

(2003) 02 DEL CK 0038

In the Delhi High Court

Case No : C.W.P. No. 6615 and 7240 of 2002

ECIL Rapiscan Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-02-2003

Acts Referred:

Citation : (2003) 3 AD 779 : (2003) 103 DLT 521

Hon'ble Judges : Devinder Gupta, Acting C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : C.S. Vaidyanathan and G.S. Sistani, for the Appellant; K.K. Sud, ASG and Jayant Bhushan for Respondent No. 1, V.P. Singh, Senior Advocate and Anajana Gosain and M.L. Bhargava and V.P. Malik, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—ECIL Rapiscan Ltd., which is the petitioner in CWP No. 6615 / 2002 is joint venture of Electronic Corporation of India Ltd., a Government of India Undertaking and Opto Sensors Incorporation, USA. Tender submitted by this petitioner for supply of 220 colour XBIS- X-ray baggage inspection system has been rejected and order is placed on respondent No. 3 for supply aforesaid system. The petitioner is challenging rejection of its bid and award of contract in favor of respondent No. 3 in this writ petition.

2. Opto Sensors has two subsidiary companies, namely, Rapiscan Security Products Ltd., U.K. and U.S.A. and Opto Sensors, Malaysia. One of its subsidiaries, namely, Rapiscan Security Products Ltd., USA had also submitted its bid pursuant to same tender which met the same fate. Accordingly, this petitioner, namely, Rapiscan Security Products Ltd., USA has also filed CWP No. 7240/2002 praying for same relief i.e. quashing of the order rejecting its bid and award of contract dated 3rd September, 2002 in favor of respondent No. 3.

3. Product of both the petitioners is same with same technical specifications which was offered in the bids submitted by these petitioners. Thus, as the same

tender is in question in both the petitions and on same grounds bids of the both the petitioners were rejected and the challenge in the petitions to the action of respondent in these writ petitions is also common, these petitions were heard together and are being disposed of by this common judgment.

4. For the sake convenience, facts in CWP No. 6615/2002 are noted. Additional facts which require mention in so far as CWP No. 7240/2002 is concerned would be mentioned at the appropriate stage.

5. Respondent No. 2, i.e., Airport Authority of India (AAI) issued Notice Inviting Tender (NIT), published on 20th November, 2001, for the supply of 145 colour XBIS X-ray baggage inspection System. However, this was cancelled on 6th March, 2002. Thereafter another NIT dated 7th June, 2002 was published for supply of 220 colour XBIS. Tenders were to be submitted in two parts, namely, technical bid and financial bid. Technical bids were to be opened and evaluated in the first instance. Financial bids of only those bidders were required to be opened who qualified in technical evaluation. Both the petitioners as well as respondent No. 3 and others submitted their bids which were opened on 19th July, 2002. These bids were evaluated on 30th, 31st July and 1st August, 2002. On 5th August, 2002 petitioner sent fax to respondent No. 2 requesting it to intimate the probable date of the financial/commercial bids. Nothing was heard. Therefore, reminder dated 6th September, 2002 was sent. It was followed by letter dated 11th September, 2002 to the Chairman of respondent No. 2 pointing out the alleged irregularities in the technical evaluation of the petitioner's System. The petitioner also wrote letter dated 17th September, 2002 to the Secretary/Ministry of Civil Aviation pointing out same irregularities. Reminders dated 18th and 19th September, 2002 were also sent to respondent No. 2. Thereafter on 19th September, 2002 petitioner received letter dated 10th September, 2002 from respondent No. 2 informing that tender had been awarded to respondent No. 3. The petitioner registered its protest vide letter dated 20th September, 2002 addressed to respondent No. 2 and also sent another communication of the same date to Commissioner, BSAS followed by representation dated 30th September, 2002 to Ministry of Civil Aviation. Receiving no response, present writ petition was filed.

6. In so far as petitioner in CWP No. 7240/2002 is concerned, after the technical evaluation, this petitioner also sent letter dated 18th September, 2002 pointing out alleged irregularities in the procedure for evaluation of technical bids and received same kind of reply dated 10th September, 2002 on 19th September, 2002 informing that its bid had been rejected and the contract had been awarded to respondent No. 3 and thus this petitioner has also filed the present writ petition for same relief.

7. Basic submissions, noted in brief at this stage, raised by the petitioner are as under:

(i) There are various irregularities in the evaluation process.

