
(2002) 02 CAL CK 0040
In the Calcutta High Court
Case No : Writ Petition No. 2266 of 2001

Gouranga Lal Chatterjee and Others	Vs	APPELLANT
State of West Bengal		RESPONDENT

Date of Decision : 12-02-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 299

Citation : AIR 2003 Cal 44 : (2002) 253 ITR 678

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : Samaraditya Pal, Abhijit Chatterjee and Ananth Bandhu Dutta, for the Appellant; Bikash Ranjan Bhattacharjee and Prabal Mukherjee, for Nos. 1 to 5 and Samir Kumar Chakroborty and Satya Brata Chakroborty for Nos. 6 and 7, for the Respondent

Final Decision : Dismissed

Judgement

Asok Kumar Ganguly, J.—In this writ petition, the petitioners have challenged the decision of the Tender evaluation Committee recommending the acceptance of the tender submitted by the respondents Nos. 6 and 7 (hereinafter referred to as the "private respondents) in respect of Construction of Belghoria Express Way, Package II. The challenge is mainly on the ground that the tender submitted by the private respondents does not conform to the requirements stipulated in the Instruction to the Bidders (hereinafter to as the said ITB). It was submitted by the petitioner that the tender of the private respondents should have been rejected as non responsive by the State if the conditions of ITB were adhered to.

2. The material facts of the case are as follows :

Both the petitioners Nos. 1 and 2 are Class I Contractors and empanelled with the Public Works Department and other organizations.

3. A pre-qualification notice was sent to the petitioners inviting proposals from them for short listing of bidders to work under package Nos. 2 and 3 of the

Belghoria Express Way. Pursuant thereto, the petitioners submitted a Pre-qualification application and, thereafter, the petitioners were informed by the respondent No. 4 that the petitioners have qualified for Package No. 2 and they may apply for the purchase of bid documents. After purchasing the said bid documents, the petitioners submitted its tender on 14th September 2000. Along with the said bid, the petitioners also submitted all the required documents. The case of the petitioners is that its tender satisfies all the requirements of the technical bid and the petitioners were intimated of the same and they were further informed that the date of opening of the financial bid was fixed on 5th October 2001.

4. By forming a joint venture, the private respondents also submitted a pre-qualification application to the respondent No. 4 and the private respondents were also informed by the respondent No. 4 that they are qualified and may apply for purchase of the bidding documents and pursuant thereto, the private respondents submitted their bids. The technical bid of the private respondents was allegedly found to be in order (this is disputed by the petitioners). The financial bid was opened thereafter and it was found that the bid of the private respondents was for a sum of Rupees 25,20,45,581/- whereas the bid of the petitioners was for a sum of Rs. 25,64,44,310/-. As the bid of the private respondents was found to be the lowest, the same was recommended for acceptance by the respondents. This decision, as noted above, has been challenged on several grounds.

5. Now coming to the detailed facts of the case, it is clear that in so far as the bid of the petitioner is concerned, the same is proper and valid in terms of ITB. In the instant case, Bank Guarantees are to be submitted by all the intending bidders. In so far as the petitioners are concerned the Bank Guarantees furnished by them were in terms of the ITB. But of the two Bank Guarantees submitted by the private respondents, one was for Rs. 30,37,500/- of the Global Trust Bank and the same was valid up to 31st March 2002. This other Bank Guarantee submitted by the private respondents was for Rs. 10,12,500/- of the United Commercial Bank and the same was valid upto 24th February 2002. The second Bank Guarantee is dated 13th September 2001. It has been specifically made clear that the said Bank Guarantee shall be valid only up to 24th February 2002. Admittedly, the validity of the said Bank Guarantee is less than the required period mentioned in the ITB.

6. In this connection, the relevant conditions in ITB may be noticed. Clause 12.1 of ITB makes it clear that the bid to be submitted shall be in two parts. The first part would be called the technical bid and the second part the financial bid.

