

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL WRIT PETITION NO. 5968 OF 2024

1. DHD Infracon Pvt Ltd.]
through The Director]
Shri. Dattatray Hanmant Desai.]
Age:45, Address: G/8, Pandurang Bhavan,]
Near Punjab hotel, Malkapur, Karad, Dist.]
Satara. 415539] ... Petitioner No. 1

2. A.S. DESAI infrastructure Pvt Ltd through]
The Director, Shri Arun Shivajirao Desai]
having registered office at 45,]
Shivsampada, Mutha colony, Sadar]
bazaar, Satara-415001] ... Petitioner No. 2

3. Unity builders & Roads constitution Pvt]
Ltd through director Shri Yatin Madhukar]
Sawant having its registered office at 653,]
Gajanan housing society, station road]
Saidapur, Karad Dist-Satara] ... Petitioner No. 3

4. Sagunamata Construction Pvt Ltd.]
Through The Director,]
Shri. Yashwant Yogesh Ohal Patil]
Age: 22 yrs, Address: Pinjan Satav]
Building, Ring Road, laxmi Nagar,]
Phaltan, Dist. Satara - 415523] ... Petitioner No. 4

VERSUS

1. Public Work Department (West) Division]
Satara, through The Secretary of Public]
Work Department (Roads) PWD, Govt. of]
Maharashtra, having office at Mantralaya,]
Churchgate, Mumbai-400020]
Email: sec.pwdroads@maharashtra.gov.in] ... Respondent
No.1

2. Chief Engineer (K) & Project Direction]
 (EAP), Public Work Department,]
 having office at Bandkam Bhawan,]
 4th Floor, 25, Murzban Road,]
 Fort, Mumbai – 400001]
 Email: cepd.mpwd@gmail.com] ... Respondent
 No.2

Mr. Abhijeet Desai a/w Karan Gajra, Vijay Singh and Digvijay
 Kachare i/by Desai Legal for the Petitioners.

Mr. Sanjay Kadam, Special Counsel a/w Nitisha Lad, Netra
 Jagtap, P. P. Kakade, Government Pleader, O.A. Chandurkar,
 Additional Government Pleader and G. R. Raghuwanshi, AGP for
 Respondent Nos.1 and 2.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
 ARIF S. DOCTOR, J.**

**RESERVED ON : 23rd APRIL, 2024
 PRONOUNCED ON : 30th APRIL, 2024**

JUDGMENT : (PER ARIF S. DOCTOR, J.)

1. The present Writ Petition is yet another instance of a
 thoroughly misconceived challenge to the terms of a tender. In
 the present case, not only is the Petitioners' challenge to the
 tender conditions lacking entirely in merit but also in conduct,
 as we shall elaborate later.

2. The Petitioners are all private limited companies stated to be carrying on the business of infrastructure development, including construction of Roads, highways, bridges etc.

3. On 16th February 2024 Respondent No. 1 had through the office of Executive Engineer, Public Works Department, Panvel issued an e-Tender Notice No.177 inviting bids for the "*Maharashtra State Road Improvement Project ("MSRIP"), Phase III*". The bids that were invited were in respect of various Engineering Procurement & Construction Packages ("EPC Package") for the works listed at Nos. 50 to 70 in the list of works appended to said Tender Notice.

4. The Petitioners' claim to be interested in bidding for EPC Package No.52 which involves the improvement of State Highway 143 (SH 143) on the Malharpeth Umbraj Masur Mayani Dighanchi Pandharpur Road (KM 0/00 – KM60/00). The Petition sets out that the Petitioners while evaluating the RFP identified certain terms and conditions in the RFP which

according to them were arbitrary, unreasonable and in violation of the guidelines and circulars issued by the Government of Maharashtra, Central Vigilance Commission and the Ministry of Road Transport and Highways ("MoRTH").

5. The Petition sets out that the Petitioners had vide a letter dated 14th March 2024 addressed to Respondent No.2 highlighted what according to them were the deviations in the Request for Proposal (RFP) from the guidelines issued by Public Works Department of State of Maharashtra, the Central Vigilance Commission and Guidelines issued by MoRTH.

