

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 09th JANUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 17106/2022 & CM APPL. 54294/2022**

RENEW VAYU ENERGY PRIVATE LIMITED Petitioner

Through: Mr. Kapil Sibal, Senior Advocate,
Mr. Sandeep Sethi, Senior Advocate
with Ms. Ranjana Roy Gawai, Ms.
Vasudha Sen, Mr. Aditya Pandey,
Advocates

versus

UNION OF INDIA THROUGH MINISTRY OF RAILWAYS &
ANR Respondents

Through: Mr. Mukul Singh, CGSC with Ms.
Avshreya Pratap Singh, Advocate Mr.
Pulkit Agarwal and Mr. Pawas
Agarwal, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SATISH CHANDRA SHARMA, C.J.

1. The present Writ Petition has been filed by the Petitioner herein seeking issuance of writ/order/directions to the Respondent No.2 herein for setting aside its decision of rejecting the technical bid of the Petitioner herein with respect to tender response to the Request for Selection (*hereinafter referred to as "RfS"*) Document bearing RfS No. REMCL/CO/PP/P-85/RTC/1000 MW/2022, which was floated by the Respondent No.1 herein through Respondent No.2 herein for Selection of Project Developers for Supply of 1000 MW of Round-the-Clock Power

from Grid-Connected Renewable Energy Power Projects with or without Storage.

2. Shorn of details, the facts leading to the instant Writ Petition are as under:

- a) Petitioner herein is a wholly owned subsidiary of ReNew Power Private Limited (*hereinafter referred to as 'ReNew Power'*) which is a renewable energy company. Respondent No.2 herein is a Joint Venture company of Ministry of Railways (Respondent No.1 herein) and Rail India Technical and Economic Service Limited. Respondent No.1 herein has designated Respondent No. 2 as Nodal Agency of Indian Railways for implementation of Renewable Energy Projects.
- b) It is stated that on 14.07.2022, Respondent No. 2 floated a Tender, being RfS No. REMCL/CO/PP/P-85/RTC/1000 MW/2022, for Selection of Project Developers for Supply of 1000 MW of Round-the-Clock (*hereinafter referred to as "RTC"*) Power from Grid-Connected Renewable Energy (*hereinafter referred to as "RE"*) Power Projects with or without Storage . It is stated that the bidding process involved three steps, namely, Technical Bid, Financial Bid and electronic Reverse Auction.
- c) It is stated that a corrigendum dated 17.10.2022 was issued by the Respondent No.2 herein re-notifying the last date for submission of bid as 09.11.2022 and for opening of the bid as 11.11.2022.

- d) In terms of the bid document, the bidders were to first submit their technical bids containing all the documents, i.e. the formats and other attachments as per Clause 3.23.2 of the bid document. It is stated that along with the technical bids, the bidders were also required to submit their financial bids containing documents regarding tariff. It is pertinent to mention here that in terms of the bid document, the financial bids submitted by the bidders were to be opened only if they are found to be eligible as per the technical bids submitted by them.
- e) It is stated that the Petitioner herein participated in the tender process and submitted its bid document on 09.11.2022 for 600 MW capacity.
- f) It is stated that the tender was opened on 11.11.2022. On 17.11.2022, Respondent No.2 herein sent an email to the Petitioner herein requesting it to provide the bank reference copy of bank guarantee issuance message transmitted by issuing Bank to the Bank of the Respondent No.2.
- g) It is stated that on 16.12.2022, the Petitioner wrote a letter to the Respondent No.2 stating that during review of its technical documents, it was found that it had inadvertently submitted unconsolidated financial data for ReNew Power in Format 7.6 for Financial Requirement instead of consolidated financial data for ReNew Power. It is stated that the Petitioner requested Respondent No.2 to consider revised Format 7.6 for Financial Requirement which was submitted by the Petitioner along with the letter dated 06.12.2022.

- h) It is stated that the Petitioner came to know from industry colleagues that they had received an email dated 10.12.2022 from the Respondent No.2 herein inviting them for electronic Reverse Auction.
- i) Aggrieved by the action of the Respondents herein in rejecting the bid of the Petitioner herein, the Petitioner has approached this Court with the following prayers:

"a. Issue a writ of certiorari or any other appropriate writ/ direction/ order writ/ direction/ order in the nature of a writ quashing and setting aside the impugned action of the respondent.

b. Issue a writ of mandamus or any other appropriate writ/ direction/ order writ/ direction/ order directing the Respondent No. 2 to consider the technical bid of Petitioner along with the revised financial data submitted vide letter dated 06.12.2022 and email dated 06.12.2022.

c. pass any such further or other orders as this Hon' ble Court may deem fit."

