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**(2019) 12 BOM CK 0063**

**In the Bombay High Court**

**Case No :** Writ Petition No. 13954 Of 2018, Civil Application No. 6319, 3911 Of 2019

Gurudatta Infrastructures And Ors

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

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**Date of Decision :** 18-12-2019

**Acts Referred:**

Contract Act, 1872 — Section 7

Constitution Of India, 1950 — Article 12, 14, 226

**Citation :** (2019) 12 BOM CK 0063

**Hon'ble Judges :** S.V. Gangapurwala, J;Avinash G. Gharote, J

**Bench :** Division Bench

**Advocate :** Sanket S. Kulkarni, S.B. Yawalkar, M.K. Goyanka, S.G. Chapalgaonkar

**Final Decision :** Dismissed/Disposed Of

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**Judgement**

Avinash G. Gharote, J

1. Rule. Rule made returnable forthwith. Heard learned Counsel for the parties finally with their consent.

2. Respondents No.2 and 3 on 04.07.2018 published notice in local dailies "Lokmat" and "Sakal" inviting E-tenders, for the work of reconstruction of S.T. bus stand (Depot) and sub-work at Beed. The cost of the tender was Rs. 14,38,28,045/-. A schedule was published, according to which the bids were to be submitted, scrutinized, opened and accepted. The cost of the tender was Rs. 17,700/- and the earnest money deposit (EMD) was Rs. 14,56,000/-. The work to be allotted, was to be completed within 730 days from the work order. Certain terms of the notice inviting tender (NIT), being material, are quoted as under:

1) Technical Bid Envelop (Cover No.1)

h) Scanned from original copy of list of similar works in hand and works tendered at present, out of which one work at least to the extent of

(1) 50% amount of Tender work, in the name of bidder/firm, as per prescribed proforma given in Form no. - I alongwith supporting certificates,

(2) and in case of private work 100% amount of tender work with valuation certificate showing name of work and amount, from Govt. Approved Registered Valuer, Architect with supporting documents related to work

(3) if there is no single work in hand to the required extent then decision for qualifying the bidder will be taken on the basis of Registration Certificate and Solvency Certificate/Bank Cash Flow Certificate issued by the Nationalized/ Scheduled Bank.

(i) Scanned from original copy of list of similar works executed in last three years, in the name of bidder (firm), as per prescribed proforma given in Form No. III, V & VI alongwith supporting certificates.

And in case of private work 50% amount of tender work with valuation certificate showing name of work and amount, from Govt. Approved Registered Valuer, Architect along with supporting documents related to work.

For the work having amount put to tender above Rs. 150 Lakhs (In case of non Renewal of Registration Certificate & for Un- registered but Experienced bidders)

(i) Financially sound and has proven tract record in successful completion of a project of similar nature involving Commercial / Industrial buildings of value not less than 50% of Estimated Cost of project / work cost during the last three years and having adequate number of qualified technical personnel.

(ii) -----

(iii) -----

iv) In case of private work supporting certificate form concerned authority is essential Necessary Certificate in case of own project will be accepted, but with the commencement / occupation / completion certificate from local authority, supported with Valuation Report from Govt. Approved Registered Architect's/ Engineer's / Valuer's report with Balance Sheet / Tax Audit Report / Tangible Net worth / Annual Turnover duly certified by C.A.

(v)-----

(vi)-----

Note: Even though the bidders need the above qualifying criteria, they are subjected to be disqualified if they have made misleading or false representation in the forms statements and attachments submitted as proof of the qualification requirements and/or record of post performance, such as abandoning the works, not properly completing the contract, inordinate delay in completion, litigation history or financial failures, etc.

Term No. 18. Acceptance of tender will rest with the competent authority who

reserves the right to reject any or all tenders without assigning any reason therefor. The tenderer whose tender is accepted will have to enter in to a regular B-1 agreement within 10 days of being notified to do so. In case of failure on the part of Tenderer to sign the agreement within the stipulated time, the earnest money paid by him shall stand forfeited to the M.S.R.T.C. and the offer of the tenderer shall be considered as withdrawn by him.