6. It is stated that thereafter in a pre-bid meeting held by Respondent No. 2 on 20th March 2024, the Petitioners raised their concerns *inter alia* that terms and conditions of the RFP were in deviation of the guidelines dated 27th September 2018 ("*2018 Guidelines*") issued by Public Works Department of State of Maharashtra as also the guidelines dated 25th October 2019 ("*2019 Guidelines*"), the guidelines issued by the Central Vigilance Commission ("*CVC Guidelines*") and the guidelines issued by MoRTH in the year 2020 ("*MoRTH Guidelines*"). It is

the Petitioners' contention that the representation made by the Petitioners came to be rejected by the Respondents on 27th March 2024 and on the same day the Respondent issued an addendum by which the terms of the RFP were modified.

7. It is in the backdrop of the above facts that the Petitioners on 17th April, 2024 filed the captioned Writ Petition, challenging the following tender conditions, viz;

2.3.2 Average Annual Construction Turnover	<i>Minimum average annual construction turnover of INR 368.83 crores [118% of the EPC Cost of the project] Calculated as total certified payments received for contracts in progress or completed, within the last THREE (3) years.</i>
2.4.1 Contracts of Similar Size and Nature	<i>Participation as a contractor, Joint Venture partner, in</i> <i>a. at least one contract that has been successfully or substantially completed within the last FIVE (5) years and that is similar to the proposed works, having cost of project / receipts from the project more than INR 295.07 Cr. [80% of 118% of the EPC Cost of the project] , and having design and construction experiences of minimum 2 lane rigid pavement road</i>

	length of 47.96 KM ; The similarity of the Bidder's participation shall be based on the physical size, nature of works, complexity, methods, technology or other characteristics for highways, expressways, bridges, tunnels, runways, Railways (construction/re-construction of railway tracks, yards for keeping containers etc.), Metro Rails and Ports (construction/re-construction of Jetties, any other linear infrastructure including bridges etc.) or b. at least two contracts those have been successfully or substantially completed within the last FIVE (5) years and that is similar to the proposed works, having cost of project / receipts from the project more than INR 184.42 Cr. [50% of 118% of the EPC Cost of the project] each and having design and construction experience of minimum 2 lane rigid pavement road length of 28.98 KM each; The similarity of bidder's participation shall be based on physical size, nature of works, complexity, methods, technology or other characteristics for highways, expressways, bridges, tunnels, runways, Railways (construction / reconstruction of railway tracks, yards for keeping containers, etc.), Metro Rails and Ports (construction/re-construction of Jetties, any other linear infrastructure including bridges etc.)
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2.4.2. Construction Experience in Key Activities <i>Must be complied with by the Bidder.</i> <i>For the above or other contracts executed during the period stipulated in 2.4.1, a minimum construction experience is required in the following key activities:</i>	<i>6. Bidder must demonstrate an experience of construction of bridge with single span of 12 meters (100% length of highest span of bridge proposed in project).</i>
2.4.5 Requirement related to Machinery	<i>Note:</i> <i>5. The machinery should be owned by the bidder/either member of the joint venture;</i> <i>6. Supporting document viz. tax invoice etc. should be provided sequentially for each equipment and the page number for the same shall be mentioned.</i>

Submissions of Mr. Desai on behalf of the Petitioners

8. At the outset, Mr. Desai invited our attention to the RFP and pointed that the very preface of the same specifically

stated that same was prepared by Respondent No. 1 based on *"the Standard Bidding Document for the Procurement of Works (SBD Works) and included modified Model EPC Agreement issued by MoRTH dated January 2021 and various Government resolutions issued by Public Works Department and MoRTH"*. He thus submitted that it was therefore clearly represented to all prospective bidders that the RFP would be in complete consonance with not only the 2018 and 2019 Guidelines but also the MoRTH Guidelines. Mr. Desai however pointed out that the aforesaid clauses of the RFP were in complete violation and/or breach of the said Guidelines, issued by the State, CVC as also MoRTH.

9. In support of the above, Mr. Desai made the following submissions in respect of the four clauses of the tender which he submitted were arbitrary and violative of said Circulars issued by the State, the CVC and MoRTH.

- i. In respect of clause 2.3.2 of the RFP he pointed both
 - (i) the stipulation of an average turnover equal to 118% of the EPC and
 - (ii) period of three years was

plainly violative and in deviation of the 2018 Guidelines. He pointed out that the 2018 Guidelines specifically provided that the turnover was to be minimum of 75 % of the cost of project per annum and the period was to be five years. He, thus, submitted that the requirement of average turnover of 118% and for three years was plainly arbitrary and contrary to the 2018 Guidelines.