(ii) The System of the petitioner met all technical specifications and Therefore rejecting the petitioner"s bid on the ground that it was not technically viable, is clearly illegal.

(iii) The entire action of respondent No. 2 was mala-fide, arbitrary and unreasonable.

(iv) Award of contract by respondent No. 2 in favor of respondent No. 3 is against public interest inasmuch as price at which the System in question is purchased from respondent No.3 is double the price quoted by the petitioner.

8. Respondent No. 2 in its counter has denied these allegations made in the writ petition. It is emphasised that technical evaluation was conducted in two stages by two separate committees consisting of very high ranking officials and it was found that System offered by petitioner was not meeting the specifications as laid down in the tender documents. Technical specifications were laid down keeping in view the security reasons and respondent No. 2 for this reason wanted very highly technical system for which specifications were finalised. Technical evaluation was done in the presence of all concerned who had submitted that bid including the petitioners who had in fact signed the technical evaluation sheet. Only thereafter, as an after-thought, they started alleging irregularities in the evaluation process. It is further stated that there are mala-fides involved. Respondent No. 2 took the decision in the public interest and there was fairness in the decision making process. In fact, it was argued, mala-fides are not even alleged in the writ petition nor anybody is imp leaded as party imputing mala-fides. Cost of the System that is supplied by respondent No. 3 was more only because of highly technical nature of the System which only respondent No. 3 could supply and which specifications petitioners were not meeting. It was also submitted that these writ petitions had become infructuous as systems have already been supplied by respondent No. 3 to respondent No, 2 pursuant to the orders placed on it.

9. Respondent No. 1, i.e., the Union of India has supported the stand taken by respondent No. 2. Respondent No. 3 has also filed its counter affidavit echoing the same stand as taken by respondent No. 2.

10. We heard the learned Counsel for all the parties at great length and have gone through record.

11. At this stage we may note that there is force in the contention of respondents that contract having been already worked out, present writ petitions have virtually become infructuous. In these writ petitions, prayers made are for quashing impugned tender dated 7th June and 19th July, 2002 and letter dated 3rd September, 2002 vide which respondent No. 3 has been awarded the contract and petitioners" bids have been rejected. Pursuant to aforesaid tenders and order placed subsequently, which are sought to be quashed, respondent No. 3 has supplied the entire machinery. Therefore, it may hardly be of any relevance to quash the tender or award of letter dated 3rd September, 2002 in favor of

respondent No. 3. However, in case petitioners succeed, some other right may flow in their favor, although no relief of the nature prayed for by petitioners can be granted, it would be appropriate to deal with the matter on merits as well.

12. It may be mentioned at the outset that respondent No. 2 has explained as to why earlier NIT dated 20th November, 2001 was withdrawn and thereafter second NIT dated 7th June, 2002, which is the subject matter of these writ petitions, was issued. Since it has some bearing on the merits of the case, it would be appropriate to take note thereof in the first instance.

13. The security system in question is for the purpose of installation at airports. These X-ray machines are needed for checking hand baggages, check in baggages, passengers and consignors of cargo. On 20.11.2001 respondent No. 2 had floated a limited global tender for supply of 145 Colour XBIS X-ray baggage inspection system. Certain specifications were laid down therein. However, it is a matter of common knowledge that on 11th September, 2001 there was an attack on twin towers of World Trade Centre in New York, USA. Planes were hijacked for this purpose and the hijackers had used those planes to hit these towers. This gory incident brought new dimensions to the security system at airports all over the world including in India. Fresh deliberations started for strengthening security system to ensure that it is not breached. (Within few months thereafter there was terrorist attack on the Parliament on 13th December, 2001.) This led to reviewing of technical parameters of X-ray baggage inspection system as well. The Ministry of Civil Aviation even sent communication dated 14th February, 2002 to the Chairman of respondent No. 2 pointing out:

"I am directed to refer to AAI's U.O. No. OPS/L-615/2001 (Pt) dated 21.12.2001 on the above subject and to say that it has been decided that keeping the quantum jump in the perception of level of threat to aviation sector, especially in the aftermath of foiled terrorist attack on Parliament on 13th December, 2001, the present process of Global NIT may be quashed and the technical parameters be reviewed at the level of Member (Ops), AAI and COSCA, BCAS and then AAI may go in for fresh open Global NIT."

