



W.P.Nos.28719, 29263, 29264, 28778, 28779, 28780, 29257 & 29260 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	21.12.2023
Pronounced on	04.01.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

W.P.Nos.28719, 29263, 29264,
28778, 28779, 28780, 29257 & 29260 of 2023
and
W.M.P.Nos.28868, 28877, 28878,
28379, 28381, 28873, 28383, 28288 of 2023

W.P.No.28719 of 2023:

EFICAA Ensmart Solutions Private Limited,
Rep by its Whole Time Director, Mr.Rabinder Deshmukh,
Having Office at:
Fortune 9 – Tower 3, Floor 5,
6-3-1091/C/1, Raj Bhavan Road,
Somajiguda, Hyderabad 500 082.

... Petitioner

Vs.

1.Tamil Nadu Generation and
Distribution Corporation Limited (TANGEDCO),
Rep by its Managing Director,
No.144, Anna Salai, Chennai 600 002.



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2.Tamil Nadu Generation and
Distribution Corporation Limited (TANGEDCO),
Rep by its Chief Engineer (IT & RAPDRP),
No.144, Anna Salai, Chennai 600 002.

... Respondents

Prayer:

Writ Petition filed under Article 226 of the Constitution of India
praying to issue a Writ of Certiorari, to call for the records pertaining to
the impugned RFP/Tender Reference No./Specification No.CE/IT and
RAPDRP-15/2023-24 dated 18.08.2023 issued by the respondents and
quash the same.

For Petitioner in
W.P.No.28778
& 28779 of 2023

: Mr.Vijay Narayan, Senior counsel,
for M/s.Raman & Associates

W.P.No.28719 of 2023

: Mr.P.R.Raman, Senior counsel,
for M/s.Raman & Associates

W.P.No.28780 of 2023

: Mr.Jayanth Muthraj, Senior Counsel,

W.P.No.29263, 29264,
29257, 29260 of 2023

: Mr.Srinath Sridevan, Senior counsel,
for Mr.M.Senthil

For Respondents
in all writ petitions

: Mr.P.S.Raman, Senior counsel,
for Mr.D.R.Arunkumar,
Standing counsel



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06.06.2023 another tender, for almost the same quantity as present tender, was floated. However, the same was also called off.

2.2 The present tender via RFP/15 to 18 was published on 18.08.2023 with the original date for opening of technical bids as 20.09.2023 and subsequently, it was extended up to 13.10.2023. Under these circumstances, the challenges have been made against the reverse bidding concept, which was contained in Clause 20.1 of the Tender Documents since according to the petitioner, the reverse bidding is not permissible and the same is contrary to the provisions of the Tamil Nadu Transparency In Tenders Act, 1998 (hereinafter called as “the Act”) and the Tamil Nadu Transparency In Tenders Rules, 2000 (hereinafter called as “the Rules”). Further, the said reverse bidding concept is also against the Model Standard Bidding Document issued by the RAC Limited, which does not contain any provision for reverse bidding. Hence, the present writ petitions.



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3. In the present case, Mr.Vijay Narayan, Mr.P.R.Raman, Mr.Jayanth Muthraj and Mr.Srinath Sridevan, all the learned Senior counsel are appearing on behalf of the petitioners and all of their initial submissions are as follows:

3.1 The process of reverse bidding as contained in Clause 20.1 of the instructions to the bidders is contrary to the provisions of the Act and Rules made thereunder and the same is expressly prohibited by the said Act and Rules. Further, in this regard, they had made the following submissions:

a) Clause 20.1 of the tender document talks about the reverse bidding. The reverse auction was set forth in the third stage, which occurs after the financial bidding is opened and L1 is determined. In the said reverse auction, all the technically and financially qualified bidders, including the highest bidder, are allowed to further lowest their price by increment of a sum of Rs.10 crore for a limited period. According to the learned Senior counsel, such a process is clearly hit by Section 10(3) of the Act read with Rules 23 and 29 of the Rules.