- ii. He pointed out that clause 2.4.1 of the RFP mandated that the bidders should have experience of having done either a single contract with 80% of 118% of the EPC cost or two contracts worth 50% of 118% of EPC costs with rigid pavement experience of 47.96 km. He submitted that this condition was plainly violative of the 2019 circular which prescribed that bidders should have experience of one work of 80%, or two works of 50% or three works of 40% of the estimated cost without the rigid pavement requirement. He thus submitted that the rigid pavement condition inserted in the RFP was entirely arbitrary and unjustified.

- iii. Insofar as clause 2.4.2 of the RFP is concerned, he pointed out that the requirement of 100% of the length of the highest span of the bridge i.e. 12 meters was in deviation of the MoRTH Guidelines as also the 2019 Guidelines. He pointed out that the MoRTH Guidelines provide that in case the longest span of a Bridge/Flyover/is less than 60 Meters, no additional qualification was required. He also pointed out that the 2019 Guidelines provided that contractors were required to establish that the valuation of similar work conducted was, of a value which is a minimum of 40% of the estimated cost in case of three similar works, 50% of estimated cost in case of two similar works and 80% of estimated cost in case of one similar work. Therefore, he submitted that the requirement of bidders demonstrating construction of 100% length of the highest span of bridge was arbitrary, unreasonable and wholly unjustified.
- iv. As regards clause 2.4.5 of the RFP, he pointed out that

the requirement of the bidders to own the machinery stipulated therein was in violation of the 2018 Guidelines and Standard Bid Document which was also a document approved by Respondent No. 1. He pointed out that nowhere was the ownership of the machinery by a bidder mandated. He submitted that the imposition of such a condition was entirely unfair and arbitrary and was only to ensure the restriction from participation of eligible bidders and nothing more.

10. Mr. Desai then in dealing with the contention that the project was funded by the Asian Development Bank ("ADB") submitted that the Respondents had not produced any cogent proof and/or basis to support the contention. He submitted that absent any such cogent material to support the contention that the project was funded by ADB could only be construed as the mere *ipse dixit* of the Respondents and was thus devoid of any legal basis.

11. He then submitted that the onus lay upon the

Respondents to produce clear and unambiguous documentary evidence to demonstrate that the conditions contained in the RFP were at the instance of ADB. He invited our attention to the letters dated 16th February, 2024 addressed by Superintendent Engineer, Public Works Department and pointed out that the same clearly bifurcated Phase III into two sections/parts. He submitted that the first section/part comprised of 23 packages which mentioned ADB bank as being the funding head. He then referred to the other letter dated 16th February, 2024 which was in respect of the other 21 packages (which included the project for which the tender was floated pointed) and pointed out that those were to be funded by the Housing and Urban Development Corporation Ltd. (HUDCO).

12. He then, without prejudice to the above, submitted that even if it was to be accepted that Phase III was funded by ADB, the preface to the RFP made clear that the terms and conditions of the RFP were to be in compliance of the Guidelines issued by the State and MoRTH. He then invited our attention to the 2018 Guidelines as also 2019 Guidelines and

pointed out that the Respondents have not disputed and/or controverted the conditions laid down in the guidelines issued by MoRTH or the respective State Government guidelines/circulars. He therefore submitted that the submissions canvassed across the bar could not be accepted to support the contentions that the said Guidelines would not be applicable to the tender in question.

13. Mr. Desai then placed reliance upon Manual for Procurement of Works dated 1st July 2022 (MPW) issued by Ministry of Finance of Union of India and pointed out that the same incorporated the CVC Guidelines. He then from the said MPW pointed out that the same specified that (a) the pre-qualification criteria specified in a tender document should neither be very stringent nor very lax to restrict/facilitate the entry of bidders (b) the pre-qualification criteria were to be exhaustive, yet specific and that there was a fair competition. He pointed out that the Respondents had not taken these CVC guidelines into consideration while formulating the terms and conditions of RFP.