14. The Bureau of Civil Aviation Security (for short "the BCAS") issued circular dated 19th March, 2002 to discuss and finalise the revised specifications for X-ray baggage inspection systems in a meeting scheduled for 27th March, 2002. Significantly Brig. Ravi Mehta, Joint Managing Director of the petitioner was also asked to attend this meeting. In the meeting which was held on 27th March, 2002 apart from Brig. Ravi Mehta, Mr. L. Satyanarayanan, Vice Chairman-cum-Managing Director of petitioner also attended. Revised specifications were discussed and following amendments in the specifications were proposed:

"1. The machine should be able to withstand voltage functions in the range of 170 V to 260 V.

2. Tunnel size etc. is to be deleted from specification.

3. Penetration: Greater than 25 mm thickness of steel.

4. Resolution: 38 SWG.

15. As Government of India finalised revised specifications on the basis of aforesaid recommendations, earlier NIT was cancelled and fresh NIT published on 7th June, 2002.

16. This not only justifies cancellation of earlier NIT and publication of new NIT, another significant aspect could be noted is that revised specifications were to the knowledge of petitioners, same were even finalised in the meeting wherein representatives of the petitioners deliberated. The petitioners Therefore cannot challenge new specification or for that matter tender dated 7th June, 2002.

17. It may also be noted at this stage itself that petitioners have claimed that Rapiscan Security Products Ltd., Inc. is the leading developer and manufacturer of multi-energy X-ray and automated explosive detection systems, metal detectors and body scanners and has supplied 7000 systems to customers world wide and Therefore decision of respondent No. 2 to reject the system of petitioners as not technically viable, was illegal and mala-fide. This claim may not have much relevance as petitioners were required to meet new specifications introduced now in NIT dated 7th June, 2002 and Therefore whether petitioners' system were meeting the specifications or not is to be examined in terms of such specifications laid down in NIT dated 7th June, 2002.

18. It may be worthwhile to first take note of the procedure which was followed by respondent No. 2 to evaluate the tenders.

19. Respondent No. 2 had constituted a committee of four persons, namely, ED(CNS-P), GM (N&S), Addl. GM (Electronics) of respondent No. 2 and Dy. Commissioner of Security, BCAS. It evaluated the X-ray baggage inspection system of the bidders. After doing this exercise from 30th July to 1st August, 2002 in presence of the representatives of the bidders, this Committee submitted its report (hereinafter referred to as the first report) dated 12th August, 2002. Relevant observations of this Committee in so far they are relate to petitioners' systems are the following:

"3. Threat Image Projection (TIP) facility is available in all the machines. However, activating the TIP could not be carried out on line while the machine is in operation in ECIL Rapiscan, Rapiscan and Control, Screening machines. These machines required rebooting to access the TIP management functionality and activate the same. TIP functionality could be activated in Heimann machine without the requirement of rebooting.

4. As per tender requirement, a visual or audible alarm should be generated to notify the operator if the machine fails to penetrate a particular item. In the case of Heimann machine an audible alarm along with blinking of the subject item (Visual Alarm) is generated in such cases. In case of Rapiscan and ECIL, Rapiscan machines there is visual alarm by way of a colour patch which at times

could be confusing to the operator. In case of Control Screening machine, there is visual alarm with blinking of the subject item."

20. This report was supported by technical evaluation sheet attached as Annexure-A which shows detailed observations in respect of Systems offered by the bidders for technical evaluation with reference to various clauses of NIT. The observations which are noted above are with reference to NIT Clauses 4.12.1.13, 4.12.1.25 and 4.12.2 and the remarks in the said sheet in respect of aforesaid clauses are as under:

Ref.to NIT clause Description/NIT requirement Observation in respect of XBIS offered for technical evaluation by the tenderer firm, M/s. Remarks

Heimann Systems ECIL- Rapiscan Rapiscan Control Screening

4.12.1.13 If the machine fails to penetrate a particular item, then an alarm (visual or audible) should be generated to notify the operator. Both audio & visual alarm are generated Which can cause confusion, Visual patch of different colour is generated Which can cause confusion. Visual patch of different colour generated Visual alarm without blinking colour

4.12.1.25 CTP Tests

I Single Wire Resolution (Test No. 1) 40 SWG 34 SWG 34 SWG 34 SWG 34SWG wire is seen with difficulty against NIT specification of 38 SWG.

II. Useful penetration (Test No. 2) 34 SWG 30 SWG 30 SWG 30 SWG

III. Multi energy X-ray (Test No. 3

Compiled Compiled Compiled Compiled

IV and Simple

4.12.1.3 Penetration (Test No. 4) 28 mm, 25 mm 25 mm 18 mm 25 mm steel penetration is seen with difficult against NIT specifications of greater than 25 mm.