3. Mr. Kapil Sibal, learned Senior Counsel appearing for the Petitioner has contended that the action of the Respondents herein in rejecting the bid of the Petitioner herein is unreasonable, irrational and arbitrary because the Respondents have not considered the revised financial data submitted by the Petitioner vide letter dated 06.12.2022. Mr. Sibal further contends that required net worth for 600 MW which is being sought by the Petitioner herein is Rs.1,800 Crores while net worth of ReNew Power is Rs.11,687 Crores. He further states that the required turnover for 600 MW is Rs.2,880 Crores whereas the actual turn-over of ReNew Power is Rs.5,935.6 Crores.

It is stated that the Petitioner herein meets the eligibility criteria as prescribed in the RfS but due to an inadvertent error, the Petitioner had submitted the incorrect detail which was corrected by the Petitioner as soon as they came to know about the same. He further submits that the bid of the Petitioner herein has been rejected by the Respondents herein without assigning any reason.

4. It is further contended by the learned Senior Counsel appearing for the Petitioner that by unreasonably rejecting the bid of the Petitioner herein, the Respondents are eliminating competition and acceptance of the revised bid of the Petitioner herein will only increase competition and in turn help the Government.

5. Mr. Sibal states that the Respondents have failed to appreciate the fact that although the Petitioner herein is technically and financially eligible to participate in the tender, however, because of an inadvertent error its bid has been rejected by the Respondents. He draws the attention of this Court to Clause 5.2.1 (c) of the bid document to contend that it is stated in the said Clause that the Respondent No.2 herein may seek clarifications/additional documents from the Bidders, if required, to satisfy themselves for meeting the eligibility conditions by the Bidder. He submits that on coming to know about the mistake the Petitioner has approached the Respondents and has provided the correct details and, therefore, the correct details submitted by the Petitioner should have been taken into consideration by the Respondents while evaluating the bids.

6. Mr. Sibal contends that the participants had to bid for 1000 MW of Round-the-Clock Power from Grid-Connected Renewable Energy and a total of six entities, including the Petitioner herein, have participated in the

tender. He states that if the bid of the Petitioner is not considered by the Respondents then the bid submission capacity of all the bidder would be 1100 MW and the participants would have 91% chance of success while if the bid of the Petitioner is accepted by the Respondents then the bid submission capacity would increase to 1700 MW and each participant will have 59% chance of success. He, therefore, submits that inclusion of the Petitioner herein in the auction will only increase the competition and it will eventually lead to profit to the public exchequer and on the other hand low competition would lead to loss to the public exchequer and for a supply period of 25 years, the loss would be as much as Rs.9,500 Crores on a likely difference of 50 paise per unit.

7. Mr. Sandeep Sethi, learned Senior Counsel, who also appears for the Petitioner, submits that the correct turn-over has also been provided by the Petitioner in the documents submitted by the Petitioner along with price bid.

8. *Per contra*, learned Counsel for the Respondents submits that the Petitioner herein participated in the tender process and had submitted its bid document on 09.11.2022 and had placed its bid for 600 MW capacity. He submits that in terms of Clause 3.23.2 (I) of the tender document, the Petitioner had submitted Format 7.6, dated 22.09.2022, duly certified by a Chartered Accountant, for showing that it meets the financial eligibility criteria. He submits that as per Format 7.6 submitted by the Petitioner, the Petitioner had sought qualification on the basis of financials of its parent company, namely, ReNew Power. He states that Since, Format 7.6, dated 22.09.2022, for Financial Requirement submitted by the Petitioner was in accordance with Clause 4.3.4 of the bid document it was accepted and considered for evaluation. He states that since the document was submitted

