

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3406 of 2019

Uttar Pradesh Rajkiya Nirman Nigam Ltd. (A U.P. Govt. Undertaking, An ISO 9001-2000 Certified) Registered Office- ishweshwaraiya Bhawan, Vibhuthi Khand Gomtinagar Lucknow-226010, through its GM Om Prakash Pathak(O.P. Pathak) son of Late Sri Kanti Krishna Pathak, Resident of 98, 2nd Main 7th Cross, Behind Corporation Bank Kengeri Satilite Town, Bangalore South, Kengari Bangalore, South Bangalore, P.S. Kengari Satellite Town, Karnatka- 560060.

... .. Petitioner

Versus

1. The State of Bihar through Principal Secretary Cum Commissioner, Building Construction Department, Govt. of Bihar, Patna.
2. The Engineer in Chief Cum Additional Commissioner Cum Special Secretary, Building Construction Department, Government of Bihar, Patna.
3. The Chief Engineer, Building Construction Department, Government of Bihar, Patna.
4. The Executive Engineer, Building Construction Department, Bihar, Patna.
5. Ahluwalia Contracts (India) Ltd., A-177, Okhla Industrial Area, Phase I, New Delhi

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr.P.K. Sahi, Sr. Advocate Mr.Ranjeet Kumar, Advocate
For the State	:	Mr.Lalit Kishore, A.G. Mr.Shailendra Kumar, AC to PAAG-2
For the Pvt. Res. No. 5	:	MR.Y.V. Giri, Sr. Advocate Mr.Pranav Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

C.A.V. JUDGMENT

Date : 10-04-2019

This writ application was initially preferred for the following reliefs:

“(i) For setting the decision of the Tender Evaluation Committee, Building Construction Department, Government of Bihar, Patna, Dated 05.02.2019, whereby the petitioner company has been disqualified erroneously and in connivance with



other bidders in NIT No. 13/2018-19 Dated 27.11.2018, relating to construction of Officers Enclave (752 Units) under Gardanibagh Housing Development at Patna, Bihar on following grounds

Solvency certificate of Rs. 192.53 Crore certified by petitioner's banker is of a previous date issued before the date of issuance of NIT

Memorandum of Association and Article of Association of the Company has not been submitted

The company also do not fulfill the condition "The contracting firm/agency should produce evidence of access to lines of credit and availability of other financial resource facility (10%) of cost of work certificate of bankers should be submitted (not fore than 3 months old)

- (ii) For a further direction to the respondents authorities to reconsider the eligibility of the petitioner company and qualify him technically and open the financial tender of the petitioner as well as the petitioner fulfill all the eligibility criteria and most eligible to execute the work.
- (iii) For any other relief for which the petitioner may be deemed entitled too."

In view of the developments which took place during pendency of the writ application whereby respondent no. 5 was awarded the contract in question, the petitioner preferred Interlocutory Application No. 02 of 2019 seeking the following reliefs:

- "(iv). For issuance of direction upon the respondents authorities to produce a copy of the proceeding of the tender evaluation committee dated 13.02.2019, whereby financial bid was opened and after production thereof same may be



quashed as petitioner had submitted objection through email and the respectable Minister of Department on the basis of written objection of the petitioner, had imposed stay by issuing PIT PATRA on the further proceeding of the tender, but even then without deciding the objection and ignoring the stay imposed by the said Minister, Financial bid was opened, which ipso fact establishes malic, unfairness, favorites and result of colorable exercise of power.