3. The respondent Nos.2 and 3 received six offers all of which were claimed to have been found to be eligible as per the Technical Bid Evaluation Statement. In so far as the present petition is concerned, the contractor's registration certificate was not submitted by the petitioner, as it was a private contractor and, therefore, considering that the value of the work was more than 150 lakhs, it was necessary for it to strictly comply with the requirements as prescribed therefor, in terms quoted above.

4. The financial offers as contained in envelope-2 were opened on 18.09.2018 at 13.19 p.m. online, in which the offer of the petitioner of Rs.12,72,83,505/- was found to be 11.50 % less and, thus, the lowest (L-1). The offer of respondent No.4 of Rs.12,92,87,029.85/- was found to be 10.11% less (L-2). As per the terms of the notice inviting tender, the petitioner thereafter under his letter dated 19.09.2018, deposited a sum of Rs.36,00,065/- vide D.D. No.958317, dated 18.08.2018, as additional security deposit. The offer of the petitioner being the lowest, a letter was issued to him on 24.09.2018, whereby he was intimated that his offer was the lowest and the same was being recommended to the Board of Directors for approval. As the approval from the Board of Directors of respondent No.2 was not forthcoming, the petitioner vide letters dated 24.09.2018 and 29.11.2018, requested for issuance of work order. There being no communication from the side of respondents No.2 and 3, the present petition is filed on 11.12.2018 seeking a relief of issuance of the work order in favour of the petitioner, in which on 14.12.2018, a notice was issued to the respondents.

5. The petitioner, thereafter vide Civil Application No. 15094/2018, brought on record a letter dated 11.12.2018, issued by respondent No.3 to respondent No.4, whereby the work under the NIT, was given to respondent No. 4.

6. Respondent Nos.2 and 3 in their reply, have contended that the petitioner, for satisfying the eligibility criteria, as contained in Clause 1 (h) and (i) of the tender document, had submitted an agreement dated 10.07.2018 with one CPM Realty, Builders and Developers, which though on primary scrutiny was prima-facie considered, however, the same on further scrutiny was found to be not only vague, uncertain, but also false and fraudulent, for which reason the Board had held the petitioner ineligible, and respondent No.4, was therefore called for negotiations and having agreed to perform the work at the amount quoted by the petitioner, was allotted the work. Specifying the reasons, it was stated that the agreement between the petitioner and the said CPM Realty was claimed to have been executed on 10.07.2018, as against which the stamp paper on which it was written, was sold on 13.07.2018; though the value of the work therein was

stated to be Rs.14,96,00,190/-, the proper stamp duty was not paid; the nature of the work was not specified; the purpose for which the building was being constructed was not specified; the name of the owner/partner/authorized signatory was not mentioned; the name of the building, location was not mentioned and there were no supporting documents, such as, sanctioned building plan etc., all of which created the impression that the agreement purported to be dated 10.07.2018 was brought about for the purposes of the present NIT and was not a genuine document. It was further submitted, that the work was already allotted to respondent No.4 on 11.12.2018 and in spite of having knowledge of the same, no challenge had been raised to the letter dated 11/12/2018.

7. Respondent No.4 filed his reply on 25.04.2019 wherein he contended that consequent to the work being allotted to him on 11.12.2018, he had already started the work.

8. The petitioner filed rejoinder on 11.03.2019 and contended that there was no mechanism in the tender document to disqualify a bidder after acceptance of the bid. The rejection/ disqualification was never communicated nor any opportunity of hearing was given. It was further contended that respondent No.4 was not eligible, inasmuch as age of the equipment as shown by him was much more than what actually it was. The negotiations were done with respondent No.4 on telephone and the other bidders were not called.

9. Respondents No.2 and 3 filed an additional reply contending that there was no denial on the part of the petitioner that a false agreement was filed by him in support of his eligibility. No registration certificate, as required, was filed. The acceptance of eligibility of the petitioner, was merely due to oversight/mistake on the part of the Executive Engineer. It was further contended that the petitioner had played mischief with the Court inasmuch as though Civil Application No. 15094/2018, purported to place a document on record, mischievously prayer clause 'B' seeking quashing of the letter dated 11th December 2018, allotting work to respondent No.4 was inserted, which ought not to have been done, which reflects upon the conduct and bonafides of the petitioner. It was further submitted that there was a Departmental Tender Committee (DTC) constituted by respondent No.2, which alone had power to accept tenders of any amount. The Executive Engineer, on 24.09.2018 had forwarded the list of all the bidders for further process, which was placed before the Departmental Tender Committee, who having found the agreement dated 10.07.2018 filed by the petitioner to be false, after taking legal opinion, the petitioner was held ineligible and respondent No.3 was directed to negotiate with respondent No.4, who on 04.12.2018 gave his acceptance, resultant to which, the letter dated 11.12.2018 was issued to respondent No.4. It is further stated that the disqualification was communicated to the petitioner vide letter dated 10.01.2019 containing reasons.