by the Petitioner after being duly certified by a Chartered Accountant, there was no occasion for the Tender Evaluation Committee to doubt the correctness of the said certificate and as such it proceeded to evaluate the bid submitted by the Petitioner on the basis of the figures mentioned in the Format 7 .6 for Financial Requirement dated 22.09.2022 and, therefore, Clause 5.2.1(c) cannot be invoked by the Petitioner as any question of seeking clarifications/ additional documents from the Petitioner does not arise. He states that since the Petitioner failed to meet the financial criteria as prescribed in the RfS document, the Petitioner was disqualified and, therefore, not invited for the opening of financial bid and for e-reverse auction. He has drawn the attention of this Court to Clause 3.21(g) of the bid document to contend that no change or supplemental information in response to the RfS document was acceptable after the last date of submission of bids, i.e. 09.11.2022. He states that the Petitioner submitted its bid on 09.11.2022 in which it had inadvertently submitted unconsolidated financials for ReNew Power in Format 7.6 for Financial Requirement instead of consolidated financials for ReNew Power and on coming to know about the mistake the Petitioner wrote a letter dated 06.12.2022 giving the revised Format 7.6 for Financial Requirement. Learned Counsel for the Respondents, therefore, submits that in terms of Clause 3.21(g) which categorically states that no change or supplemental information in response to the RfS will be accepted after the scheduled date and time of submission of response to RfS, the revised Format 7.6 was not accepted by the Respondents while evaluating the bids of the Petitioner herein.

9. Heard the counsels for the parties and perused the material on record.

10. Relevant Clauses of the tender document which are important for the instant case reads as under:

"3.21 IMPORTANT NOTES AND INSTRUCTIONS TO BIDDERS

.....

*(g) The response to RfS shall be submitted as mentioned in Clause No. 3.21, Section-III, Instructions to Bidders (ITB) of RfS. **No change or supplemental information to a response to RfS will be accepted after the scheduled date and time of submission of response to RfS.** However, REMCL reserves the right to seek additional information from the Bidders, if found necessary, during the course of evaluation of the response to RfS.*

3.23.2 Documents to be Submitted Online

Detailed instructions to be followed by the Bidders for online submission of response to RfS as stated as Annexure-C. The bidders shall strictly follow the instructions mentioned in the electronic form in respective technical bid and financial bid while filling the form.

If the Bidder has submitted bid online and fails to submit the Bank Guarantee for requisite amount and/or DDs/Pay order against cost of RfS Document and bid processing fee offline within 2 working days from last date of bid submission, then the same shall be treated as incomplete bid and Cost of RfS, Processing fee submitted shall be encashed and the EMD(s) shall be returned.

All documents of the response to RfS submitted online must be digitally signed and uploaded on the website, <https://www.bharat-electronictender.com> <http://www.tcilindia->

electronictender.com/which should contain the following:

I. Technical Bid (First Envelope)

The Bidder shall upload single technical bid containing the scanned copies of following documents duly signed and stamped on each page by the authorized signatory as mentioned below.

(a) Formats - 7.1, 7.2 (if applicable), 7.3A, 7.4, 7.5 (if applicable), 7.6, 7.7, 7.8, 7.8A, 7.9, 7.10 as elaborated in Clause No. 3.20, Section-III, Instructions to Bidders (ITB).

(b) All attachments elaborated in Clause No. 3.20, Section-III, Instructions to Bidders (ITB), under the sub-clause (k), Attachments with proper file names.

(c) All supporting documents regarding meeting the eligibility criteria.

(d) Scanned Copies of NEFT/RTGS/DD/Pay order details towards Cost of RfS Document as mentioned in Bid Information Sheet.

(e) Scanned Copies of requisite amount of Bank Guarantee towards EMD as mentioned in the Bid Information Sheet.

The Bidder will have to fill the Electronic Form provided at the ISN-ETS portal as part of Technical Bid.

Submission of Pass-phrases: In line with Section III, Clause 3.21(h), and Annexure-D, the Bidder shall be required to submit the

Pass-Phrase to decrypt the relevant Bid-part is submitted into the 'Time Locked Electronic Key Box (EKB)' after the deadline of Bid submission, and before the commencement of the Online Tender Opening Event (TOE) of Technical bid.

II. Financial Bid (Second Envelope)

Bidders shall submit the single Financial Bid containing the scanned copy of following document(s):

(a) Covering letter as per Format - 7.11 of this RfS document

(b) Preliminary Estimate of Cost of the Project as per Format 7.12 The financial bid shall be submitted online, in the format as per the Electronic Form on the ISN-ETS portal. In addition to the Financial Bid, the corresponding excel sheet consisting the tariff for 25 years.....