- v. For setting aside the proceeding of the Tender Evaluation Committee dated 18.02.2018, contained in Memo No. 303 Date d18.02.2019 whereby objection of the petitioner and one another contractor was rejected and a decision was taken to issue Letter of Acceptance to Ahluwalia Contracts (India) Ltd, A-177, Okhla Industrial Area, Phase I, New Delhi at the rate of Plus 7.5 % of the Estimated cost i.e. Total Rs. 518,63,56,008.
- vi. For setting aside order contained in Memo No. 323 (P) Dated 20.02.2019 written by Chief Engineer (Patna), BCD, Bihar Patna whereby the petitioner company was communicated that its objection has been rejected on 18.02.2019 by the Tender Evaluation Committee.
- vii. For setting aside the Letter of allotment contained in Memo No. 321 Dated 20.02.2019, whereby work namely construction of Officers Enclave-752 Units under Gardanibag Housing Development at Patna Bihar has been allotted to Ahluwalia Contracts (India) Ltd, A-177, Okhla Industrial Area, Phase I, New Delhi
- viii. For a further direction to the respondents authorities to produce a copy of the Letter of Acceptance given to Ahluwalia Contracts (India) Ltd, A-177, Okhla Industrial Area, Phase I, New Delhi and after production thereof same may be quashed.



ix. For the petitioner further prays for allotment of the work in question as the work has been allotted to Ahluwalia Contracts (India)Ltd at the rate of PLUS 7.75 % , i.e. Rs. 5186356008/- whereby the petitioner has quoted only 4.89 i.e. Rs. 5047250960 and therefore, there is difference of amount of Rs. 139105047.4.”

Yet another interlocutory application being I. A. No. 4 of 2019 has been preferred for amending the prayer portion of the writ application by adding two further reliefs as under:

“1(x):- For setting aside the Letter of acceptance bearing Letter No. 267 dated 21.02.2019, issued by the Executive Engineer, Construction Division No. 1, Building Construction Department, Patna.

1(xi) For setting aside the Agreement No. SBD No. 16/2018-19, executed in between the Executive Engineer, Construction Division No. 1, Building Construction Department, Patna.”

Both the aforesaid Interlocutory Applications were allowed vide order dated 08.04.2019.

It is the case of the petitioner that pursuant to the Notice Inviting Tender (‘NIT’) No. 13/2018-19 issued by the Executive Engineer, Construction Division No. 1, Building Construction Department, Government of Bihar regarding construction of Officers Enclave-752 Units (13.16 Acre) under Gardanibag Housing Development at Patna, the petitioner being eligible participated in the tender process. On 05.02.2019 the tenders of all the bidders were opened online and the Tender Evaluation Committee (‘TEC’) headed by the Principal Secretary of the



Department in the meeting held on 05.02.2019 considered the tender of all the bidders but disqualified the petitioner company. A copy of the decision dated 05.02.2019 of the TEC has been brought on record as Annexure '3' to the writ application.

The decision of the TEC would show that the petitioner has been disqualified on the following three grounds:- (i) Solvency certificate of Rs. 192.53 Crore certified by petitioner's banker is of a previous date issued before the date of NIT, (ii) Memorandum of Association and Article of Association of the Company has not been submitted and (iii) The company also do not fulfill the condition "The contracting firm/agency should produce evidence of access to lines of credit and availability of other financial resource facility (10 %) of cost of work-certificate of bankers should be submitted (not more than 3 months old)" These documents were required to be uploaded but the last two documents were not uploaded by the petitioner.

In course of hearing, Mr. P. K. Shahi, learned Senior Counsel representing the petitioner has taken this Court through the various terms and conditions of the tender document. Sub-clause (iv) (d) and (e) of Clause (C) under paragraph '3' has been referred to submit that under these provisions the Contracting Firm was required to produce Bankers Solvency certificate or Revenue



Solvency Certificate of value not less than 40 % of the estimated cost. There is, however, no stipulation that the Bankers' Solvency Certificate cannot be of a date prior to the date of 'NIT'. Extending the arguments it is submitted that regarding the production of evidence of accesses to lines of credit and availability of other financial resources facilities (10 % of contract value) certified by the Bankers, there was a clear stipulation that it should not be more than 3 months old but there was no similar stipulation with respect to the Bankers Solvency Certificate and therefore, the respondent authorities were not correct in rejecting the tender of the petitioner on the ground of submission of Bankers Solvency Certificate of a date prior to the date of 'NIT'.

