Letter of Acceptance was made conditional either by operation of the GR or on a plain reading of the Letter of Acceptance then the decision of the TAC (the decision-making authority) cannot simply be assailed on the ground that an executive authority had already issued some documents.

40. He then relies on the decision of the Supreme Court in *State of Jharkhand & Ors v CWE–Soma Consortium*[6] and particularly paragraphs 2, 3, 6, 11 and 13 to emphasis that where there is only one responsive bid — as in the present case — the decision to invite fresh tenders cannot be interfered with unless it is established to be mala fide and arbitrary. Now nowhere in the Petition have we found any allegations of mala fide — and rightly so. As to arbitrariness, this has to be tested not by some convoluted process of reasoning but to see whether the decision is such that no reasonable person could ever have arrived at it, that is to say by the established test of *Wednesbury* unreasonableness: *Associated Provincial Picture Houses Limited v Wednesbury Corporation.*[7] The assailed decision must be shown to be 'utterly outrageous in its defiance of logic' and, presumably, law.[8]

41. Mr Kamdar does not dispute that a Letter of Acceptance was issued. That is correct, because he cannot factually dispute the state of the record. What he does dispute is the effect on the consequence

6 (2016) 14 SCC 172.

7 [1948] 1 KB 223, per Lord Greene, MR.

8 [1983] UKHL 6 : [1984] 3 All ER 935 : [1984] 3 WLR 1174.

of that Letter of Acceptance and Dr Tulzapurkar's formulation that it automatically resulted in a binding contract.

42. A few principles are sufficiently well settled and are not really contentious. One of these is that in government matters, the government always has some room for discretion. The government must take commercial decisions in a commercially sound manner. True, its actions cannot be arbitrary, but they must be *shown* to be arbitrary or, as the law has set out, to be mala fide. The role of a Court concerned with judicial review of administrative action is to assess the decision-making process and not substitute the decision by one of its own liking. After all the Court is not the decision-making authority itself.

43. It is with this that we turn to the two critical documents in question. These are respectively the Letter of Acceptance and the impugned decision of 25th May 2022. It is true that the Letter of Acceptance followed a clarification/explanation sought, given and accepted for the Petitioners submitting a higher bid. It is also true that the contract contemplates the issuance of a Letter of Acceptance and that the subject of the Letter of Acceptance is a Notification of the Award. But it is clear from the endorsement at the foot that this Letter of Acceptance was made subject to another approval. That request for approval of 17th February 2022 is crucial because it necessarily brings into play the applicable GR. It notes two things. First that the project cost is above 100 crores which invokes the jurisdiction of the TAC. The second is that it notes the considerably higher quote, i.e., that the Petitioners' quote was 24.57% higher than the estimates.

44. We note this for the limited purpose of our finding that the Letter of Acceptance cannot in and of itself said to be unconditional for the purposes of Section 5 of the Contract Act. We are not actually addressing the merits of the contentions in regard to either the Letter of Acceptance or the 17th February 2022 request for approval. This has an immediate consequence. What this would necessarily mean is that the present case is at some distance from the *Mihan India* case. If the Letter of Acceptance is not unconditional and is properly said on its face to be subject to some other approval, then merely on the issuance of the Letter of Acceptance a concluded contract cannot be said to have been arrived at. We find there is some substance to Mr Kamdar's submission that the next steps in Clause 47 were also unavoidable. In fact, carrying it to the next logical step, if Dr Tulzapurkar's argument is to be accepted, then Clauses 47.2, 47.3 and 47.4 were entirely nugatory or otiose. No contract can be read in that fashion.

45. The impugned decision, however, is not entirely satisfactory in our view. It proceeds on the basis that because the three other bidders were technically non-responsive that and only the Petitioner was responsive, that this is an unavoidable reason to begin the process of re-tender. That is not the state of the law. The law does not require or mandate that in such a case where there is only one responsive bid, a re-tender *must* necessarily be ordered. The law is that if a re-tender is ordered on this basis, it is not bad only for that reason.

46. As to the question of the higher quotation, this is part of the commercial aspect of the matter. The impugned decision does not seem to us adequately address the consequences of the explanation being sought, given and accepted, and how this would have a bearing on the contract in question. The delay of six months is in itself not an argument that appeals to us as a reason, because that delay is not shown to be attributable to the Petitioners.

47. There is one important consideration that seems to have been left out entirely by the TAC. The impugned decision proceeds on the footing that a re-tender will result in a bid that matches or is lower than the 2021 tender estimates. Obviously, there can be no such assurance. We believe that the TAC ought to have considered the consequences of this aspect while it was addressing the question of the Petitioners bid being 25.5% higher. A comprehensive and holistic view ought to have been taken into account.

48. As a result of this discussion, we are not inclined to make Rule absolute or to declare that the Letter of Acceptance has resulted in a concluded contract. We would require the TAC reconsider the impugned decision keeping all relevant factors in mind. The Tender Acceptance Committee would reconsider the impugned decision within four weeks and will communicate to the Petitioners. Until that reconsidered decision is communicated the re-tender process will be temporarily suspended.

49. The Petition is disposed of in these terms with no order as to costs.

50. We regret the inadvertent delay in releasing this order. There was some confusion and mis-filing of papers.

(Gauri Godse, J) **(G. S. Patel, J)**