4.3 FINANCIAL ELIGIBILITY CRITERIA

4.3.1 Net-worth

(a) The Net Worth of the Bidder should be equal to or greater than INR 3.00 Crores per MW, during the previous financial year i.e., immediately preceding the due date of bid submission. If the Audited Financial Statements for immediately preceding year are not available, in case of bids opened before 30th September, Audited Financial Statements of the

financial year immediately preceding the previous financial year shall be considered.

(b) The net worth to be considered for the above purpose will be the cumulative networth of the Bidding Company or Consortium together with the Net Worth of those Affiliates of the Bidder(s) that undertake to contribute the required equity funding and performance bank guarantees in case the Bidder(s) fail to do so in accordance with the RfS.

(c) Net Worth to be considered for this clause shall be the total Net Worth as calculated in accordance with the Companies Act, 2013 and any further amendments thereto.

4.3.2 Liquidity

In order to ascertain that the Bidder has sufficient means to manage the fund requirements for the Project, the Bidder shall be required to demonstrate at least one of the following parameters:

(a) A minimum annual turnover of INR 4.80 Crores per MW during the previous financial year i.e., immediately preceding the due date of bid submission. If the Audited Financial Statements for immediately preceding year are not available, in case of bids opened before 30th September, Audited Financial Statements of the financial year immediately preceding the previous financial year shall be considered. It is hereby clarified that "Other Income" as indicated in the annual accounts of the Bidder shall not be considered for arriving at the annual turnover.

(b) Internal resource generation capability, in the form of Profit Before Depreciation Interest Taxes and Amortization (PBDITA) for a minimum amount of INR 96 Lakhs per MW, during the previous financial year i.e., immediately preceding the due date of bid submission. If the Audited Financial Statements for immediately preceding year are not available, in case of bids opened before 30th September, Audited Financial Statements of the financial year immediately preceding the previous financial year shall be considered.

(c) In-principal sanction letter from the lending institutions/ banks of the Bidder, committing a Line of Credit for a minimum amount INR 1.2 Crores per MW, towards meeting the working capital requirement of the project quoted under this RfS. Such letter can also be obtained by the Affiliate(s) of the Bidder.

4.3.3 The Bidder may seek qualification on the basis of financial capability of its Affiliate(s) for the purpose of meeting the qualification requirements as per Clause 4.3.1 and 4.3.2 above. In case of the Bidder being a Bidding Consortium, any Member may seek qualification on the basis of financial capability of its Affiliate(s). In such cases, the Bidder shall be required to submit Board Resolutions from the respective Affiliate(s), undertaking to contribute the required equity funding and Performance Bank Guarantees in case the Bidder(s) fail to do so in accordance with the RfS. In case of non-availability of the Board Resolution as required above, a letter from the CEO/ Managing Director of the respective Affiliate(s), undertaking the above, shall be required to be submitted and the requisite Board

Resolution from the Affiliate(s) shall be required to be submitted prior to signing of PPA.

4.3.4 For the purposes of meeting financial requirements, only latest unconsolidated audited annual accounts shall be used. However, audited consolidated annual accounts of the Bidder may be used for the purpose of financial requirements provided the Bidder has at least twenty six percent (26%) equity in each Company whose accounts are merged in the audited consolidated account.

5.2 TECHNO-COMMERCIAL EVALUATION OF BIDDERS

5.2.1 First Envelope (Technical Bid) Evaluation (Step 1)

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(c) Subject to Clause No. 3.22, Section-III, Instructions to Bidders (ITB) of this RfS, REMCL will examine all the documents submitted by the Bidders and ascertain meeting of eligibility conditions prescribed in the RfS. During the examination of the bids, REMCL may seek clarifications/ additional documents to the documents submitted etc. from the Bidders if required to satisfy themselves for meeting the eligibility conditions by the Bidders. Bidders shall be required to respond to any clarifications/ additional documents sought by REMCL within 07 (seven) days from the date of such intimation from REMCL. All correspondence in this regard shall be made through email/ ISN-ETS portal only. It shall be the responsibility of the Bidder to ensure that the email id of the authorized signatory of the Bidder is functional. The Bidder may provide an additional email id of the authorized signatory in the covering letter. No reminders in this case shall be sent. It shall

be the sole responsibility of the Bidders to remove all the discrepancies and furnish additional documents as requested. REMCL shall not be responsible for rejection of any bid on account of the above."