It is further submitted that as regards the evidence of access to lines of credit also there was no stipulation that it should be with regard to the present work for which such access to lines of credit was required.

Learned Senior Counsel has further taken this Court through clause 7.0 which provides for INITIAL CRITERIA FOR ELIGIBILITY FOR PRE-QUALIFICATION. Further taking this Court through clause 8 which lays down the EVALUATION CRITERIA FOR TECHNICAL-QUALIFICATION, learned



Senior Counsel submits that clause 7.1, 7.2 and 7.3 are the only essential requisites to be seen by the TEC and the petitioner was fulfilling the three essential criteria for eligibility, hence, the Department was not justified in rejecting the technical bid of the petitioner. It is submitted that the evidence with regard to access to lines of credit was not an essential condition of contract. Further learned Senior Counsel while admitting the fact that the Bankers Certificate and the Memorandum of Association and Articles of Association were not submitted online and only the hard copies of those documents were sought to be produced by the petitioner simultaneously submits that non-submission of these documents online in course of E-Tendering process would not render the bid of the petitioner liable to be rejected.

Learned Senior Counsel thereafter, submits that the official respondents have in their counter affidavit in paragraphs 6, 7 and 8 have taken a stand that in view of letter dated 05.05.2009 is part of the 'NIT' and has been duly mentioned at page 5 of the NIT, it is evident that Bank's certificate as to credit facility and solvency certificate are to be issued in relation to the work against which tender has been invited but the petitioner has not fulfilled the requirement at paragraph '5' and '6' of the said letter. It is the submission of learned Senior Counsel for the petitioner that what



has been stated in paragraph '5' of letter no. 3284 as contained in Annexure5/A to the counter affidavit would not be applicable as the same would only apply to a completion certificate as envisaged under Clause 9 (page 19 of the writ application) of the NIT.

In course of argument it was further submitted that although the decision was taken in the meeting held on 05.02.2019 but the said decision was not uploaded. The petitioner somehow came to know about the decision taken by the TEC on 05.02.2019 and thereafter filed an objection on 12.02.2019 (11:45 p.m.). According to the learned Senior Counsel, the objection was required to be uploaded by 10:00 a.m. on the same day, however, the petitioner uploaded the objection at 11:45 p.m. on 12.02.2019. Referring to Annexure '10' to the writ application, learned Senior Counsel submits that on 13.02.2019 the Departmental Minister had written to the Principal Secretary to abstain from opening the financial tender but despite that the respondent department opened the financial tender in haste.

It is further stated that a post decisional consideration was given to the objection submitted by the petitioner. In this regard the minutes of the meeting dated 18.02.2019 as contained in annexure-7 (running page 422 of the brief) has been referred to. It is submitted that the objections of the petitioner were rejected for



the reasons provided in Annexure-7. The TEC has in its minute dated 18.02.2019 recorded that in E- Tender module the Bank Solvency issued by Punjab National Bank on 12.09.2018 with limit up to Rs. 116.00 crores is of a date prior to the issuance of NIT, hence, the same was rejected. Further it was recorded that the Bank Certificate and the Memorandum of Association and Articles of Association were not uploaded, hence, those documents cannot be taken into consideration if the documents were not uploaded in the E-Tender process.

Learned Senior Counsel submits that by ousting the petitioner at the Technical Bid stage, the respondent department is in fact wasting the public money of approximately Rs. 14 Crores by paying in excess to respondent no. 5 if compared with the rate offered by the petitioner.

It is further submitted that in their counter affidavit, the respondents have come out with some additional grounds to submit that this petitioner has not performed satisfactorily in some of the Tenders awarded to them outside the State of Bihar, that the petitioner has no experience of work as a prime contractor and in fact petitioner has been sub-letting the contract to other agencies which is impermissible but because these are not the reason assigned for rejection of the technical bid of the petitioner,



according to learned Senior Counsel the respondents cannot add grounds while filing counter affidavit. Reliance has been placed on the proposition of law laid down in the case of **Mohinder Singh Gill & Anr. V.s The Chief Election Commissioner, New Delhi & Ors.** reported in **AIR 1978 SC 851 : 1978 SCR (3) 272** to submit that when an order is based on certain grounds, it's validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in shape of affidavit.