10. The petitioner filed rejoinder, whereby it was contended that consequent to acceptance of the financial bid, there was no reason or cause for further

scrutinizing the documents, particularly so, when there was no complaint from any quarter. It was further contended that, the agreement dated 10.07.2018 was not required to be stamped or registered, as there was no such condition in the tender document and if at all there was any query, the petitioner could have been called upon to answer the same. It is stated that in fact, a query was made with CPM Realty, whose reply supported the petitioner.

11. We have heard the learned Counsel for the parties, whose submissions were in consonance with their respective written averments, written notes of arguments and have perused the record with their assistance.

12. It is a trite position of law that in the realm of tenders, a notice inviting tender is, in fact, an invitation for an offer to be submitted by the tenderer. On submission of the tender, the satisfaction of the eligibility criteria as contained in the tender document, is a sine qua non for the further process to proceed. However, this is always subject to the terms of the tender and the established procedure in various departments. Where the offer, is subject to further approval, any communication, intimating the tenderer about acceptance of his offer, would not be considered to create a binding contract, sans the approval.

13. In respect of the scope of judicial review, the position has been considered by various Courts time and again the conspectus of which in so far as the present matter is concerned, can be said to be as under.

13.1 The Hon'ble Apex Court in W.B. Electricity Board Vs. Patel Engineering Co. Ltd. and others, (2001) 2 SCC 451, has held thus:

"32.....

The project undertaken by the appellant is undoubtedly for the benefit of public. The mode of execution of the work of the project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of work of the project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and on the other hand it affords the appellant a choice to select the best of the competitors on competitive price without prejudice to the quality of the work. Above all it eliminates favouritism and discrimination in awarding public works to contractors. The contract is therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance of rules and conditions cannot be ignored....."

13.2. In Kishore Chandrakant Shah Vs. State of Maharashtra and others, 2008) 3 Mh.L.J. 760, the Division Bench of this Court held in para 11, thus:

"11. It is well established in law that the Government is entitled to enter into any

contract with the citizens and the judicial review in such cases is restricted and the Court can interfere only where the Government action is arbitrary, unreasonable or contrary to the public interest or the same discriminates between persons similarly situated....."

13.3. In *Kailash Constructions Vs. Vidarbha Irrigation Development Corporation and others*, 2011(4) Mh.L.J. 718, the Division Bench of this Court held in para 10, thus:

"10. The observations made by the Apex Court show that if the decision relating to award of contract is bonafide and in public interest, Courts will not, in exercise of powers of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out....."

13.4. In *Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India* (2006) 10 SCC. 1, the Hon'ble Apex Court held that while judicial review cannot be denied in contractual matters or matters in which the Government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in larger public interest.

13.5. In *Michigan Rubber (India) Ltd. Vs. State of Karnataka*, (2012) 8 SCC 216, the following principles have been laid down in the matter of exercise of powers of judicial review in contractual and tender matters:

"23) From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest

in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24) Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" ; and

(ii) Whether the public interest is affected.

If the answers to the above questions are in negative, then there should be no interference under Article 226."

13.6. In Uttar Pradesh Avas Evam Vikas Parishad and others Vs. Om Prakash Sharma, (2013) 5 SCC 182, relying upon the law as laid down in (a) Meerut Development Authority Vs. Association of Management Studies, (2009) 6 SCC 171 (b) Rajasthan Housing Board Vs. G.S. Investments, (2007) 1 SCC 477, (c) State of Orissa Vs. Harinarayan Jaiswal, (1972) 2 SCC 36, the Hon'ble Apex Court has held thus:

"31. In view of the law laid down by this Court in the aforesaid decisions, the learned Senior Counsel Mr. Rakesh Dwivedi has rightly placed reliance upon the same in support of the case of the first defendant, which would clearly go to show that the plaintiff had not acquired any right and no vested right has been accrued in his favour in respect of the plot in question merely because his bid amount is highest and he had deposited 20% of the highest bid amount along with the earnest money with the Board. In the absence of acceptance of bid offered by the plaintiff to the competent authority of the first defendant, there is no concluded contract in respect of the plot in question....."