(emphasis supplied)

11. A perusal of the abovementioned Clauses shows that as per Clause 3.21(g) of the bid document no change or supplemental information in response to the RfS document was acceptable after the last date of submission of bids, which in the present case is 09.11.2022. As per Clause 4.3.3 of the tender document, the Bidder may seek qualification on the basis of financial capability of its Affiliate(s) for the purpose of meeting the qualification requirements of the bid document. Clause 4.3.4 of the tender document provides that for the purposes of meeting financial requirements, only latest unconsolidated audited annual accounts shall be submitted by the bidders. The Petitioner herein participated in the tender process and had submitted its bid document on 09.11.2022 and had placed its bid for 600 MW capacity. In terms of Clause 3.23.2 (I) of the tender document, the Petitioner had submitted Format 7.6, dated 22.09.2022, duly certified by a Chartered Accountant, for showing that it meets the financial eligibility criteria and as per Format 7.6 submitted by the Petitioner, the Petitioner had sought qualification on the basis of financials of its parent company, namely, ReNew Power. Since Format 7.6, dated 22.09.2022, for Financial Requirement submitted by the Petitioner was in accordance with Clause 4.3.4 of the bid document it was accepted and considered for evaluation and since the document was submitted by the Petitioner after being duly certified by a Chartered Accountant, there was no occasion for the Tender Evaluation Committee to doubt the correctness of the said certificate and as such it

proceeded to evaluate the bid submitted by the Petitioner on the basis of the figures mentioned in the said Format.

12. As per the certificate, ReNew Power had Net worth of Rs.12,161 Crores and Turn Over of Rs. 804.4 crores based on its unconsolidated financials. Petitioner had bid for 600 MW capacity and as such in terms of Clause 4.3.1 and 4.3.2, the Petitioner should have had a Net worth equal to or more than Rs.1800 Crores (3 x 600) and turnover equal to or more than Rs.2880 Crores (4.8 x 600). The Petitioner was found to be qualifying as regards Net Worth is concerned being greater than Rs.1800 Crores. However, it was found short in respect of required turnover as it had only Rs.804.4 Crores as compared to minimum requirement of Rs.2880 Crores. Since the Petitioner failed to meet the financial criteria as prescribed in the RfS document, the Petitioner was disqualified and, therefore, not invited for the opening of financial bid and for e-reverse auction.

13. Clause 3.21(g) of the bid document categorically states that no change or supplemental information in response to the RfS document shall be acceptable after the last date of submission of bids. Petitioner herein submitted its bid on 09.11.2022 in which it had inadvertently submitted unconsolidated financials for ReNew Power in Format 7.6 for Financial Requirement instead of consolidated financials for ReNew Power and on coming to know about the mistake, the Petitioner wrote a letter dated 06.12.2022 giving the revised Format 7.6 for Financial Requirement. Non-acceptance of revised Format 7.6 in terms of Clause 3.21(g) for Financial Requirement cannot be found fault with.

14. The scope of interference under Article 226 of the Constitution of India in matters of tender is well settled. The Apex Court in Michigan

Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, after relying on various judgments has observed as under:-

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has

the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

15. In Uflex Ltd. v. State of T.N., (2022) 1 SCC 165, the Apex Court has observed as under:-

*“2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. **The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.** [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517].”*
(emphasis supplied)

16. The Apex Court in a number of judgments has crystallized the test to be taken into account by the Courts before interfering in tender matters which reads as under:-

“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 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.”

[Refer: Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216; Ranaq International Ltd. v. I.V.R. Construction Ltd. & Ors., (1999) 1 SCC 492 etc.]

17. In view of the above, it is well settled that the scope of interference by the High Court while exercising its jurisdiction under Article 226 of the Constitution of India is extremely narrow. This Court ought not to interfere unless it is established that the process adopted by the decision-making authority is *mala fide*, intended to favor someone, arbitrary or irrational. In case the decision-making process is just, fair and reasonable, the writ courts must loathe to interfere with the award of contracts by the

State/Instrumentalities of the State. The decision taken by the Respondents cannot be said to be vitiated by any of the aforesaid criteria.

18. The Apex Court in Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., (2016) 16 SCC 818, has observed as under:-

*"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. **Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.***

*12. In Dwarkadas Marfatia and Sons v. Port of Bombay [Dwarkadas Marfatia and Sons v. Port of Bombay, (1989) 3 SCC 293] it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. **However, the constitutional courts are expected to exercise restraint in interfering***

with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] as mentioned in Central Coalfields [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] .

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision."