For the aforesaid reasons learned Senior Counsel submits that the decision of the TEC dated 05.02.2019 and 18.02.2019 are liable to be set aside. As stated above the consequential action of the respondent department have also been challenged and have been sought to be quashed.

Learned Senior Counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Poddar Steel Corporation Versus Ganesh Engineering Works and Others** reported in **(1991) 3 Supreme Court Cases 273** (paragraph 6) and in the case of **Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala** reported in **2019 (1) PLJR 472**. A judgment in the case of **M/s Cano Pharma (P) Limited and Vs. The State of Telangana** decided by the Hon'ble Andhra Pradesh High Court on 31st of August, 2015 has also been relied



upon to submit that non-essential corollary condition of tender cannot be treated as at par with essential conditions and therefore, the respondents were required to ignore the minor deviation, minor infirmity or irregularities which were not constituting material deviation.

On the other hand, Mr. Lalit Kishore, learned Advocate General representing the State has taken this Court through Clause 1 under the heading “MODE OF SUBMISSION”. It is his submission that the tender in this case is to be submitted by E tendering only and hard copy of all document required for technical qualification had to be submitted to the office of the Executive Engineer, Construction Division No. 1 or the Superintending Engineer or the Chief Engineer along with fee of bid document and EMD in original. It is submitted that in case of discrepancy, according to this provision, if any found in hard copy and uploaded bid document through E-Tendering, E-Tender document has to be treated as valid tender document. It is the submission of learned Advocate General that in this case admittedly, the petitioner had not uploaded at least two documents i.e. the Memorandum of Association and Articles of Association of the petitioner company and further the Bank Certificate with respect to the lines to access the credit. It is submitted that if these



two documents were not uploaded, the petitioner had violated the essential condition of the tender document, therefore, his technical bid could not have been accepted by considering the hard copies of the documents which were sought to be delivered at the time of evaluation of the technical bid.

Learned Advocate General has further referred Clause 19 of the tender document which refers letter no. 3284 dated 05.05.2009 of the Building Construction Department, Bihar for technical evaluation of tenders invited on Standard Bid Document basis and says that the completion certificate shall be issued not below the rank of Executive Engineer or Project Manager. Referring to paragraph '5' of the said letter, learned Advocate General submits that in this case the petitioner had submitted the solvency certificate dated 12.09.2018 which is a date much before 27.11.2018 i.e. the date of issuance of tender. According to him, the solvency certificate should not be of a prior date as even if it is valid for some more time, as per banking norms, the certificate is required to get satisfied with the Solvency of the Contractor in relation to the work in question. Referring to the EVALUATION CRITERIA FOR TECHNICAL-QUALIFICATION, learned Advocate General submits that in terms of Clause 8.1.1. the initial criteria prescribed in para 7.1 to



7.3 of Technical Qualification Document and para '3' of Technical Qualification criteria both in respect of experience of similar class of works completed, bidding capacity and financial turnover etc. are required to be first scrutinized and the applicant's eligibility for Technical Qualification for the same is to be determined. It is submitted that under para '3' of the Technical Qualification Criteria one of the conditions is that the contractor firm/agency should have satisfactorily completed as a prime contractor, ending October 2018 (i) three similar works (non industrial) each costing not less than 40 % (forty percent) of the estimated cost or completed two similar works (non industrial) each costing not less than 60 % (sixty percent) of the estimated cost or completed one similar work (non industrial) costing not less than 80 % (eighty percent) of the estimated cost during the last five years.