14. Mr. Desai then placed reliance upon a judgment of this Court in the case of ***Health-O-Wonder Private Limited Vs. The Commissioner, Medical Education and Ayush Maharashtra & Ors.***¹ to submit that any classification under Article 14 must (i) be based on an intelligible differentia and (ii) the intelligible differentia must bear a rational nexus with the object sought to be achieved by or under the tender. He pointed out that in the present case, the situation was identical to the facts in the case of ***Health-O-Wonder Private Limited*** (supra) wherein, the Respondents under the guise that the said project was a special project funded by ADB had imposed conditions that had no reference and/or rational nexus with the object sought to be achieved by the tender. He thus submitted that the same were completely arbitrary in nature.

15. He then placed reliance upon a judgment of the Hon'ble Supreme Court in the case of ***Meerut Development Authority Vs. Association of Management Studies and Anr.***² to submit the terms of a tender can be subjected to limited judicial review in cases where it is established that the

¹ Unreported judgment dated 14th March, 2024 passed in Writ Petition No.2445 of 2024.

² (2009) 6 SCC 171

terms of the tender are tailor-made to suit the convenience of a particular person with a view to eliminating all other participants from the bidding process. From the said judgment, he pointed out that the Hon'ble Supreme Court had held that bidders participating in the tender process have a right to equality and fair treatment and that the action or procedure adopted by the authorities under the ambit of Article 12 while awarding contracts concerning properties of the State Government, can be judged and tested in the light of Article 14.

16. He also referred to another judgment of the Hon'ble Supreme Court in the case of ***Indian Railway Catering and Tourism Corporation Limited & Anr. vs. Doshion Veolia Water Solutions Private Limited & Ors.***³ wherein the Hon'ble Supreme Court had observed that the very purpose of issuing rules/instructions was to ensure their enforcement lest the rule of law should be a casualty. He pointed out that the relaxation and/or waiver of a rule or condition, unless so provided under the instructions to bidders, by the State or its

³ (2010) 13 SCC 364

agencies in favour of one bidder would create justifiable doubts in the minds of other bidders and would thus impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts. Mr. Desai also placed reliance upon judgment of this Court in case of ***M/s D.B. Infratech vs Municipal Corporation of Greater Bombay and Ors.***⁴ to submit that tendering authorities cannot introduce condition at subsequent stage which were not provided in the tender document.

17. Though not canvassed at the time when the matter was heard, the Petitioners have filed written submissions in which it has been contended that only two bidders had participated in the tender. It has been contended that this fact unequivocally demonstrates that the conditions were arbitrary, unreasonable and disproportionately restrictive in nature and designed "*to benefit a handful number of people*".

Basis these submissions Mr. Desai submitted that the present Petition ought to be allowed as prayed for.

⁴ Unreported judgment of this court dated 31st August 2023 in Writ Petition (L) 312 of 2023

Submissions of Mr. Kadam on behalf of Respondent Nos. 1 and 2.

18. Mr. Kadam at the outset raised the following preliminary objections to the maintainability of the present Petition, namely,

- i. That the Petitioners were four separate and distinct legal entities however the Petition was verified by only Petitioner No.1. He submitted that the Petition was neither affirmed by any of the other three Petitioners nor was any Power of Attorney of Petitioners issued by them in favour of Petitioner No.1 to file the present Petition. He submitted that the Petition as filed was not maintainable and was required to be dismissed as such.
- ii. That the Petitioners had not even annexed to the Petition the subject tender of which the terms were challenged. He pointed out that the tender document which was annexed to the Petition was in respect of

'EPC 24' which was in relation to Sangli District whereas the subject tender was in respect of 'EPC-52' which was in respect of the Satara district.

- iii. Mr. Kadam then submitted that the Petitioners had not even purchased the tender document/RFP. He pointed out that the RFP document had been made available for downloading to bidders from 27th February 2024 to those bidders who paid the tender fee of Rs. 47,200/-. He pointed out that the last day for submission of the bids was 24th April, 2024 and therefore clearly the Petitioners not having even purchased the tender document by paying the requisite fee and showing their intention to participate in the bid process, were now precluded from challenging the terms of the tender document/RFP at this belated stage. We must note here that Mr. Desai, did not dispute this, however submitted that the Petitioners had not done so as it would be futile to, since the Petitioners would not have been held eligible as per the terms of the tender which were under challenge in this Petition. He submitted

that the Petitioners would do so immediately and requested that the time for submission of the bid be extended to permit the Petitioners to participate. Mr. Kadam however submitted that the original date for submission of bids was 12th April, 2024 which was subsequently extended to 24th April 2024 after the pre-bid meeting. He submitted that the present Petition had been filed only on 17th April 2024 and thus, the Petition was extremely belated and was required to be dismissed on this ground alone.