7. Part I of the technical bid comprises various components and of them bid security is important. That is why bid security is dealt with separately under Clause 16.1. For proper appreciation, the said Clause is set out below :

"Clause 16.1 : The Bidder shall furnish, as part of his Bid, a Bid security in the

amount as shown in column 4 of the table of IFB for this particular work. This bid security shall be in favour of Employer as names in Appendix and may be in one of the following forms :

- a. Receipt in challan of cash deposit in the Government Treasury in India.
- b. Deposit-at-call Receipt from any scheduled Indian Bank or a foreign Bank located in India and approved by the Reserve Bank of India.
- c. Indian Post Office/National Savings Certificate duly endorsed by the competent postal authority in India.
- d. Bank Guarantee from any scheduled Indian bank, in the format given in Volume III.
- e. Fixed Deposit Receipt, a certified cheque or an irrevocable letter of credit, issued by any Scheduled Indian Bank or a foreign Bank approved by the Reserve Bank of India."

Clause 16.2 runs as follows :

"Clause 16.2 : Bank guarantees (and other instruments having fixed validity) issued as surety for the bid shall be valid for 45 days beyond the validity of the bid."

8. Under Clause 15.1, a bid shall remain valid for a period of not less than 120 days after the deadline for submission of the bid submitted as specified in Clause 20.

9. It is not in dispute that the deadline for submission of the bid is 14th September 2001. Therefore, 120 days under Clause 15.1 and 45 days under Clause 16.2 come to about 165 days. From 14th September 2001, 165th day will expire on 26th February 2002.

10. There is no dispute about this date.

11. In the instant case, admittedly, one of the bid securities furnished by the private respondents is not valid up to 26th February 2002, but is valid only up to 24th February 2002. This was found by the authorities on the date of opening of the bid on 14th September 2001.

12. In this context the stipulation in Clause 16.3 is set out. Clause 16.3 runs as follows :

"Clause 16.3 : Any bid not accompanied by an acceptable Bid Security and not secured as indicated in Sub-clauses 16.1 and 16.2 above shall be rejected by the Employer as non-responsive."

13. In the affidavit filed by the State, it appears that so far as the bid security of the private respondent is concerned, the Bank Guarantee of the United Commercial Bank, which was submitted on 13th September 2001, was allegedly

amended on 21st September 2001. But the Bank Guarantee of the Global Trust Bank dated 12th September 2001 was not required to be amended.

14. Now the question is whether there could be an amendment of the Bank Guarantee after the date of opening of the Bid on 14th September 2001. In this connection, matters relating to the modification and withdrawal of the bids are contained in Clause 22 of the ITB. The said Clause runs as follows :

"Clause 22 : Modification and Withdrawal of Bids.

22.1 : Bidders may modify or withdraw their bids by giving notice in writing before the deadline prescribed in Clause 20 or pursuant to Clause 23.

22.2 : Each Bidder's modification or withdrawal notice shall be prepared, sealed, marked, and delivered in accordance with Clauses 18 & 19, with the outer and inner envelopes additionally marked "Modification" or "withdrawal", as appropriate.

22.3 : No bid may be modified after the deadline for submission of Bids except in pursuance of Clause 23.

22.4 : Withdrawal or modification of a Bid between the deadline for submission of bids and the expiration of the original period of bid validity specified in Clause 15.1 above or as extended pursuant to Clause 15.2 may result in the forfeiture of the Bid security pursuant to Clause 16."

15. It appears that the modification and withdrawal of bids can be done by giving a notice by the bidder before the deadline prescribed in Clause 20 or pursuant to Clause 23.

16. In the instant case, the deadline for opening the technical bid was 14th September 2001. Here it has not been contended that the private respondents have modified their bid security before the opening of the bid.

17. Counsel for the petitioner has urged from the Clauses of ITB, which are extracted above, that they do not provide for modification of the bid security after the technical bid is opened. The modification of bid cannot be done in an unrestrained manner. It has to be done by giving a notice in writing before the deadline prescribed in Clause 20 or pursuant to Clause 23 of ITB. Here admittedly, nothing was done before the deadline, viz. 14-9-2001, when the technical bid was opened. Clause 23 provides that the employer will open all bids received including modification made pursuant to Clause 23 in the presence of the bidders or their representatives who choose to attend at the time, date and place specified. In this connection, Clause 23.3 of ITB has some relevance and is set out as follows :

"23.3. The envelope containing "Technical Bid" shall be opened. The amount, form and validity of the bid security furnished with each bid will be announced. If the bid security furnished does not conform to the amount and validity period as specified in the Invitation for Bid (Ref. Column 4 and Paragraph 3), and has not

been furnished in the form specified in Clause 16, the remaining technical bid and the sealed financial bid will be returned to the bidder."