At this stage, learned Advocate General submits that after rejection of the Technical Bid of the petitioner further information have come in the domain of the respondent authorities whereunder it has been found that the petitioner has suppressed material facts and indulged in creating documents showing that the petitioner is eligible to participate in the tender process as it has completed the work as per requirements as a prime contractor,



but the fact is that the petitioner is subletting its contract work to other agencies and is not acting as a prime contractor. Reference have been made to Annexure '5/C', '5/D' and '5/E' attached to the counter affidavit of respondent no. 5 to show that the petitioner obtained a work of construction of ESIC, Temporary Unit, Panchdeep Bhawan, C.I.G. Marg, New Delhi, which was to be completed by 15.08.2011 but in fact the work was completed after five years on 30.11.2016. It is submitted that for the said work the petitioner obtained an experience certificate dated 23.12.2016 as contained in Annexure-5/C but then this petitioner granted experience certificate to the agency NKJ Infrastructure Limited who had also participated in the tender on the strength of the same experience certificate. It is, thus, submitted that these facts have though come to the notice later on but are relevant as this Court had been called upon to exercise its discretionary power under Article 226 of the Constitution of India to direct the respondent authorities to consider the bid of the petitioner. The submission is that this Court should not exercise its discretionary power under Article 226 of the Constitution of India in the facts and circumstances of the case.

Learned Advocate General referred Annexure '5/H' to the counter affidavit filed on behalf of respondent no. 5 which is a



report of Comptroller Audit General of India for the year ending 31st March,2016 with regard to Performance Audit of Modernisation and Strengthening of Police Forces. In this report it is stated that the petitioner is worst performing agency to whom 57 works costing Rs. 231.83 crore were awarded during 1995 to 2012 but 29 works costing Rs. 207.82 crore were incomplete as of March, 2017.

Learned Advocate General has further submitted that as per the Central Vigilance Guidelines, the petitioner could not have sub-letted the work. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **Air India Ltd. Versus Cochin International Airport Ltd. And Others** reported in **(2000) 2 SCC 617** (para 7) to submit that this Court in exercise of its power of judicial review need not interfere with the decision of the TEC.

Mr. Y. V. Giri, learned Senior Counsel representing the private respondent no. 5 has adopted the argument of learned Advocate General. Learned Senior Counsel has, however, referred Clause 13 of the Tender Document to submit that according to this provision, it was E-Tender and the Tender was to be carried out only through E-Tendering. Learned Senior Counsel has referred to paragraph '7' and paragraph '9' of the rejoinder of the petitioner



(page 501 of the brief) wherein the petitioner has admitted that the Bank certificate and Memorandum of Association and Articles of Association could not be uploaded on the official website. Learned Senior Counsel has submitted that in paragraph '10' of the rejoinder a plea has been taken now that this petitioner was a Nodal Agency appointed by the ESIC to develop their infrastructure work. This, according to learned Senior Counsel, is contrary to the claim of the petitioner that he had acted as a prime contractor.

Learned Senior Counsel has further relied upon the judgment of the Hon'ble Supreme Court in the case of **Municipal Corporation Ujjain And Another Versus BVG India Limited and Others** reported in (2018) 5 SCC 462 and in the case of **Raunaq Internatinal Ltd. Versus I.V.R. Construction Ltd. and Others** reported in (1999) 1 SCC 492. It is submitted that the judgment of the Hon'ble Supreme Court in the case of **Vidarbha Irrigation Development Corporation** (supra) helps the case of private respondent only.

Having heard learned Senior Counsel for the parties and on perusal of the records, this Court finds that Clause 13 of the NIT clearly provides that Tender shall be carried out only through E-Tendering procedure at the website (www.eproc.bihar.gov.in).



Further the mode of submission also requires that the tender is to be submitted by E-Tendering only and hard copy of all documents were required to be submitted with the authorities of the Department as provided in the said Rules. In case of discrepancy found in the hard copy and uploaded bid document through E-Tender, it was the E-Tendering document which will be treated as valid.