V. Spatial Resolution (Test No. 5)

Compiled Compiled Compiled Compiled

4.12.2 Threat Image Projection

Compiled Compiled Compiled Compiled

21. It may be mentioned that ED (Tech.) had also constituted a committee of three officers of the rank of GM, Addl. GM and Assistant CM. Respectively for scrutinising the documents/clarifications submitted by the tenderers which clarifications were obtained after the initial evaluation done from 30th July to 1st August 2002. This committee submitted its report on 20th August/ 2002 of all three categories of Systems, namely, hand baggage (category A), Registered baggage (Category B) and Cargo (category C). In respect of hand baggage

machine offered by the petitioners this committee remarked.

"X Ray Machine for Hand Baggage (Category A)

Four firms offered this category of machine.

(i) The machines offered by M/s. Heimann and M/s. Control Screening meet all the NIT requirements.

(ii) The machine offered by M/s. ECIL-Rapiscan meets all NIT requirements except the following:

(a) Penetration of Steel is below the specified requirement of "more than 25 mm thickness" as mentioned against S. No. 5.

(b) Does not fully meet NIT requirement of ISO 9001 certification (S. No. 21).

(c) Regarding the requirement of alarm generation in case of failure of machine to penetrate a particular item (S. No. 16), though the firm has claimed compliance yet there is no specific mention in the tender document/brochure about any audible/visual alarm to alert the operation -- except that the particular area shall be shown in black colour.

(iii) The machine offered by M/s. Rapiscan complies with the NIT requirements, however, the observation made regarding alarm generation at para ii(C) above in respect of ECIL-Rapiscan machine is applicable here also."

22. The aforesaid reports would show that primarily following two factors were noted as not meeting the required specifications :

A. Penetration of steel was below the specified requirement of "more than 25 mm thickness".

B. The systems offered by the petitioners did not fulfill the requirement of alarm generation in case of failure of machine to penetrate a particular item, except that the particular area should be shown in black colour. However, there was no audio/visual alarm to operator.

23. With respect to first requirement, it was contended by learned Senior Counsel for petitioners that the systems offered by petitioners could penetrate the steel up to 25 mm thickness which was as per the specifications. His submission was that as specified requirement of "more than 25 mm thickness" had to be read with specifications, laid down in Circular No. 15/2002 dated 20th May, 2002 relating to Simple Penetration Test No. 4 which is as under :

"4. Simple Penetration (Test No. 4)

This test defines what thickness of steel the machine should be able to penetrate. The steel step wedge on the CTP has steps 2 mm from 16 mm to 30 mm with a lead strip to check that the machine is above or below the requirement. The requirement is that lead is visible beneath 24mm steel. Atick in

log sheet will indicate where a difference between the lead strip and the step wedge is visible."

24. As per the aforesaid test, steel wedge CTP has steps of 2 mm and Therefore in the test it could ascertain the penetration of 2 mm steps, i.e. 24, 26, 28..... Testing on such CTP, 25 mm would not be vis. and Therefore petitioners" systems on the allegation that it was less than 25 mm should not be rejected. Moreover as per aforesaid test No. 4, argued the learned Senior Counsel, requirement was that lead should be visible beneath 24 mm steel and thus petitioners" system was meeting this requirement.

25. In respect of second observation, it was submitted that there was no such requirement of audio/visual alarm in the specifications and Therefore, respondent No. 2 could not insist on such requirement.

26. Mr. V.P. Singh, learned Senior Counsel appearing for respondent No. 2, on the other hand, submitted that the tests were to be in two stages: pre-award and post-award. The test No. 4 was post award stage test, which was meant for the contractor ultimately awarded the contract and to be conducted on the machinery supplied and the said machinery was to be examined to ensure that it met the specifications. At the stage of evaluation of tenders respondent No. 2 was concerned with pre-award tests when the sample system was to be produced for testing. It was submitted that test which was carried out with machine available with the respondent No. 2 could penetrate 25 mm as well. In fact in order to prove this, the respondent No. 2 even brought the CTP in the Court to demonstration. Further, it was contended that as per specification laid down for this system, Clause 3 of NIT, which is at page 103 of the paper book of, clearly stipulated :

"Penetration : Greater than 25 mm Thickness of steel."