18. This is the requirement at the stage of opening. After this stage, comes the question of evaluation of the bid. Between the opening and the evaluation of the bid, the bid security furnished by the bidder is to be confirmed by the issuing Bank. After confirmation of the bid security, the bidder may be asked in writing which should be usually within 10 days of its opening of the technical bid, to clarify or modify the technical bid, if necessary, in respect of any rectifiable defect.

19. The other objection which has been raised by the petitioners impugning the acceptance of the bid of the private respondents is that two sets of undertaking are required to be given by the bidder as per Clause 12.1 (iii). Clause 12 of ITB lists the documents comprising a bid. It appears that the documents which were furnished by the private respondents along with his technical bid do not satisfy the requirements under Clause 12.1 (iii). At the time of hearing of the matter, the learned Counsel for the private respondents handed over those documents showing that initially the forms of undertaking which were given by the private respondents and were included in the tender were admittedly not the form acceptable under the tender. So after opening of the technical bid by the State-respondent, a letter dated 19-9-2001 was addressed to the private respondents by the Superintending Engineer, Construction Circle (N.H. Wing), Durgapur Express Way, asking the private respondents to furnish the undertaking for cash investment and the undertaking about the bid validity in the proper form. Pursuant to the demand from the State-respondent, the private respondents handed over both the forms of undertaking in proper form on 21-9-2001. The learned counsel for the petitioner argued that this is also an instance which would show that instead of rejecting the bid of the private respondents, as the same was not in proper form, an opportunity was given to them by the State to submit fresh undertaking in the proper form.

20. The other objection is that there are corrections in the bid in respect of certain quantities and price in the tender submitted by the private respondents and these corrections are not dated as required by Clause 13.2 of ITB. Clause 13.2 of ITB also provides that the bidder shall fill in rate, price and line item total (both in figures and words) for all items of works described in the Bill of Quantities along with the detail bid price. About corrections in those figures the relevant stipulation in Clause 13.2 is as follows :

"13.2. The bidder shall fill in rates and prices and line item total (both in figures and words) for all items of the Works described in the Bill of Quantities along with total bid price (both in figures and words). Items for which no rate or price is entered by the bidder will not be paid for by the Employer when executed and shall be deemed covered by the other rates and prices in the Bill of Quantities. Correction, if any, shall be made by crossing out, initiating dating and rewriting."

21. The learned Counsel by referring to page 33 of the State's Affidavit pointed out that the corrections which have been made in the bid documents by the private respondents are not permissible under Clause 13.2. As such, the said bid of the private respondents should not have been accepted.

22. The learned counsel for the petitioners also pointed out from page 25 of the said Affidavit that in the bid document of the private respondent, there are certain corrections, which have, been signed and stamped but they do not contain any date. Therefore, these corrections in the absence of a date should not have been accepted as authorized correction within the meaning of ITB and on that ground itself, the bid should have been rejected.

23. In dealing with those contentions made on behalf of the petitioner, the learned counsel for the State-respondent raised various issues. It has been stated that no objection was taken by the writ petitioner at the time of opening of the technical bid on 14-9-2001, that one of the Bank Guarantees submitted by the private respondents was not in order. It has further been stated that the Bank Guarantees, its date and period were announced in the presence of the bidders and/or their representatives and by not raising any objection at this stage, the petitioners have taken chances. Now after finding that the petitioner's bid is higher than that of the private respondents, the petitioners have come before this Court and filed the instant writ petition.

24. It has further been stated that the petitioners did not raise any objection even at the stage of opening of the financial bid on 5-10-01. The learned counsel further referred to Clause 9.2 of ITB and submitted that under the said clause, there is a provision for pre-bid meeting. Therefore, the entire exercise in the bid was participatory in nature and the petitioner was allowed to participate at every stage and the fact that they have not raised any objection shows that they were fence sitters and finding that their bid is not the lowest and the lowest bid of the private respondents has been recommended for acceptance, they have come before this Hon"ble Court challenging that.