Further NIT Clause 19 talks of the letter no. 3284 dated 05.05.2009 of the Building Construction Department, a copy of which has been brought on record at page 485 of the brief. Paragraph 5 of the said letter reads as under:-

“(5) Inruction Bidder (ITB) के क्लाउज-4.2 के अनुरूप क्रेडिट सुविधा से संबंधित बैंक प्रमाण पत्र तथा कार्य में लगाये जाने वाली राशि से संबंधित अन्डरटेकिंग से संबंधित प्रमाण पत्र सभी निविदाताओं को बीड कागजात के सेक्शन-2 में दिया जाना चाहिये एवं कार्य विशेष, जिससे निविदा संबंधित है, के लिये होना चाहिए। इस संबंध में कोई calrfiication/modification की माँग अलग से नहीं की जानी चाहिए।”

Submission of learned Senior Counsel for the petitioner that Para 7.1 to 7.3 of the Tender Document which provide the Initial Criteria for eligibility for Pre-Qualification are the only essential requisites to be seen by the TEC does not impress this Court for the reason that in Para 8.1.1 which is under the heading ‘EVALUATION CRITERIA FOR TECHNICAL-QUALIFICATION”, it is clearly provided as under:-



“The initial criteria prescribed in para 7.1 to 7.3 of Technical Qualification Document and para -3 of Technical Qualification criteria above in respect of experience of similar class or works completed, bidding capacity and financial turnover etc. will first be scrutinized and the applicant’s eligibility for Technical Qualification for the work be determined.”

Thus, apart from Para 7.1 to 7.3 it is Para 3 also which lays down the evaluation criterion.

In the opinion of this Court, once it is made clear in the NIT that the mode of submission of the Tender will be in form of E-Tendering only but the petitioner failed to upload the Memorandum of Association and Articles of Association of the company as also the Bank’s certificate in proof of access to lines of credit in respect of the work in question, the plea of the petitioner that these uploading of documents cannot be said to be an essential condition is not fit to be accepted.

This Court is willing to accept the submission of learned Advocate General and learned Senior Counsel representing the private respondent no. 5 that in terms of paragraph 5 of Annexure ‘5/A’ to the counter affidavit of respondent no. 5, the petitioner was required to produce the certificate/evidence with regard to lines of access of credit in respect of the work in question. The petitioner had not uploaded



the same and thereby breached the essential requirement of uploading all the tender documents.

Although submissions have been made on behalf of learned Advocate General as well as learned Senior Counsel for the private respondent no. 5 with regard to non-fulfillment of the criteria as laid down under paragraph '3' of the NIT with regard to the experience of the petitioner as a prime contractor and this Court has taken note of those submissions but is not going into that aspect of the matter in view of the fact that this Court is convinced with the submission of learned Advocate General as well as learned Senior Counsel for the private respondent no. 5 that in this case the petitioner has violated an essential condition of tender as the petitioner failed to submit the two documents which were required to be uploaded.

Here, it is worth mentioning that although in course of hearing learned Senior Counsel for the petitioner made a submission that the decision of the TEC dated 05.02.2019 was not uploaded and it was only when the petitioner came to know somehow the decision of the TEC, an objection was filed belatedly on 12.02.2019 at 11:45 p.m. instead of 10:00 a.m., I find from paragraph 8 of the writ application that in fact it is their own statement in the writ application that Annexure '3' to the writ



application was uploaded on the website. Annexure '3' clearly mentioned that the objections if any were required to be submitted by 10:00 a.m. on 12.02.2019 which the petitioner had failed to do, still the objections were considered on 18.02.2019 by the respondent officials. Reasons are provided in the minute dated 18.02.2019 for rejection of the objection of the petitioner.

Learned Senior Counsel for the petitioner has relied upon the judgments of the Hon'ble Apex Court as referred above, however, in view of the opinion of this Court that the petitioner has been found in breach of essential condition of the Tender Document, the judgment in the case of **Poddar Steel** (supra) would not apply.