Therefore, it was this requirement which the petitioners had to satisfy. It was submitted that as per petitioners" own showing their systems" penetration was up to 25 mm but what was required was "greater than 25 mm". It was also submitted that tests were conducted in presence of the representatives of petitioners who were present and had signed the attendance sheet and had never raised such a contention / objection. It was also submitted that going by the threat perception it was also advisable to have the systems which could raise audio/visual alarm in case of failure of machine to penetrate a particular item. When systems offered by respondent No. 3 had this feature, which was lacking in the systems offered by the petitioners, it was thought desirable to purchase the systems with such alarm in better public interest. It was submitted that the entire process of technical evaluation was transparent where representatives of the bidders were present, four experts in the field who were very senior officers and one of whom was from BCAS who had submitted their report. This report was then examined by a committee consisting of Director level officers and only after this committee approved the report that matter was sent to Chairman,

respondent No. 2 who thereafter approved the award of contract to respondent No. 3.

27. Learned Senior Counsel further submitted that it was not the function of the Court to make minute or comparative evaluation or go into the merit of the decision. The Court was only concerned with decision making process and since there was no fault therein, petitioners could not challenge the decision of respondent No. 2 in awarding contract to respondent No. 3.

28. We are of the considered opinion that there is force in the contention of respondent No. 2. It hardly needs to be emphasised that as per the technical specifications laid down in NIT penetration required was "greater than 25 mm thickness steel". As per petitioners' own showing their systems could penetrate up to 25 mm steel which obviously mean not "greater than 25 mm thickness steel". Therefore, when respondent No. 2 found that systems offered by respondent No. 3 to be better than that of petitioners and placed orders on respondent No. 3 for supply of such system the action cannot be faulted with.

29. On our direction, respondent No. 2 had produced the records for our perusal. These records show that as per the committee report, following salient points were observed:

"(a) While M/s. Heimann Systems could pass single wire resolution up to 40 SWG against NIT requirement of 38 SWG all other three machines failed to meet the specifications:

(b) NIT specification for penetration is greater than 25 mm M/s. Heimann Systems could pass this test up to 28 mm penetration while other three makes could not show penetration of 25 mm steel.

(c) For detection of explosives M /s. Control Screening does not have ADX facility.

(d) Threat Image Projection (TIP) facility is not available on line in M/s. ECIL-Rapiscan, M/s. Rapiscan and M/s. Control Screening equipments whereas the facility is available in the machine of M/s. Heimann Systems.

(e) In case of M/s. Control Screening colour discrimination for various objects is not clearly visible.

(f) Feedback/report is not available with M/s. Control Screening equipment."

30. The records further reveal that after the two reports discussed above, matter was placed before the PAB which consisted of the Chairman, Member (F & A), Member (Ops), ED (Tech), ED (F & A) and CM (Electronics) respectively. After consideration of these aspects of the reports submitted by the respective committees and the recommendations of the technical department, this committee approved the proposal to open the price bid of respondent No. 3. It is only thereafter that price bid of respondent No.3 was opened. Not only this since respondent No.3 was found to be technically qualified, respondent No. 2 held negotiations with respondent No. 3 on price which resulted in respondent No. 3

agreeing to further reduction in price. Negotiated price was again put before the PAB and after consideration thereof, it was decided to place order on respondent No. 3.

31. Parameters of judicial review of such actions are now well defined. Without quoting various judgments, our purpose would be served by referring to celebrated case of Tata Cellular Vs. Union of India, , wherein the Supreme Court observed :

"53. The principal objection of the Union of India is that the High Court was not justified in scrutinising the tendering process in such detail. The minute examination is unwarranted because the High Court cannot constitute itself the selecting authority. However, no appeal is preferred, as otherwise, it would have further delayed the introduction of very valuable communication facility in this Court. Beyond that it has no particular interest as to who is selected. However, it becomes necessary to answer the allegations made about the actual selection and whether there was any bias on the part of the selection committee. The selection process was dictated by the exigencies of the situation. It is a question, as to what one could settle for, in the given circumstances. The Government was embarking upon a totally new technology project, for the first time. At that stage, it was impossible to predict what kind of response will there be. Therefore, it is impossible to predicate the cut-off limits which could be set or which conditions have to be relaxed or softened. The allegations of bias, it is held, must be a case of reasonable possibility or likelihood of bias. In this case, there is no such reasonable likelihood. Mr. B.R. Nair was not influenced directly, or, in any other manner, subtle or otherwise. He did not, in fact, participate in any of the significant or crucial stages in the selection process. Even otherwise, the relationship is not such as to give reasonable apprehension of bias. In support of this argument reliance is placed on Manak Lal Vs. Dr. Prem Chand, and Ashok Kumar Yadav and Others Vs. State of Haryana and Others, . As regards the parameter in relation to project financing it was kept in view by taking into account the estimated number of subscribers, installation charges, monthly rental, any other charges etc. They were included in the competition. The other parameters of the bidders were treated on the same footing as regards this parameter is concerned. Concerning rental, it was specifically averred in the counter before the High Court that the other charges had also been included while calculating quoted rental."""