25. Apart from advancing the aforesaid contentions, the learned counsel for the State-Respondent further submitted that the bid security is for the benefits of the employer and the said security has no relation with the tenderers' ability to perform and the same is not a performance security either. Therefore, in the context of the said requirement of bid security, the petitioners cannot make out a case for not accepting the bid of the private respondents because of certain technical grounds. It has further been stated that the Government has got the confirmation from the Bank in relation to the bid security in question and in view of the said confirmation from the Bank it is clear that the security is valid and in order. Since there is no defect in the security furnished by the private respondents there was no error on the part of the State in accepting the same. The respondents further submitted that the bid of the petitioner was properly considered. It is not the case of the petitioner that while considering the bid of the petitioner, the same was found defective and it was not treated in the same

manner in which the bid of the private respondents was treated. It has been further stated that apart from that the complaint of the writ petitioner is in relation to post-qualification matter and this has no relevance with the ultimate decision of the Government. The learned counsel further submitted that Clause 27 of ITB gives the employer, i.e. the State, an opportunity to correct the error and on the basis of that power, in the instant case the inconsequential errors in the bid security of the private respondents were corrected. The learned counsel relied on Clause 32 of ITB and submitted that under this clause, power is reserved to the employer to accept and/or reject any bid and, therefore, the employer acted within its power by accepting the bid of the private respondents.

26. The learned counsel for the private respondents has relied on most of the submissions of the learned counsel for the State-respondents. It has been further stated that the bid and bid security are different matters and that the bid security is independent of the bid. Relying on Clause 15.1 of ITB, the learned counsel urged that under the said clause there is no prescribed format of bid validity and it provides for amendment of bid validity. The learned counsel has referred to the bid security, bank guarantee form and submitted that in the said form, the date is to be inserted by the employer before bid document is issued. In the instant case, no date was inserted by the employer and of the two bid securities furnished by the private respondents one of them was short by two days. For this unintentional mistake of the private respondents, their bid cannot be rejected. It has further been stated that the submission of the undertaking for cash investment in response to the Government letter dated 19-9-2001 was in order. It was done after confirmation of the bid security.

27. The learned counsel for the private respondents however admitted that the Bank Guarantee dated 13-9-2001 of the United Commercial Bank contains an inadvertent error, but, then ultimately the same was rectified when the attention of the Bank authorities was drawn to that and thereafter the private respondents obtained and submitted the amended Bank Guarantee which was issued by the United Commercial Bank on 21-9-2001. wherein it was specifically provided that the Bank Guarantee would remain in force up to 31-3-2002 which is well beyond 165 days from the deadline date and the said amended Bank Guarantee was submitted on 25-9-2001 to the respondent No. 4.

28. The learned counsel further submitted that a distinction between bid and bid security has been maintained throughout in the various clauses of ITB and if those clauses are properly construed, it will be clear that the bid security can be amended. The learned counsel further stated that the restraint imposed by Clauses 22.1 and 22.3 of ITB are in respect of bid and not bid security.

29. The learned counsel further stated that the Court should consider the intention of the bidder. In this case, two Bank Guarantees have been furnished, one was for more than Rs. 30/- lacs and other was for more than Rs. 10/- lacs. So far as the first is concerned, there is no dispute and in case of the second one, there is a marginal shortfall of two days which was later on amended. The

said opportunity of amending the Bank Guarantee was also extended to another bidder. So no special favour was shown to the private respondents by the employer. Apart from that since the amendment of the Bank Guarantee is not one of the essential aspects relating to the performance of the contract, the said amendment has been allowed. Therefore, the State-respondent has not acted unreasonably.

30. The learned counsel further stated that the undertaking for cash investment was submitted even before the opening of the bid, only it was not submitted in the proper form. It was further stated that in terms of Clause 4.2 (ii) of ITB, the undertaking to invest has to be given by way of information. It was not required to be given in any proper form and the undertaking was duly furnished along with the tender and the same was ultimately corrected. The same is true also of the bid validity undertaking. It has also been stated that the said request of giving the undertaking in proper form was made to another tenderer. Therefore, no favour was shown to the private respondents. So far as the material correction in the financial bid is concerned, the submission of the learned counsel is that the financial bid was opened on 5-10-2001 and prior to the opening, the corrections were made and those corrections were all noted and recorded in the Financial Bid Opening Sheet and the same was signed by the bidders. Therefore, there is no material alteration as a result of those corrections.