19. Mr. Kadam then on merits submitted that the Petitioners' entire challenge was plainly misconceived and devoid of merit. He submitted that the subject tender was part of phase three of the flagship project of the State of Maharashtra for improvement of roads under the program '*Maharashtra State Road Improvement Project*' (MSRIP) ("the said Project"). He submitted that the works taken up under this project are with the financial assistance from lending agencies, such as ADB, HUDCO, etc. He submitted that works under this project had commenced in the year 2019 and had been

planned in three phases of which phase one and two were at the stage of completion. He pointed out that given the importance of this project, the Government of Maharashtra had set up a project management unit for the overall management of these works falling under MS RIP Chief Engineer who was the project director for externally aided projects.

20. Mr. Kadam then, to emphasis the importance of this project and the seriousness with which the Government of Maharashtra was treating the same, pointed out that the Chief Engineer (Konkan) had been given the additional responsibility of project director Externally Aided Project and was heading the Project Management Unit of the said project. He submitted that ordinarily the tender document and/or terms of the RFP were prepared and approved by the concerned field officers as per the powers of approval which had been conferred upon them by State Government but in the present case however, he pointed out that given that this was a flagship project of the Government of Maharashtra the terms of the RFP had been approved by the Government of Maharashtra on 20th December 2023. He submitted that this was done to ensure that the best

possible bidders, both National and International, come forward and participate in the said tender. He pointed out that the Chief Engineer (Konkan) in his capacity as project director of Externally Aided Project was working on behalf of the Government of Maharashtra, and thereby responsibly, adherence to all the necessary rules and regulations has been ensured. He thus submitted that the Petitioners' contention that the terms and conditions of the said tender were arbitrary and unreasonable was patently, untenable, and baseless.

21. He then placed reliance upon the Government Resolution dated 4th December 2023 of the Government of Maharashtra to point out that the said project which comprised in total of 60kms was being funded by the ADB. He submitted that the contention of Petitioners that the said project was not funded by RFP was a mere bald statement without any merit.

22. Mr. Kadam pointed out that what the Petitioners were attempting to do was to set forth a counter proposal to the terms of the tender, which was impermissible in law. He submitted that it was well settled that the tendering authority

was the best judge of what was required from the said tender and thus accordingly it decided the terms thereof. Mr. Kadam pointed out that the bid document had been prepared and which contained such terms which ensure that the type of work to be done thereunder, which was construction of concrete type of roads with a lifespan of 30 years, was best achieved. He submitted that it was solely keeping in mind this objective that the Respondents had invited bids from both National as well as International bidders.

23. Mr. Kadam then placed reliance upon the Letters of Award dated 16th April 2018, 8th June 2018 and 7th September 2019 issued to Petitioner No. 2 in respect of phase two of the said project. He pointed out that the terms of the RFP pursuant to which these Letters of Award had been issued contained the very same tender conditions which the Petitioners had impugned herein. Basis this he submitted that it was not now open to the Petitioners to claim that the terms of the present tender were in any manner arbitrary, unreasonable or in violation of the said Guidelines and/or Circulars.

24. Mr. Kadam, then, to dispel the Petitioners contentions that the terms of RFP were in any manner arbitrary and/or unreasonable and that the Guidelines issued by the State and/or MoRTH and/or the CVC were inapplicable, pointed out the following, viz.

- i. That since the State had issued a special bidding document for this particular project, the criteria for turnover of 75% of the project cost as per the 2018 Guidelines was not applicable to the present project.
- ii. That the criteria under 'financial capacity' of average annual construction turnover was also the same in phase two. The same was however revised to five years after discussion with ADB. However, in view of the intervening COVID 19 pandemic, representations were received from bidders to make it three years and it was thus amended to three years, which time period was the same as in phase two.
- iii. That since the tender/project contemplated construction of highways with rigid pavements, the

requirement was for contractors having the necessary past experience of construction of rigid pavements. It was thus that the condition of bidder requiring experience in construction of rigid pavement road was inserted in the tender.