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b) Once the Respondents have opened the bid and determined L1 in the 2nd stage itself, thereafter allowing the other bidders to further reduce their prices would clearly be contrary to Rule 23 which prohibits any further change, alteration or amendment of the prices after the opening of the tender. The only exception to Rule 23 is when the lowest tenderer has quoted higher than the market rate. Only as per section 10(3) of the Act, the procuring authority is permitted to negotiate with the Lowest Bidder alone for a reduced price. However the procedure contemplated in the impugned tender is that after the tender is opened and L1 is determined, the L1 price is opened and for a period of time all the bidders are allowed to quote prices lowest than L1 by reducing their offers by increments of 10 Crores. Hence, the said clause in the tender is a clear violation of Section 10(3) read with Rule 23.

c) Rule 29, which lays down the process for determination of the lowest 10 evaluated price, also permits negotiations with the lowest tenderer only, that too, only within the limits prescribed under section 10.

d) It is relevant to mention that even under section 18 to favours circumstances, where the lowest bid need not be accepted is to favour a domestic enterprise but only to an extent of 25% of the total requirement, if the domestic



enterprise is willing to match the price of the lowest tenderer. Similarly, the authority can accept the offer of the public sector undertaking not being the lowest tenderer only to the extent of 40% of its total requirement in that procurement.

e) Rule 31 is yet an other exception where the lowest tenderer is unable to meet the required quantity in which case the said Rule permits negotiations with the next lowest tenderer strictly in ascending order or permits the other tenderer to submit their offers for the remaining quantities in sealed covers.

f) Thus it can be seen that in the present case, clause 20.1 and Exhibit 6 can never come even under the excepted clauses where negotiations for price reduction can occur since the same permits all the bidders including the highest bidder, a second chance after the opening the bid to lowest their prices by increment of Rs.10 Crores to quote prices lesser than the LI's price. Evidently, such a process runs foul of the above provisions. When the Act and Rules strictly contemplate a manner and procedure for determining the lowest evaluated price and expressly prohibit any sort of alteration in the price bid after opened. Hence, they would submit that the said impugned tenders are liable to be quashed.



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3.2 Further, they would submit that the Reverse Auction is not the best methodology for effective implementation of a sensitive and large project as in the present nature.

3.3 The Reverse auction process has evidently been inserted into the impugned tender at the last minute, which is contrary to the provisions of the Act and also the Model Standard Bidding Documents issued by the RAC Limited, which does not contain any provisions for the reverse bidding.

3.4 The learned Senior counsel would contend that the submission, which was made by the respondents that in an earlier occasions, they had conducted the tender for coal procurement through reverse auction and hence, the same law has to be permitted in the present case also, is erroneous for a simple reason that coal procurement was guided by the Global Standard Prices and a bidder has to just quote the lowest price than the existing market price. However, in the present



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tender, a bidder has to take into account the cost of execution of metres, namely building, smart metres, cost of manpower and machinery, maintenance of the project and service charges borne by the respondent on a per metre per month basis. A bidder has to account for all these expenses involved in the execution of the project while submitting the bid and round it off to the monthly charges for each metre. In such view of the matter, the scope of the bid involved in the present case is certainly different from the coal procurement.

3.5 Further, the learned Senior counsel appearing for the petitioner had referred to the following judgements in support of their contentions:

- i) ***J.Jayalalithaa and others vs. State of Karnataka and others*** reported in ***(2014) 2 SCC 401***;
- ii) ***State of Uttar Pradesh vs. Singhara Singh and others*** reported in ***1963 SCC online SC 23***;
- iii) ***Nazir Ahmad vs. The King Emperor*** reported in ***Vol LX 31 ILR 372***;
- iv) ***Appu Food Products vs. P.Uma Maheshwari*** reported in ***2019 SCC Online Mad 12378***;
- v) ***P.Ravishankar vs. State of Tamil Nadu***



***Highways Department and others reported in 2021 SCC
Online Mad 5965;***

3.6 Thus, they would contend that the present tender has been floated in an arbitrary manner by incorporating the concept of reverse bidding, which is illegal and irrational and also contrary to the provisions of Model Standard Bidding Documents issued by the RAC and in contravention to the Act and the Rules made thereunder. Hence, they prayed this Court to quash the present tender notification floated by the respondents.