31. These are the rival contentions of the parties.

32. The learned counsel for the parties also relied on certain decisions. Mr. Pal, firstly, relied on the well-known decision rendered in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . Relying on paras 10 and 12 of the said judgment, the learned counsel urged that in the matter of granting an award in a contract, the Government must act in a reasonable manner and must not make a departure from the standard which has been set by it. In the instant case, the norms for submission of tender have been stipulated in ITB and no departure can be made from them. The learned counsel in making such submission specifically relied on the principles laid down in the case of Vitarelli v. Scaton, (1959 (359) US 535) which have been accepted by the Hon"ble Supreme Court in the Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, as an established rule of law in this country. The learned counsel submitted that in view of the said principles, the executive agency, the State herein, must be rigorously held to the standards by which it professes its action to be judged. Therefore, in the instant case, it was submitted, the stipulation in ITB should be rigorously followed.

33. The learned counsel further relied on the concluding portion of para 12 in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and contended that the discretion of the Government in the matter of awarding of Job and contract must be structured by rational, relevant and non-discriminatory standard.

34. The learned counsel also relied on the judgment in the case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, . In the said judgment, the Hon''ble Supreme Court has classified clauses in the tender notice under two categories. Some clauses are essential and others are merely ancillary. So far as the first category is concerned, they must be enforced strictly and so far as the second category is concerned, it is open to the authority to make a deviation in appropriate cases.

35. In that case, what happened was a cheque of the Union Bank of India was submitted by the tenderer. But under the relevant Clause 6 of the tender notice requirement was of sending of the earnest money either by cash or by Demand Draft drawn on the State Bank of India. The learned Judges of the Hon''ble Supreme Court held that this deviation does not relate to a deviation in the essential terms of the contract as the Court found that the cheque certified by the Union Bank of India drawn by its own Bank satisfied the tender conditions and the tender committee by way of abundant caution got a further verification from the Bank. Therefore, there is no error on the part of the authority in accepting the tender. Mr. Pal, submitted that in the instant case, the departure relating to the bid security is a departure of an essential item of contract and is not permissible. Reliance was also placed by Mr. Pal on the judgment of the Hon''ble Supreme Court in the case of West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, . In that case Mr. Pal placed reliance on Paragraph 28 of the judgment.

36. The learned counsel for the State and the learned counsel for the private respondents also relied on certain judgments. The Court proposes to consider the same in this judgment.

37. The basic question here is one of acting with fairness and in public interest. There is a degree of overlap between the two. Again fairness and reasonableness are kindred concepts in administrative and constitutional law and fairness today is virtually the touchstone of reasonableness. And the standards of fairness are not cut and dried, in fact, they admit of infinite variety.

38. But certain principles have been judicially determined to indicate how the Government should act in a situation where it is considering the claims of various tenderers at a threshold stage. In words of Justice Bhagawati in Ramana, Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , the discretion of the Government must be "confined and structured by rational, relevant and non-discriminatory standards or norm". (See page 1638)

39. Therefore, at the stage of consideration of different offers there should not be any discrimination. Every valid offer should receive a fair consideration by the Government. Now looking at the facts of this case, it is clear that the offers of both the petitioner and that of the private respondent have been considered. The grievance of the petitioner is that the offer of the private respondent should not have been considered at all, mainly because of the fact that the validity period of

one of the two bank guarantees furnished by it. on the date of the opening of the technical bid, was short by two days. Of course, before the evaluation of the technical bid the same was extended and the Bank confirmed the same. But the petitioners' case is that such extension of the period of technical bid is not permissible under the terms of ITB.

40. Now it cannot be disputed that all the terms in the ITB are not of same importance. Some of them are essential whereas some are ancillary. This has been made clear both in *M/s. G. J. Fernandez Vs. State of Karnataka and others*, and *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, .

41. The learned counsel for the petitioner has urged that the clause relating to bid security in 16.2 and 16.3 are essential terms in the ITB and non-compliance with those terms makes the bid non-responsive and liable to rejection. But then how the clauses in ITB are to be read.