In fact Mr. Y. V.Giri, learned Senior Counsel for the private respondent has rightly relied upon the judgment of the Hon'ble Apex Court in the case of **Vidarbha Irrigation Development Corporation** (supra), paragraph 10, 13 and 14 of the said judgment are quoted hereunder for a ready reference:

“ 10. We may now come to Clause 2.35 which makes it clear that a substantially responsive bid is one which conforms to all terms, conditions and specifications without any material deviation. *Inater alia*, a material deviation is one which limits, in any substantial way, or is inconsistent with the bidding documents or the employer's rights or bidder's obligations under the Contract. It cannot be gainsaid that a bank guarantee, which is for a period of six months and not for a period of 40 months, would not



only be directly inconsistent with the bidding documents but would also be contrary to the employers' right to a bank guarantee for a longer period. This being the case, since a material deviation from the terms and conditions of the tender document was made by Respondent No. 2, when it furnished a bank guarantee for only six months initially, it would be clear that such bid would have to be considered as not substantially responsive and ought to have been rejected by the employer. Clause 2.35.2 also makes it clear that such a bid would have to be rejected outrightly and may not be subsequently made responsive by correction.

13. The law on the subject is well settled in **Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors.**, (2016)8 SCC 446*, this Court held.

“14. The law is settled that an essential condition of a tender has to be strictly complied with in *Poddar Steel Cropn. v. Ganesh Engg. Works* [*Poddar Steel Cropn. v. Ganesh Engg. Works*, (1991)3 SCC 273] this Court held as under: (SCC p. 276, para 6)

“6. ... The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.”

In the opinion of this Court, the aforesaid view of the Hon'ble Supreme Court helps the private respondent and not for the petitioner in this case.

Further reliance on the judgment in the case of **M/s Cyano Pharma (P) Limited** (supra) decided by Hon'ble Andhra

*Ed.-Reported in 2016(4) PLJR (SC)85 : 2016(3) JLJR462.



Pradesh High Court on 31st August, 2015 would also not help the petitioner. In the said case under Clause 7(b) of the Tender Document which dealt with pre-qualification criteria what was required to be submitted was a non-conviction certificate from the DCA, however, was not specified as to whether it was to be filed online or offline. Clause 7 (b) in said case only states that “Bidder who are convicted in the last three years (from Bid calling date). The Bidder must produce non-conviction certificate from the concerned DCA”. In the facts of the said case the Hon’ble High Court was of the view that the condition so prescribed was not an essential condition.

I also find that the reliance placed by learned Advocate General on the judgment of the **Air India Ltd.** (supra) is fit to be taking note of, paragraph 7 of the said judgment is quoted hereunder for a ready reference:

“7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India*¹, *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India*², *CCE v. Dunlop India Ltd.*³, *Tata Cellular v. Union of India*⁴, *Ramniklal N. Bhutta v. State of Maharashtra*⁵ and *Raunaq International Ltd. v. I.V.R. Construction Ltd*⁶. 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

1 (1979) 3 SCC 489

2 (1981) 1 SCC 568

3 (1985) 1 SCC 260 : 1985 SCC (Tax) 75

4 (1994) 6 SCC 651

5 (1997) 1 SCC 134

6 (1999) 1 SCC 492



considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.”

Further this Court would also rely upon the judgment of the Hon’ble Apex Court in the case of **Raunaq International Ltd.** (supra). Paragraph 10 and 11 of the said judgment are quoted hereunder for a ready reference:

“10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods



can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.”

In the light of the judicial pronouncement of the Hon’ble Apex Court when this Court considers the facts of this case noted hereinabove, it is found that it would not be a fit case to exercise the discretionary power of this Court under Article 226 of the Constitution of India to set aside the decision of TEC taken in its meeting held on 05.02.2019 and the decision dated



18.02.2019 by which the objections of the petitioner were rejected.

For the aforesaid reasons, this writ application is dismissed.

(Rajeev Ranjan Prasad, J)

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AFR/NAFR	AFR
CAV DATE	09.04.2019
Uploading Date	10.04.2019
Transmission Date	