4. The submissions of Mr.P.S.Raman, learned Senior counsel appearing for the respondent are as follows:

4.1 Per Contra, Mr.P.S.Raman, learned Senior counsel, who is appearing for the respondents in all the writ petitions, would submit that in the present tender document, the reverse bidding has been included, which is permissible in terms of the provisions of the Act and Rules made thereunder. It is not that the TANGEDCO only had floated the



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tender for procuring meters, but also the Government of Maharashtra and other States also had floated such tenders and the successful bidders have been identified by them. Hence, he would contend that whichever is beneficial for the person, who is floating the tender, the same is permissible. In those situations, it is the prerogative of the respondent to take any decision as to whether they have to go for reverse bidding or not. The ultimate aim of the respondent is to get the minimum price for smart metres.

4.2 Further, he would contend that one of the petitioner's bid was rejected on the technical specification itself whereas, one of the petitioner had not even participated in the tender and thus, they are not entitled to challenge the said tender process. In the present case, the issue is pertaining to the financial bid, which is between the successful bidders and therefore, the petitioners, who are the non-successful bidders, have no *locus standi* to approach this Court to challenge the tender documents. Hence, he would contend that the petitioners are not supposed to file these writ petitions.



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4.3 Further, as far as the non-compliance of Model Standard

Bidding Documents issued by the RAC is concerned, he would submit that they had communicated the Chief Project Manager, RAC Limited by virtue of letter dated 17.07.2023, wherein they had informed about the respondents' decision to go for reverse bidding, for which the RAC Limited had neither made any comments nor refused to permit the respondents to go for the reverse bidding. Therefore, it is not that there is a violation of bidding document as stated by the petitioner.

4.4 Further, he would contend that the lowest tender is not defined in a narrow way. Only after the entire process is completed and an objective evaluation has been done, the entity shall decide which tender is the "most beneficial" in financially quantifiable terms, based on 'objective and quantifiable factors'. Hence, it is very clear that the methodology for arriving at the 'lowest tender' is completely within the discretion of the procuring entity, provided that the resultant successful bid is the 'most beneficial' and is selected based on 'objective and quantifiable' factors. The critical point here is that evaluation is



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considered completed only when the identity of the bidders is revealed along with their price bids. In the case of reverse auction, this happens only after the final round of bidding. In all the intermediate rounds, only the price and not the identity is revealed. Thus, the sacrosanct aspect of secrecy of the bid process is maintained. Therefore, he would submit that the Act, allows sufficient room to conduct reverse auction & determine the "lowest tender" and does not prohibit the same.

4.5 He would also submit that as described above, reverse bidding is merely one method adopted for submission and opening of bids to evaluate the bids and determine the 'most beneficial bid'. 'Submission of bid' and 'Opening of bid' are matters of administrative procedure to be adopted by the procuring entity. One needs to distinguish between 'initial submission' of a bid and 'final submission'. Submission of bid means submission of bids till designated date and time. In a reverse bid, the time is till the final submission by the lowest bidder. The bids are considered as submitted once the final submissions are made in the last round. Similarly, 'Opening of bid' involves two distinct acts - revealing



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the prices offered and revealing the identity of bidders who have offered the respective prices. In reverse bidding, only the price is disclosed without revealing the identity till the cut off time. The final offered price and identity are revealed only after the last round of bidding and only then, the bids can be considered to have been 'opened'. The prices are revealed to everyone with all fairness. Everyone gets an equal opportunity and transparency is ensured similar to an open auction. Participation is transparent as no one is prohibited from participating till initial submission.

4.6 It is further submitted by him that with respect to the claim of the petitioner that negotiation is permitted only with the lowest bidder as per Section 10(3) of the Act and hence, the reverse bidding is not in line with the law, betrays the lack of understanding of the petitioner with both the Act and with the process of reverse bidding.