13.7. In this regard we may with benefit quote the principles as laid down by the Hon'ble Apex Court after considering a number of judgments on the point, in Silppi Constructions Contractors v. Union of India and Another, Special Leave Petition (Civil) Nos. 13802-13805 of 2019, decided on June 21, 2019 [2019 SCC OnLine SC 1133 ] which are as under:

"7. In Tata Cellular v. Union of India<sup>3</sup>, it was held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism. The principles enunciated in this case are:-

"94. ....

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

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

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

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a 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."

8. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.*<sup>4</sup>, this Court held that superior courts should not interfere in matters of tenders unless substantial public interest was involved or the transaction was mala fide.

9. In *Air India Ltd. v. Cochin International Airport Ltd.*<sup>5</sup>, this Court once again stressed the need for overwhelming public interest to justify judicial intervention in contracts involving the State and its instrumentalities. It was held that Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

10. In *KSIIDC Ltd. v. Cavalet India Ltd.*<sup>6</sup> it was held that while effective steps must be taken to realise the maximum amount, the High Court exercising its power under Article 226 of the Constitution is not competent to decide the correctness of the sale affected by the Corporation.

11. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*<sup>7</sup> it was held that while exercising power of judicial review in respect of contracts, the Court should concern itself primarily with the question, whether there has been any infirmity in the decision-making process. By way of judicial review, Court cannot examine details of terms of contract which have been entered into by public bodies or State.

12. In *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*<sup>8</sup> it was held that it is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefor; the same ordinarily being within its domain. Therefore, the court's interference in such matters should be minimal. The High Court's jurisdiction in such matters being

limited, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

13. In *Jagdish Mandal v. State of Orissa*<sup>9</sup> it was held:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.

The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold....."

14. In *Michigan Rubber (India) Ltd. v. State of Karnataka*<sup>10</sup> it was held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

15. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*<sup>11</sup> it was held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision. The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

16. In *Montecarlo Ltd. v. NTPC Ltd.*<sup>12</sup> it was held that where a decision is taken

that is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

17. In *Municipal Corpn., Ujjain v. BVG India Ltd.*<sup>13</sup> it was held that the authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such undeserving person/company to carry out the work. 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 re-doing the entire work.

18. Most recently this Court in *Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd.*<sup>14</sup> observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias.

However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters.

This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big

blunder.

In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal.

The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

25. That brings us to the most contentious issue as to whether the learned single judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a state within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. The Respondent nos. 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done."

13.8. The Hon'ble Full Bench of this Court in Electrical Contractors Association of Maharashtra, Mumbai Vs. CIDCO, Mumbai, 2019 (6) Mh.L.J. 130, has held thus:

"27. With reference to the law noted by us here- in-above concerning judicial scrutiny of a tender, the position would be that since the basic requirement of Article 14 is fairness in action by the State, the norms specified in a tender would be within the domain of the executive and unless it is shown that a norm is malicious and intended to confer benefit to an individual, it would be conceded as a valid norm.

28. The validity of a norm could be tested on the principle of a criteria having a reasonable nexus with the objects sought to be achieved.

13.9. In A.U.W.Services Private Limited Vs. State of Maharashtra, 2019(6) Mh.L.J., it has been held thus:

"27. The words used in the tender documents cannot be ignored or treated as redundant and they must be accorded their meaning and necessary significance. The tender inviting authority is the best person to understand and appreciate its requirements."

It has further been held that it is not possible for the Court to interpret the terms to extend any relaxation of the conditions of the tender.

In addition to the above, it can also be stated that no judicial review would be permissible on mere procedural aberrations or error in assessment or prejudice and where the actions were bonafide.

14. Thus it is a settled position of law, that:

(a) The principle of awarding the contract to the lowest tenderer applies when all things are equal.

(b) It is equally in public interest to adhere to the rules and conditions subject to which bids are invited.