42. In *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, the Hon'ble Supreme Court held that clauses in ITB "should be complied with scrupulously" and "adherence to the instructions cannot be given a go-by by branding it as a pedantic approach". It has also been stated that "adherence to the ITB or rules is the best principle" and in "the best public interest". (see para 24)

43. But the factual context of the case in *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, should be considered to appreciate those observations. In *Patel Engineering*, the learned judges of the Supreme Court found, on facts, that the errors which were sought to be corrected are not mere clerical or mechanical ones. If those errors are allowed to be corrected, that would result in re-writing unit rates in 37 entries and also appending an explanation regarding the splitting of unit rates.

44. The Court held that neither Clause 27 nor 29 or any other clause in ITB permits such a correction (see para 22, page 467). In the context of those facts, the observations about the interpretation of clauses in ITB made in Para 24 of the judgment in *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, must be understood.

45. Normally the clauses in a contract cannot be read as one reads the statutory provision. They must be read keeping in mind the intentions of the parties.

46. On a close scrutiny one finds that Clause 16.3 of ITB has two parts. The first part requires that a bid is to be accompanied by an acceptable bid security and secondly it must be secured as indicated in Sub-clauses 16.1 and 16.2. The bank guarantee of a nationalized bank is certainly an acceptable bid security. Now so far as its validity period is concerned, it is stated in the Bank Guarantee dated 13-9-2001 "This guarantee will remain in force upto and including the date 24th February 2002, i.e. 165 days after the deadline for submission of Bids" (page 18

of the Affidavit-in-Opposition by the State). So the intention of the private respondent is to keep the bid security valid upto 165 days after the deadline for submission of bids. Here the intention being clear, the bid of the private respondent cannot be totally thrown out of consideration Just because there was an error in the counting of 165 days from the date of the deadline, in this background the Court has to keep in mind the factual aspect that the form prescribed for submission of Bank Guarantee clearly provides that the date upto which the Bank Guarantee is to remain "should be inserted by the employer before the Bidding documents are issued".

47. There is, therefore, a clear obligation on the employer to furnish the date. Here, admittedly the employer did not discharge its obligation of furnishing the date. Now will it not be unfair on its part to reject the offer of a qualified tenderer on the ground that the bank guarantee furnished by the tenderer with the clear intention to keep it valid for 165 days falls short by two days by an error of calculation. It is very likely that the errors might have been induced by the failure of the employer to furnish the date. It is not disputed that immediately on detection and before evaluation of the technical bid. the validity period was amended and extended much beyond 165 days.

48. Can the Court, in the aforesaid facts and circumstances describe the action of State respondents to be unfair just because the tender of the private respondents is not rejected on that ground. On the other hand the State respondents considered the tender of the private respondents and also the tender of another party whose bank guarantee was also similarly amended along with the tenders submitted by others including that of the petitioner. It appears from the report dated 28-9-01 of the Evaluation Committee of Technical Bids that the bid securities submitted by the bidders were considered along with the amendments. Therefore, no special favour was shown to the private respondents. Similar treatment was accorded to another tenderer namely Shapoorji Pallorji & Co. Ltd.

49. It has not even been urged by the petitioners that there is any malice in fact or mala fide operating with the State respondents against the petitioner. No such case has been made out.

50. In the context of the facts pointed out above, the conscience of the Court is not disturbed by the action of the State respondents and it cannot hold that the action of the State is either unreasonable or unfair. On the contrary this Court finds that the State respondents have followed "relevant, rational and non-discriminatory standards" and that is all what is required of them, as succinctly put by Justice Bhagawati in *Ramana, Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, in the concluding portion of paragraph 12, after noticing the observation of Justice Frankfurter in *Vitraelli v. Seaton*, (1959 (359) US 535) in Paragraph 10.

51. The facts in *Ramana, Ramana Dayaram Shetty Vs. International Airport*

Authority of India and Others, are well known. The condition of eligibility, namely, registered class II hotelier with a minimum experience of 5 years mentioned in the tender notice was sought to be diluted in the tendering process. That was found to be bad and in that context the observations of Justice Frankfurter were considered very apposite by the Apex Court and it was held that the State's contracting power must be governed by principles of Article 14.