4.7 He would also submit that as per Section 10(3) of the Act, the Tender Accepting Authority may negotiate with the lowest tenderer and



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the said 'lowest tenderer' is determined only after the entire process of evaluation has been completed, i.e. after the final round of reverse bidding in the present case. The bid is considered evaluated only, once final submission is made in the final round and then the bid is opened, revealing the identity and final bid amounts of the bidders. Negotiation takes place only after this. In the present case, TANGEDCO may decide to negotiate further after the lowest tender is determined in the manner prescribed by the Act and explained herein.

4.8 Further, he would refer the Tamil Nadu Government eProcurement system, which contains the provision of floating tenders along with Reverse bidding option and formulations framed for this purpose and submit that many of the government organizations like Railways, Power Grid Corporation of India etc., have been adopting the reverse auction mechanism for procurements. It is TANGEDCO's prerogative to decide the suitable buying mechanism for their procurement and bidders have no right to dictate terms on the process of procurement. Therefore the contention of the petitioner that the



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specification in the present tender is contrary to the provisions of the Act and Rules is not correct and liable to be rejected.

4.9 It is also submitted by Mr.P.S.Raman, learned Senior counsel that TANGEDCO is following the process of Reverse bidding right from the year 2017 and tenders have been finalized using Reverse bidding option towards the procurement of International Coal for the utilization in TANGEDCO. Few of the same is furnished already for kind reference. In such circumstances, it is well evident that TANGEDCO is following the process of reverse bidding right from the year 2017 and is being in practice.

4.10 He would also submit that the present writ petitions are not maintainable and the same are liable to be dismissed. In support of his contention, he referred to the following three judgements and prayed for the dismissal of these writ petitions:

i) ***Rajendra Prasad Gupta vs. Prakash Chandra Mishra and others*** reported in ***(2011) 2 SCC 705***;



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ii) *Vaishnav Transformers vs. Union of India and another* reported in *2017 SCC OnLine Del 6445*;

iii) *Monnet Power Company Limited vs. Union of India and others* reported in *2017 SC Online Del 7399*;

5. I have given due consideration to the submissions made by Mr.Vijay Narayan, Mr.P.R.Raman, Mr.Jayanth Muthraj and Mr.Srinath Sridevan, all the learned Senior counsel, who are appearing on behalf of the petitioners and Mr.P.S.Raman, learned Senior counsel, who is appearing on behalf of the respondents and also perused the materials available on record.

6. The central issue, which requires to be decided in this matter is as to whether the reverse bidding as contained in Clause 20.1 of the instructions to the bidders is contrary to the provisions of the Act and Rules made thereunder? If so, whether this Court can interfere?

7. At this juncture, it would be appropriate to extract Clause 20.1 of the instructions to bidders, which reads as follows:



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“20.1 First Stage-Fulfillment of Eligibility and Qualification requirements and determination of substantial responsiveness to the RFP Documents: The Technical Bids shall be opened by Utility and be checked to determine:

(i) whether the Bidders comply with the Eligibility Requirements, have offered eligible AMI Services in their Bids, as specified in ITB 6.1 and Section 2

(ii) whether the Bidders meet the Qualification Requirement specified in ITB 6.2 and Section 2

(iii) whether the Bids are substantially responsive to the RFP document including the requirements specified in Section 6 basis 'Clause by Clause' compliance to the RFP Document including the technical specifications and functional requirements (with amendments, if any) as per the format prescribed in Form 15 given in Section 4.

Second Stage-Opening of Financial Bid: Financial Bids of all technically qualified Bidders would be opened, basis which the award of AMISP Contract shall be determined.

Third Stage-Award of Project: The "Successful Bidder" as defined in ITB 25 shall be awarded the AMISP Contract."



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8. A perusal of the above clause would makes it clear that the reverse bidding was introduced at the third stage by the respondents, which is subsequent to the opening of the financial bids. In such case, the first stage is pertaining to the technical bid, the second stage is pertaining to the financial bid and the third stage is pertaining to the reverse bidding and the fourth stage is pertaining to the award of tender.