(emphasis supplied)

19. This position has also been reiterated by the Apex Court in Municipal Corporation, Ujjain & Anr. v. BVG India Limited &Ors., (2018) 5 SCC

462. The relevant portion of the said judgment reads as under:-

"14. The judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision; and if the public interest is not affected, there should be no interference under Article 226.

15. *It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.*

16. *The State, its corporations, instrumentalities and agencies have a 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 them 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 interfere. (See the judgment in Air India Ltd. v. Cochin International Airport Ltd. [Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617])"*

20. The aforesaid decisions make it clear that in a challenge to the decision of a Tendering Authority, the Court must consider whether the decision has been made lawfully and not whether the decision is sound. The Court's should interfere in such decisions only when the decision made is so

perverse, irrational and arbitrary that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached.

21. In Silppi Constructions Contractors vs. Union of India and Anr., (2020) 16 SCC 489, the Apex Court has observed as under:-

*"19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. **The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract.***

Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case." (emphasis supplied)

22. In N.G. Projects Limited v. Vinod Kumar Jain and Ors., (2022) 6 SCC 127, the Apex Court has held as under:-

"23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to

adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.

(emphasis supplied)

23. A perusal of the abovementioned judgments would show that the tendering authority is the best judge to decide as to whether the bidder has qualified the conditions prescribed in the tender document or not. The Court should not sit as an appellate authority over the decision taken by the tendering authority and come to a conclusion that the decision taken by the tendering authority on technical aspects should be interfered with or not. The interference as stated by the Apex Court in such matters is extremely narrow and the courts should refrain from exercising their jurisdiction under Article 226 of the Constitution of India unless there is *mala fide* or the decision was intended to favour someone or is so perverse that no prudent person could have come to that decision.

24. A perusal of the material on record would show that the unconsolidated financial statement submitted by the Petitioner herein shows

total turnover of the Petitioner as Rs.804.4 Crores which is less than the required turnover, i.e. Rs.2,880 Crores. The revised Format 7.6 was submitted by the Petitioner after the last date of the bid submission and in view of Clause 3.21(g), it cannot be said that purported decision of the Respondent herein in rejecting the bid of the Petitioner herein is arbitrary or illegal and requires interference by this Court. It can also not be said that the Petitioner's bid has been rejected only to single out the Petitioner in order to favour another bidder. The submission of Mr. Sethi that the corrected figures were submitted by the Petitioner along with the price bid is of no importance because the Petitioner has not qualified in the technical bid and there was no occasion for the Respondents to open the price bid to ascertain the figures.

25. The argument of Mr. Sibal that Petitioner's participation in the auction will increase competition and can result in bringing down the price and will save Rs.9,500 Crores on a likely difference of 50 paise per unit, is no doubt very attractive at the first instance but on a deeper consideration, this Court is not inclined to accept this submission for the reason that firstly it is made on the basis of a speculation that there will be reduction of 50 paise per unit and secondly that tenders cannot be upset on the basis of speculation. As correctly pointed out by the learned Counsel for the Respondents that Clause 3.21(g) of the tender document provides that no change or supplemental information to a response to RfS will be accepted after the scheduled date and time of submission of response to RfS. The Petitioner had given its bid wherein it had stated that its total turnover is Rs.804.4 Crores. There was no occasion for the Respondents to seek clarification from the Petitioner. In fact had the Respondents sought for any clarification from the Petitioner herein and had accepted the said clarification, it would have amounted to revision

of bid by the Petitioner herein and in such an eventuality other bidders would have challenged the decision of the Respondents as that would have amounted to Respondents showing extra concession to the Petitioner herein by permitting it to modify their bid.

26. It is well settled that one of the reasons for interference in a tender process by a writ Court under Article 226 of the Constitution of India is when the decision making process has been vitiated and the decision has been made with an intention to favour someone. Accepting the revised Format 7.6 of the Petitioner herein would no doubt amount to accepting a revised bid. The officials of the Petitioner herein have been careless in not filling up the bid properly for which only they are responsible. The Courts cannot put a premium on the mistake committed by the Petitioner while submitting its bid. In the present case, it cannot be said that the process adopted by the Respondents in not accepting the revised Format 7.6 of the Petitioner or not seeking clarification from the Petitioner is faulty or requires interference by this Court.

27. In light of the aforesaid, this Court does not find any reason to interfere with the purported decision of the Respondents herein.

28. Accordingly, Writ Petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JANUARY 09, 2023

Rahul