- iv. That the condition of having experience of construction of 12 Meter of bridge length as also for ownership of the machinery were both reasonable conditions inserted to best ensure that the object of the tender is best achieved.
- v. That the CVC guidelines would not apply in view of the fact that the said project was funded by ADB and thus the CVC Guidelines were exempt as per the letter of the CVC dated 1st October 1999.
- vi. Mr. Kadam, then without prejudice to the above, submitted the said Guidelines and circulars were formal and merely indicative in nature. He submitted that the said Guidelines were thus neither binding

nor mandatory.

25. Mr. Kadam then took pains to point out (i) the Government Resolution dated 4th December 2023 which approved the work mentioned in RFP and estimated cost of the said work under Asian Development Bank (ii) the Supplementary Statement of Expenditure 2023-2024 dated 7th December 2023 which was presented to the legislature which recorded that work in the RFP was under financial assistance of ADB. (iii) the letter dated 20th December 2023 issued by Chief Engineer (Konkan) and the Project Director which stated that changes in Standard Bidding Documents were to be adopted for works of MSRIP Phase-III aided by ADB. Basis this he submitted that the contentions of the Petitioners were all entirely baseless.

26. Mr. Kadam then submitted that what the Petitioners were attempting to do is to re write the terms of the tender. He submitted that this was entirely impermissible in law as it was the sole prerogative of the tendering authority to decide the terms of the tender. He submitted that unless such terms were

arbitrary, unreasonable, mala fide or there is any act of Respondent which could suggest that the conditions of RFP were tailor made to select any particular bidder, this Court may dismiss this Petition keeping in mind the law laid down by Hon'ble Supreme Court in ***Tata Motors Vs. The Brihan Mumbai Electrical Supply and Trasport Undertaking (BEST) and others.***⁵

Reasons and Conclusions

27. As already noted above, we have found this Petition both wanting in substance as also in the Petitioners conduct. We thus find that the Petition not only deserves to be dismissed but deserves to be dismissed with cost, for the following reasons, viz.

A. The Petition admittedly arrays four private limited companies as Petitioners. However, the verification of the Petition is only on behalf of Petitioner No. 1. Admittedly there is no power of attorney and/or authority given to Petitioner No.1 to file the Petition on behalf of the other Petitioners.

⁵ 2023 SCC OnLine BOM 671

- B. *Crucially*, the Petition sets out that the Petitioners had obtained the tender document by "*paying the tender fee of Rs. 47,200/-*".⁶ This is clearly a false statement as during the course of the hearing on 23rd April, 2024, it was conceded that the Petitioners had not even purchased the bid document. Thus, clearly, a false statement has been made in the Petition. This fact alone not only disentitles the Petitioner to any reliefs, but also warrants the grant of exemplary costs.
- C. *Additionally*, even on the ground of delay, the Petitioners have dis-entitled themselves to the grant of any reliefs. It is not in dispute that the RFP was floated on 16th February, 2024 and the time for submission of bids was kept open from 27th February 2024 to 24th April 2024. The addendum was issued on 27th March 2024 which infact changed only one tender condition i.e. 2.3.2 out of other four conditions challenged by Petitioners. However, the present Petition was filed only on 17th April, 2024. It

⁶ Paragraph 2 of Petition

is indisputable that if the present Petition were to be allowed the same would result in effectively stalling and/or delaying a project of vital public importance. Nothing prevented the Petitioners from approaching this Court earlier. The Petitioners not having done so, in our view a challenge at this belated stage to a project of vital public interest cannot be countenanced. At this stage it will be useful to refer the judgment of Hon'ble Supreme Court in the case of **National High Speed Rail Corpn. Ltd. Vs. Montecarlo Ltd.**⁷ in which it has been held as follows:

47 *Many a times, such a delay in the execution of the project due to the intervention by the courts may have cascading effect on the project cost and ultimately may increase the project cost and may impose heavy financial burden and lead to increased and unbudgeted expenditure. Therefore, while exercising the writ jurisdiction challenging the tender process midway and/or while entertaining the writ petition challenging the award of contract with respect to such Mega projects, more particularly, when such Mega projects are funded by the foreign countries, the Courts have to bear in mind the following principles laid down by this Court in Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] in para 94 as under: (SCC pp. 687-88)*

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

⁷ (2022) 6 SCC 401

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

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

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

48. *Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of*

the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advice, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved."