9. Therefore, the Clause 20.1 of the instructions to the bidder issued by the respondents contains the provisions with regard to the reverse bidding. However, in the Model Standard Bidding Document issued by RAC, which has to be followed while bidding for the advanced metering, there is no such provision with regard to the concept of reverse bidding. The said Model Standard Bidding Document, which was the guide-notes, has been issued by the RAC Limited when they are procuring for advance metering infrastructure for the smart metering system and the same also form and part of the Tender Documents. Hence, the petitioner had contended that it is clearly against the



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provisions of the Model Standard Bidding Document issued by RAC.

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10. With regard to the aforesaid contention of the petitioner, Mr.P.S.Raman, learned Senior counsel appearing for the respondents had submitted that already the respondents had informed about the reverse bidding to the Chief Project Manager, RAC Limited, by virtue of the letter dated 17.07.2023 and the RAC had not rejected the said proposal of the respondents for reverse bidding. Hence, the question of failing to get consent from the RAC does not arise.

11. As far as the above submissions are concerned, a perusal of the tender document contains the provisions with regard to the reverse bidding, however, the Model Standard Bidding Document had no such provisions. Further, in the letter dated 17.07.2023 issued by the respondents to the RAC Limited, they had referred about the reverse bidding only at the subject portion, but nowhere in the contents of the said letter, it has been stated that the respondents are intend to introduce the reverse bidding concept or seeking any permission from RAC to



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introduce the reverse bidding. Further, even assuming that the said letter would be considered as an intimation with regard to the actions to be initiated by the respondents and since there was no specific refusal from RAC Limited, the same can be considered as a consent by the respondents, however, in the body of the said letter, nothing has been mentioned about the proposal of the respondents to go for the reverse bidding and requesting the RAC to give consent for the same, only in the subject portion, the respondents had stated about the intimation with regard to the reverse bidding. Therefore, it cannot be construed as a request for consent and consent from the RAC.

12. In view of the above discussions, this Court has no hesitation to conclude that the present Clause 20.1 of the Instructions to the bidders is in contrary to the provisions of the Model Standard Bidding Document issued by the RAC Limited.

13. Now this Court has to examine with regard to the aspect whether the reverse bidding is permissible in terms of the provisions of



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the Act and the Rules made thereunder.

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14. Section 2(cc) of the Act defines “Lowest Tender” as follows:

*“2(cc) **Lowest Tender**:- means the tender which, on evaluation, is found to be the most beneficial to the procuring entity in financially quantifiable terms.”*

15. Further, Section 2(i) of the Act defines “Tender Documents” as follows:

*“2(i) ‘**Tender Document**’ means a set of papers containing schedule of works, rates, requirement of goods or services, technical specifications, procedure and criteria as may be prescribed for evaluation and comparison of tenders and such other particulars as may be prescribed;”*

16. A reading of the above definitions would reveal that the “Lowest Tender” means the tender which, on evaluation, is found to be most beneficial to the procuring entity in financially quantifiable terms,



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which means, as per the Act, whatever is beneficial to the procuring entity in financially quantifiable terms, the same would be considered as a lowest tender.

17. At this juncture, it would be relevant to extract provisions of Section 10(1) of the Act, which reads as follows:

“10.Evaluation and Acceptance of Tender:-

(1) The Tender Accepting Authority shall cause an objective evaluation of the tenders taking into consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and comparison of the tenders in accordance with the procedure and criteria specified in the tender document.”