52. Bereft of all verbiage, the core of the guarantee epitomized in Article 14 is fairness based on reason. This Court finds that the said guarantee in the facts of this case has not been denied to the petitioner.

53. After all what is the requirement of a bank guarantee? The purpose of the Bank Guarantee is clearly mentioned in the conditions stipulated in the Bank Guarantee forms. Those conditions are set out below :

"The Conditions of this obligation are :

(1) If after Bid opening the Bidder withdraws his bid during the period of Bid validity specified in the Form of Bid:

OR

(2) If the Bidder having been notified to the acceptance of his bid by the Employer during the period of Bid validity:

(a) fails or refuses to execute the Form of Agreement in accordance with the Instructions to Bidders, if required: or

(b) fails or refuses to furnish the Performance Security, in accordance with the Instructions to Bidders; or

(c) does not accept the correction of the Bid Price pursuant to Clause 27.

We undertake to pay to the Employer up to the above amount upon receipt of his first written demand, without the Employer having to substantiate his demand, provided that in his demand the Employer will note that the amount claimed by him is due to him owing to the occurrence of one or any of the three conditions, specifying the occurred condition or conditions."

54. This being the purpose of furnishing a Bank Guarantee, the clause in 16.3 must be construed keeping in mind the said purpose. If so construed, in my judgment, the said clause as to period of validity must be reasonably read and such a reasonable construction will not rule out the possibility of amendment of an obvious error and especially when correction of such an error, before evaluation of the bid, does not in any way prevent a fair consideration of other bids. But the corrections of mistakes, prayed for in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, , were of such a magnitude that, if permitted, the corrections would have altered the "complexion" of the bid. (para 25) That is why they were declined. The decision in Patel Engineering is not an authority for the proposition that a non-material correction of an

obvious mistake for extending the validity period of Bank Guarantee without affecting other bids is not permissible.

55. In my view, Clause 16.3 must be read with Clause 23.4 (ii). Clause 23.4 (ii) is in the following terms:

"23.4 (ii). After receipt of confirmation of the bid security, the bidder will be asked in writing (usually within 10 days of opening of the Technical Bid) to clarify or modify his technical bid, if necessary, with respect to any rectifiable defects."

56. Apart from that the technical bid evaluation took place on 28-9-01 and on that date it was declared that the technical bids of all the 6 bidders including that of the private respondents were "substantially responsive". This evaluation of the technical bid of the private respondents, that it is substantially responsive, has not been challenged and possibly it cannot be challenged. Thai evaluation of technical bid has been made in terms of Clause 26.1 of ITB. Clause 26.1 of ITB is set out below :

"26.1 : During the detailed evaluation of "Technical Bids", the Employer will determine whether each Bid (a) meets the eligibility criteria defined in Clause 3 and 4: (b) has been properly signed; (c) is accompanied by the required securities and; (d) is substantially responsive to the requirements of the Bidding documents. During the detailed evaluation of the "Financial Bid", the responsiveness of the bids will be further determined with respect to the remaining bid conditions, i.e., priced bill of quantities, technical specifications, and drawings."

57. It is clear that there is substantial requirement with the bidding documents in respect of the technical bid submitted by the private respondents. Therefore, Clause 16.3 must not be read in isolation. The said clause must be read harmoniously with Clause 23.4 (ii) and Clause 26.1.

58. Therefore, the recommendation of the Tender Evaluation Committee for accepting the bid of the private respondent does not call for any interference by this Court. This Court finds that Award Criteria in Clause 31 of ITB has been followed in the said recommendation. Clause 31.1 is set out below :

"31.1. Subject to Clause 32, the Employer will award the Contract to the Bidder whose Bid has been determined.

(i) to be substantially responsive to the Bidding documents and who has offered the lowest evaluated Bid Price; and

(ii) to be within the available bid capacity adjusted to account for his bid price which is evaluated the lowest in any of the packages opened earlier than the one under consideration.

In no case, the contract shall be awarded to any bidder whose available bid capacity is less than the evaluated bid price, even if the said bid is the lowest evaluated bid. The contract will in such cases be awarded to the next lowest

bidder at his evaluated bid price".