92. In Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , this Court observed thus:

"In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation or the revenue. But even in such matters they have to follow the norms recognised by Courts while dealing with public property. It is not possible for Courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in

due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken bonafide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

93. In Union of India and others Vs. Hindustan Development Corpn. and others, , this Court held thus:

"....the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds. In Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, , this Court observed as under:

"When the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transaction". The activities of the Government have a public element and, Therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure."

94. The principles deducible form the above are:

- (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 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 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."

32. One may also refer to judgment of the Supreme Court in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , wherein following observations were made:

"Any judicial relief at the instance of a party which does not fulfill the requisite criteria, would be misplaced. Even if criteria can be relaxed both for the awardee and the petitioner it is clear that the offer of the awardee is lower and it is on this ground that the Board has accepted the offer. The award of tender cannot be stayed at the instance of a party which does not fulfill the requisite criteria itself and whose offer is higher than the offer which has been accepted. It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210 Mws. is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people."

33. Coming to the allegations on mala-fides, we may note that admittedly no specific allegations are made in the writ petitions. Allegations of mala-fides are conspicuously absent in the pleadings. It is not alleged that any person had interest in favoring respondent No. 3 or had any animus qua petitioners. The argument of learned Senior Counsel for petitioners was that such mala-fides should be inferred from the circumstances. He submitted that much before the last date of submitting the tender which was 19th July, 2002, newspaper report had appeared on 10th July, 2002 in Times of India, Bangalore wherein the Commissioner of BCAS had remarked that the Government would be buying systems of respondent No. 3 and Therefore, decision had already been taken even before opening the tenders. He further submitted that petitioners were kept in dark till the last date. Although tender of respondent No. 3 was accepted on 3rd September, 2002, petitioners were not informed about the rejection of their tenders till 19th September, 2002 when letter pre-dated 10th September, 2002 posted on 19th September, 2002 was received by petitioners. Moreover, no clarifications were sought from petitioners on technical aspects and contract was awarded to respondent No. 3 who was the only party left in the fray that too at much higher rates.

34. In the absence of plea of mala-fides, such a plea cannot be considered. Even otherwise, the aforesaid allegations of petitioners would not establish any mala-fides when records speak otherwise as already indicated above. In so far as alleged statement of the Commissioner of BCAS is concerned, respondent No. 2 has given its clarification in the counter affidavit in the following words:

"It is denied that there had been any pre-determination in awarding the contract to respondent No. 3. It is stated that the Commissioner of Bureau of Civil

Aviation Security only issued a statement that Government would buy 200 Heimann X-ray Baggage Inspection machines. It is nothing but only newspaper report, which appeared in the Times of India Bangalore edition. The same cannot also be verified as Shri Veeranna Alvalli has unfortunately expired and the authenticity of the statement cannot be verified or even taken as gospel truth. It is denied that Major Narayanan, Deputy Commissioner, BCAS was nominated as key person for evaluation of the Systems on 30, 31st July, 2002 and August 1, 2002. In fact there are two technical committees as mentioned herein above and Major Narayanan was the member of one committee and the evaluation was conducted in all fairness and not of the basis of his own decision. The petitioner has no locus standi to challenge the requirement or specifications of the committee. The entire process has been transparent and is in accordance with law."

35. Further as noted above, it is not the decision of any particular individual. Group of people are involved in two committees and ultimately in PAB. Case of mala-fides cannot be established as held by this Court in the case of Ghanshyam Singh Vs. Union of India and Others, . We may also notice following observations of the Supreme Court in the case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, :

"Para 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 Vs. International Airport Authority of India and Others, Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, Tata Cellular Vs. Union of India, Ramniklal N. Bhutta and another Vs. State of Maharashtra and others, and Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, . 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, 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 conclusion that overwhelming public interest requires interference, the Court should intervene."

36. These Writ petitions are, Therefore, without any merit and are accordingly dismissed leaving the parties to bear their own costs.