- D. We also find merit in the contention of the Respondents that the present challenge to the tender conditions by the Petitioners is purely an academic one given the Petitioners have not even purchased the tender document. The Petitioners' contention that they did not do so because they knew they would not be eligible is an untenable one. In our view, it was incumbent for the Petitioners to have first purchased the tender document to demonstrate that the Petitioners were infact desirous of participating in the tender process. The Petitioners not having done so cannot be said to be interested in participating and are thus, in our view, just meddlesome interlopers.

- E. Another factor which is crucial to note is that if the Petitioners did not purchase the tender document, then how did the Petitioners become aware of its terms and conditions. All this is left entirely opaque.
- F. Even considering the Petitioners challenge on merits, the same is clearly untenable since the Respondents have unequivocally demonstrated (i) that the work in respect of which the RFP was floated was a special project funded and/or aided under the financial assistance of ADB (ii) that the Government of Maharashtra had accorded its special sanction to the RFP in question and (iii) that there was no challenge to this special sanction.
- G. *Also*, the Petitioners' contention that the terms of the tender were tailor made is also plainly devoid of merit. While the Petitioners have taken this plea, not even an attempt was made to (i) explain how these terms were so tailor made and (ii) to which party/entity they were tailor made to benefit. Conversely, the Respondents have

demonstrated the reason for which each of the impugned tender conditions was introduced in the RFP. Therefore, we find absolutely no merit in the Petitioners' contention that the tender conditions were tailor made.

- H. It is well settled that no person and/or entity *has a right to do business with the Government*⁸ and it is equally well settled *that the tendering authority is the best judge of its requirements*⁹. Therefore, absent any arbitrariness, unreasonableness, mala fides or bias on the part of the tendering authority, it is not possible for us to invoke our jurisdiction under Article 226 of the Constitution of India.
- I. We have only recently noted in our judgement in the case of ***B Right Real Estate vs. Pune Metropolitan Region and Others***¹⁰ that "*challenge to both, the award of tenders as also the process, are made in the most routine and casual manner, despite the law in respect of the same having been well settled*" the challenge in the present Petition only amplifies this finding. We find it

⁸ ***Michingan Rubber (India) Ltd. Vs. State of Karnataka (2012) 8 SCC 216***

⁹ ***Silppi Constructions Contractors Vs. Union of India 2019 SCC OnLine SC 1133***

¹⁰ Unreported judgment of this court dated 10th April 2024 in WP 5400 of 2024

apposite to quote the finding of the Hon'ble Supreme Court in the case of **N.G. Projects Ltd. vs. Vinod Kumar Jain and Others**¹¹ wherein the Hon'ble Supreme Court has held as follows, viz.

"15.The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Court held 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]"

- J. The judgements upon which reliance was placed by the Petitioners are wholly inapplicable to the facts of the present case. The judgments in the case of **M/s D.B. Infratech** (supra) and **Indian Railway Catering and**

¹¹ 2022 6 SCC 127

Tourism Corporation Limited (supra) were rendered in respect of deviation from tender conditions after the submission of the bids and not before. Hence, the same would be of no assistance to the Petitioners who have not even participated in the tender process. The judgment in the case of ***Health-O-Wonder Private Limited*** (supra) would also not be applicable to facts of the present case since in the present case the nexus between the terms of the RFP and object sought to be achieved under the tender is plainly cogent and clear. *Equally*, the judgement in the case of ***Meerut Development Authority*** (supra) would not apply since we have found that no case that the conditions have been tailor made has even remotely been made out by the Petitioners.

28. Hence for the reasons stated above, we passed the following order:

- i. Petition is dismissed.
- ii. Petitioner No.1 is directed to file an Affidavit

stating viz.

(a) the basis on which Petitioner Nos.2, 3 and 4 have been arrayed as Petitioners to the Petition and the authority based on which Petitioner No.1 had verified the Petition on behalf of Petitioner Nos. 2, 3 and 4.

(b) the date on which each of the Petitioners purchased the tender document by paying tender fee of Rs.47,200/- with supporting documents to that effect.

- iii. The question of costs to be decided after compliance of above.
- iv. List the Petition on **9th May 2024 for compliance.**

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)