18. The aforesaid Section provides that the evaluation of tenders shall be done with reference to the rates mentioned in the tender document and the prevailing market rate for procurement and comparison of tenders in accordance with the provisions and criteria specified in the tender documents. By referring Section 10(1) of the Act,



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it was contended by the learned Senior counsel for the respondents that the lowest tender is not defined in a narrow way and it is clear that only after the entire process is completed and an objective evaluation has been done. Thereafter, the entity shall decide which standard is the most beneficial in financially quantifiable terms based on objective and quantifiable process. Therefore, he had contended that the methodology for arriving the lowest tender is completely within the discretion of the procuring authority, provided that the successful bid is the most beneficial and selected based on objective and quantifiable process. Hence, it is up to the procuring entity to fix the lowest price and accordingly, they have introduced the reverse bidding, whereby they had arrived at L1 and awarded the Tender.

19. Further, by referring the Section 10(3) of the Act, the learned Senior counsel for the respondents had submitted that the price of lowest tender mentioned in the above Section would mean that L1 has to be determined by virtue of reverse bidding, which is permissible under the Act. Further, he had submitted that the said L1 will not be determined at



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the time of opening of tenders, but after opening, even still, the L1 can be re-determined by virtue of reverse bidding. At this juncture, it would be appropriate to extract Section 10(3) of the Act, which reads as follows:

“10(3) Notwithstanding anything contained in sub-section (2), if the Tender Accepting Authority decides that the price of the lowest tender is higher with reference to the prevailing market rate or the schedule of rates, he may negotiate for a reduction of price with that tenderer.”

20. It is not that only by virtue of Sections 10(1) and 10(3) of the Act, one can come to the conclusion that the procuring authority can arrive at L1, but it is also relevant to deal with the other provisions, which are also relevant for determining L1. In such view, Section 4 of the Act also relevant, which reads as follows:

“4.Regulation of Tenders:- *No tender shall be invited or accepted by any authority after the commencement of this Act, except in accordance with the procedure specified in this Act and the rules made there*



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under.”

21. A reading of the above Section would make it clear that no tender can be invited or accepted after the commencement of the Act, contrary to the provisions specified in the Act and the Rules made thereunder. In the present case, the grievance of the petitioner was that the present L1 was arrived at by virtue of the reverse bidding methodology would be contrary to the provisions of the Act and Rules made thereunder. In this regard, it would be apposite to extract Rule 23 of the said Rules, which reads as follows:

“23. Changes and alterations not to be permitted after tender opening.- No changes, amendments which materially alter the tendered prices shall be permitted after the opening of the tender, except as per the procedure prescribed in sub-section (3) of section 10 of the Act.”

22. A perusal of the above makes it clear that the Rule 23 has put an embargo to alter, change or amend the tender prices after the opening

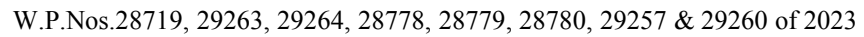


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of tenders, except as per the provisions of Section 10(3) of the Act.

Therefore, except Section 10(3) of the Act, the tender prices shall not be altered, changed or amended.

23. Further, a conjoint reading of Section 10(3) and Rule 23 makes it clear that the lowest tender referred in Section 10(3) of the Act shall be the lowest tender prices without any alteration at the time of opening of the tender in terms of Rule 23. Further, when there is an embargo in terms of Rule 23, the tender prices shall not be altered, changed or amended except in terms of provisions of Section 10(3), wherein it has been provided to negotiate with the lowest tenderer. Hence, a reading of the Section 10(3) with Rule 23 would makes it clear that one could arrive at a conclusion that lowest tender means the tenderer, who quoted the lowest price when the procuring authorities found L1 at the time of opening of tenders without making any further alteration or changes, etc. Therefore, the lowest tender mentioned in Section 10(3) is not that the lowest tenderer is L1 in terms of the reverse bidding since for the said reverse bidding there is a clear cut embargo in Rule 23. In such case,



24. In view of the above, this Court has no hesitation to hold that the introduction of the reverse bidding in terms of Clause 20.1 is not only against the provisions of the Model Standard Bidding Document, but also it is contrary to the provisions of Rule 23 read with Section 10(3) of the Act. Therefore, in the present case, in violation of Model Standard Bidding Documents and provisions of Rules 23 read with Section 10(3) of the Act, the respondent had introduced the reverse bidding mechanism, which are not permissible since the Rule 23 is an clear embargo for reverse bidding mechanism.