59. It is not in dispute that the rate of the private respondent is the lowest.

60. But so far as Clause 32 of ITB is concerned, a part of the said clause which purports to confer unfettered power on the employer to reject or accept any bid without informing any ground to the affected bidder is not in consonance with the evolving mosaic of constitutional and administrative law as developed by the Hon"ble Supreme Court right from its decision in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . In fact such a clause was frowned upon in *Ramana* (para 8).

61. Since it cannot be disputed that the contracting power of the State is subject to Article 14 and the said Article is an antithesis to all shades of arbitrary and unreasonable power, this Court holds that the conferment of arbitrary power in the first part of Clause"32 namely the employer"s right to accept or reject any tender without informing the affected bidder of the grounds of such rejection is ultra vires Article 14. Conferment of such an arbitrary power is opposed to the very fabric of constitutional law woven around Article 14 since the decision of the Apex Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, and which has been further developed in the case of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, .

62. But since in the instant case, the impugned decision has not been taken under Clause 32, this declaration of ultra vires of the first part of Clause 32 does not affect the said decision.

63. So far as other objections raised by the petitioner about the validity of the bid of the private respondents are concerned, they do not merit any serious consideration.

64. Dr. Chakroborty. appearing for the private respondents, handed over certain documents to the other side and also to Court to show the sets of undertaking filed by his client in answer to the letter of the State respondent dated 19-9-2000. This Court has compared the documents which were filed before the State"s letter with those which were filed after the letter. The Court found hardly any difference between the two. It Is a matter of mere form and not of substance. A mere distinction between twiddledum and twiddledee. On the ground this Court cannot interfere with the decision of respondent.

65. The same is true of the correction alleged to be unauthorisedly made in the Financial Bid. Those corrections were stamped and initialled and were admittedly there before the opening of the financial bid. It is nobody"s case that those corrections were surreptitiously made or were smuggled in after the opening of the financial bid. So the absence of dates loses much of its significance in this factual background. Apart from that those corrections also do not materially alter the bid price. Therefore, those corrections cannot be equated with corrections which were not permitted by the Apex Court in *West Bengal State Electricity*

Board Vs. Patel Engineering Co. Ltd. and Others, .

66. So judging from all angles it appears to this Court the purpose of filing this writ petition is to eliminate a competitor namely the private respondents. A writ petition to achieve that purpose will not succeed in a case where there is no other ground of judicial review. This is settled by Supreme Court in the case of M/ s. G. J. Fernandez Vs. State of Karnataka and others, .

67. This judicial trend of observing restraint in matters of interference with public tender involving projects of national importance was noticed by Supreme Court in Tata Cellular Vs. Union of India, , After noticing the case law on this point, the three judges Bench in Tata Cellular pointed it out in Paragraph 94. The same trend continues and has been noticed also in the case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, . There are other recent judgments striking the same note. Courts now permit the respondents a "little free play at the joints" as long as they keep themselves within "relevant, rational and non-discriminatory norms".

68. A recent judgment by a Single Judge of this Court in Golam Mohammad case AIR 2001 Cal 5, relied on by the petitioner, was rendered on completely different facts. In that case the tender filed by the petitioner was totally left out of consideration on the basis of an undisclosed criteria not mentioned in the tender notice. This was sought to be justified before the Court on grounds of pragmatism. In the context of this factual background, observations were made in para 34. The facts of the case in hand are totally different and in this case the broad parameters of Article 14 have not been breached. So those observations in Golam Mohammad made in a different context, do not render any assistance to the petitioner's case.

69. Clause 32.1 of ITB is set out below :

"Notwithstanding Clause 31. the Employer reserves the right to accept or reject any Bid. and to cancel the Bidding process and reject all Bids, at any time prior to the award of Contract without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action."

70. The underlined part of Clause 32.1 is declared ultra vires Article 14 of the Constitution. Since the rest of Clause 32.1 is clearly severable, the same is, therefore, valid.

71. But since the impugned action of the State is not based on any part of Clause 32.1 of ITB, the same is upheld.

72. With the aforesaid declaration, the writ petition is dismissed. All interim orders are vacated.

73. There will be no order as to costs.

LATER :

74. Prayer for stay is considered and rejected.

75. Let xerox certified copy of this judgment and order be given to the parties expeditiously, if applied for. Petition dismissed.