(c) It is for the authority to decide whether the qualifications or the price offered is adequate. While accepting or rejecting a bid it is merely forming an executive function. The correctness of its conclusion is not open to judicial review.

(d) Merely because a bid is the lowest the requirement of compliance of rules and conditions cannot be ignored.

(e) The highest bidder does not acquire a vested right, so long as the tender has to be approved by the Higher Authorities or the contract is to come into existence only on a written agreement to be executed between the parties.

(f) The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids.

(g) No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

(h) Public interest will have paramount consideration.

(i) The Courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable.

(j) The Court does not sit like a Court of appeal over the appropriate authority.

(k) The authority floating the tender is the best judge of its requirements and, therefore, the Court's interference should be minimal.

(l) The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted.

(m) If two interpretations are possible then the interpretation of the author must be accepted.

(n) The need for overwhelming public interest can only justify judicial intervention in matters of contract involving the state instrumentalities.

(o) The Courts will only interfere to prevent arbitrariness, irrationality, bias, malafides or perversity.

(p) The norms specified in a tender would be within the domain of the executive and unless it is shown that a norm is malicious and intended to confer benefit to an individual, it would be conceded as a valid norm.

(q) The validity of a norm could be tested on the principle of a criteria having a reasonable nexus with the objects sought to be achieved.

(r) The words used in the tender documents cannot be ignored or treated as redundant and they must be accorded their meaning and necessary significance.

(s) The tender inviting authority is the best person to understand and appreciate its requirements.

15. The Courts, while considering a challenge to the decision of an authority in accepting/ rejecting a tender, will also have to consider that :

i) the preconditions or qualifications laid down ought to be satisfied.

ii) the contractor has the technical capacity and the resources to successfully execute the work.

iii) The contractor has the financial capacity and resources to execute the work.

iv) Where the conditions require the work of a similar nature having been executed or being executed, this should be demonstrable from the documents submitted. There cannot be any scope of raising any inferences, in this regard.

For any challenge to be successful, it will also have to be demonstrated that the decision, action or process:

a. was arbitrary or irrational.

b. was malafide.

c. was done to favour someone.

d. was discriminatory.

e. was unreasonable.

f. was whimsical.

g. was for ulterior purpose

h. was malicious

- i. was in misuse of statutory powers.
- j. was contrary to law.
- k. whether a condition, non-conformity of which non-compliance is alleged was an essential or non-essential condition.
- l. whether Public Interest was being adversely affected.

There may be other factors to be considered depending upon the nature of the work and the terms of the notice inviting tender, all of which have to be kept in mind.

16. In addition to the above, we find that in the matter of award of a contract through tender, the following additional factors are also necessary to be kept in mind:

(a) Where the eligibility criteria requires the tenderer to file documents, to satisfy the eligibility criteria, these documents must be clear, precise in all matters, including the nature of work done/in hand, where it was done, for whom it was done, the quantity of the work done, its value and all other requirements, as are necessary to satisfy the eligibility criteria . It is trite that any vagueness in the documents, would enable the authorities to reject the same.

(b) The documents must also satisfy the requirements of law, which are applicable to them including stamp duty, registration, etc.

17. The moot question which surfaces for consideration is:

What would happen, if a flaw is discovered in the eligibility documents submitted by the tenderer, subsequent to the opening of the financial bid. Could it be said, that in spite of such a flaw, which may in circumstances, make the tenderer ineligible, the same could not be considered as it was not discovered earlier ?. In our opinion, holding that any subsequent discovery of a flaw in the eligibility of a tenderer, cannot be considered in any circumstances, would render the very purpose of effective implementation of the work, nugatory. Of course, the future course of action, upon discovery of such a flaw, would depend upon various factors, to be considered by the Authority.

18. Considering a case in point, where on a prima facie perusal of the documents, it is held that the tenderer satisfies the eligibility criteria of having done a particular nature of work, of a quantified value, successfully, and subsequently it is found that the documents on the basis of which such satisfaction was arrived at, were either false, forged or fabricated, or for that matter, the eligibility had been obtained for extraneous consideration, it cannot be said that such subsequent discovery ought not to be considered at all as at a point, earlier in time, the same was not discovered or brought to the attention/ notice of the authorities.