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25. As far as the submission made with regard to the introduction of reverse bidding in the other States is concerned, this Court is of the view that the same has not been challenged before any Court of law and apart from that, no submission has been made with regard to the availability of the relevant provisions for reverse bidding mechanism in terms of the Acts of those States. On the other hand, in some of the States, the reverse bidding mechanism is permissible in the Acts of those States. Therefore, when such being the case, the decision cannot be arrived at based on the reference to the other States.

26. Further, in the present case, as far as the reverse bidding introduced by the respondents is concerned, it can be decided only with reference to the Model Standard Bidding Document and also as per the provisions of the Act and Rules made thereunder. However, in total contrary to the provisions of the Act, Rules and Model Standard Bidding Document, the respondents had introduced the reverse bidding, which is not permissible under the Act.



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27. At this juncture, it would be appropriate to state that in a similar situation in ***J.Jayalalithaa and others*** (referred supra) the

Hon'ble Apex Court has held as follows:

“34. There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim “Expressio unius est exclusio alterius”, meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible.

35. In State of Uttar Pradesh v. Singhara Singh & Ors., AIR 1964 SC 358, this court held as under:

“8. The rule adopted in Taylor v. Taylor (1876) 1 Ch D 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it



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necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.”

28. Further, with regard to the maintainability of these writ petitions is concerned, this Court is inclined to refer to the judgement in ***Appu Food Products*** (referred supra), wherein this Court had referred the various judgements of the Hon'ble Apex Court and arrived at a conclusion with regard to the circumstances, under which the tender process can be interfered, which states as follows:

“36.Before proceeding further, at the first instance, it would be advantageous to refer to the following judgments of the Supreme Court touching upon the scope of judicial review under Article 226 of the Constitution in the tender matters:

(a)In Tata Cellular v. Union of India [(1994) 6 SCC 651], having reviewed the law on award of public contracts, the Supreme Court laid down the following guiding principles:



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“94.1) The modern trend points to judicial restraint in administrative action.

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

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

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

5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free of 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.”



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(b) In Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617], the Supreme Court observed as follows:

“7.....The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, Standard and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.”

(c) In Jespar I. Slong v. State of Meghalaya and others [(2004) 11 SCC 485], the Supreme Court considered grants of Government contracts awarding



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rights to collect tolls, weightment charges etc. and held thus:

"19. It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy Standard and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. (See para 7 of Hindustan Development case; (1993) 3 SCC 499). The said judgment also states that any act which excluded competition from any part of the trade or commerce by forming cartels should not be permitted."

(d)In Directorate Of Education and Others vs. Educomp Datamaatics Ltd. & Ors. [(2004) 4 SCC 19], the Supreme Court held thus:

"9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of



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judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India; (1994) 6 SCC 651.

(e)In State of U.P and Another. v. Johri Mal [(2004) 4 SCC 714], it was held as follows:

"It is well settled that while exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision- maker's opinion on facts is final. But while examining and scrutinising the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to



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a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the court with special reference to a given case. This position is well settled in the Indian administrative law. Therefore, to a limited extent of scrutinising the decision-making process, it is always open to the court to review the evaluation of facts by the decision-maker."

(f) In Maa Binda Express Carrier v. North-East Frontier Railway [(2014) 3 SCC 760], the Supreme Court held thus:

"8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders



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are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly wellsettled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.”

37. Thus, the law laid down by the Supreme Court in the aforesaid judgments is that the Courts can scrutinise the award of the contracts by the Government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. Further, the



Supreme Court indicated that interference in the contractual matters is permissible, if decisionmaking process is illegal, irrational, arbitrary and procedural impropriety and it must meet the test of reasons and relevance.”

29. In another judgement of ***Singhara Singh*** (referred supra), the Hon'ble Apex Court had held as follows:

“The rule adopted in Taylor v. Taylor(3) is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in s. 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of s. 164 including the safeguards



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contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him.

9. Mr. Aggarwala does not question the validity of the principle but says that Nazir Ahmed's case(1) was wrongly decided as the principle was not applicable to its facts. He put his challenge to the correctness of the decision on two grounds, the first of which was that the principle applied in Taylor v. Taylor(2) had no application where the statutory provision conferring the power was not mandatory and that the provisions of s. 164 were not mandatory as would appear from the terms of s. 533.

10. This contention seems to us to be without foundation. Quite clearly, the power conferred by s. 164 to record a statement or confession is not one which must be exercised. The Judicial Committee expressly said so in Nazir Ahmed's case(3) and we did not understand Mr. Aggarwala to question this part of the judgment. What he meant was that s. 533 of the Code showed that in recording a statement or confession under s. 164, it was



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not obligatory for the magistrate to follow the procedure mentioned in it. Section 533 says that if the court before which a statement or confession of an accused person purporting to be recorded under s. 164 or s. 364 is tendered, in evidence, "finds that any of the provisions of either of such sections have not been complied with by -the magistrate recording the' statements it shall take evidence, that such person duly made the statement recorded." Now a statement would not have been "duly made" unless the procedure for, make in it, laid down in s. 164 had been followed. What s. 533 therefore does is to permit oral evidence to be given to prove that the procedure laid down in s. 164 had,in fact-been followed when the court finds that the record produced before it does not show that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in s. 164 is not intended to be obligatory, s. 533 really emphasises that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so"



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30. In view of the above, since the law laid down by the Hon'ble

Apex Court and this Court will squarely applicable to the present case, this Court is inclined to interfere with the decision making process of the respondent with regard to the introduction of reverse bidding mechanism. Accordingly, these writ petitions are maintainable.

31. Further, as far as the submissions made with regard to the entitlement of the petitioner, who lost the technical bid, is concerned, this Court had already held in the judgement of **P.Ravishankar** (referred supra), wherein it was held as follows:

“27. Regarding the contention that the petitioner, who is an unsuccessful bidder, cannot question the decision of the first respondent, this court is of the view that he has participated in the tender process, pursuant to the notice inviting tender and hence, he can very well challenge the tender process. The supreme court in NHAI v. Gwalior Jhansi Expressway Ltd [Civil Appeal No.3288 of 2018 dated 13.07.2018], holds that 'the right to exercise by any contractor would come into play only if he participates in the tender process pursuant to notice inviting tenders from other interested parties'. Therefore,



the petitioner has locus standi to file the present writ petitions, to challenge the decision of the first respondent. Accordingly, the issue relating to maintainability is answered in favour of the petitioner.”

Hence, there is no embargo for the petitioner, who lost the bid to challenge the tender process.

32. Therefore, this Court is of the considered view that where a power is given to do certain things in a certain way, the said thing has to be done in that way, otherwise not at all. The other methods of performance are necessarily forbidden. In the present case, the Act and Rules provides a way to determine the L1 in the above said manner. On the other hand, the Board of the respondents had decided contrary to the provisions of the said Act and Rules and had introduced the reverse bidding method, which is beyond the scope of the Act and the Rules made thereunder. Thus, the same will not have any binding force and the said impugned tender is liable to be quashed.



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33. As far as the citations referred by the respondents are concerned, all are pertaining to the reverse bidding, which were not challenged before any Court of law, or where they have provisions for the reverse bidding concept or, they are not having any Act or Rules prohibiting the reverse bidding concept for procurement of tender by the Authorities. Hence, those citations will not apply for the present case.

34. For all the reasons stated above, this Court is inclined to quash the impugned tender notification. Accordingly, impugned RFP/Tender Reference No./Specification No.CE/IT and RAPDRP-15/2023-24 dated 18.08.2023 is quashed.

35. In the result, these writ petitions are allowed. No cost. Consequently, the connected miscellaneous petitions are also closed.

04.01.2024

Speaking/Non-speaking order

Index : Yes / No

Neutral Citation : Yes / No

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