19. It would therefore, always be permissible to the authorities, to consider any

document/material, brought to its notice, even subsequent in point of time, if it affects the eligibility of the tenderer in carrying out the work. This is so for the reason, that in every offer, the tenderer is duty bound to make a full and candid disclosure of all the relevant and material facts, necessary for the satisfaction of the eligibility criteria. Any suppression on the part of the tenderer, though the same may be discovered subsequent in point of time, would naturally affect the original offer itself, which would then become open for scrutiny again.

20. In the present case, in order to ascertain whether the decision taken by the respondents 2 and 3 for rejecting the claim of the petitioner of having satisfied the eligibility criteria was within the framework of law, it would be permissible to consider the relevant terms of the notice inviting tender, vis-a-vis the document/agreement dated 10/07/2018 as submitted by the petitioner, on the basis of which it claims that the eligibility criteria stood satisfied by it. In light of the eligibility requirement as per the tender clause quoted in para 2 above, it was expected that the tenderer, for satisfaction thereof would submit a document, which (a) was clear and precise in all matters, which such an agreement in-law would require, as well as (b) one which complied with the requirements of law as applicable thereto. Only such a document which satisfied these tests, would be permissible to be considered to comply with the eligibility requirement. The agreement dated 10.07.2018 as submitted by the petitioner, with its bid, therefore is required to pass these twin tests to satisfy the eligibility criteria.

20.1 In the instant case, the agreement dated 10.07.2018 has not been placed on record by the petitioner, but has been filed as Exh- R-1 by the respondent Nos.2 and 3 alongwith their reply affidavit dated 12.02.2019. This agreement has to be considered in light of the fact that the notice inviting tenders (NIT) was published in the local newspapers on 11.07.2018. The agreement is dated 10.07.2018, however, the stamp paper of Rs. 100/- on which it has been written, has been purchased by the petitioner on 13.07.2018, as is apparent from the endorsement thereupon, which clearly indicates that the agreement was prepared only with the intention to satisfy the eligibility criteria as contained in the tender document. It is trite that when the eligibility criteria mandates some work, it has to be either work completed or work in hand, which would mean, work commenced, or in the process of being commenced. In any case, it would not mean a document created for the purpose of satisfying the eligibility criteria, which appears to be the case, in the present matter, as can be gathered from a comparison of the date of the tender notice, date of the agreement and date of the stamp paper, which is later in point of time, which is inexplicable. One can understand use of a stamp paper of a prior date, than the date on which the agreement is said to have been entered into, however, the later date of the stamp paper, leaves much to doubt about the genuineness of the document.

20.2. That apart, if the alleged agreement dated 10.07.2018 is perused, though the value of the work is stated to be Rs. 14,96,00,190/- (Rupees Fourteen Crores Ninety Six Lakhs One Hundred and Ninety only), and is for the work of "for all

the with material works like brickwork, plaster, gypsum, fall ceiling, flooring, interior painting, water supply, sanitation etc.", for the project of CPM Estate, NH-3, Adgaon, Nashik, as per the plans, designs, and elevations of the said intended buildings, claimed to have been prepared by the Architect of CPM Realty and as per the structural drawings, specification, method of concreting and other such details in respect of RCC Works for the project as prepared by their Engineer, no such drawings are annexed to the agreement. When the work was to the extent of nearly 15.00 crores, and has to be done in accordance with the drawings and specification prepared, it is naturally expected that such drawings and specifications, signed by both the parties, would form a part and parcel of the agreement. The absence of any such drawings and specifications, again affects the genuineness of the agreement. The agreement further speaks of having awarded the R.C.C. work too, which makes the inclusion of the structural plans a must.

20.3. It is inconceivable as to how the petitioner can comprehend the nature of work to be performed under the agreement, without the drawings or arrive at an estimate as to its cost. For determining the value of the work to be carried out under the agreement, the floor plans, structural drawings, specifications are a must, all of which are absent in the present case. The entire agreement runs into mere six pages of which the first page is the stamp paper, with a single line and the last page bears signatures, leaving only four pages, to fathom the work. Further though page No.2 of the agreement spells out that the plans, designs, drawings, elevations, structural drawings, specifications are prepared by the Architect and Engineer of CPM Realty, term No.3 of the Annexure B on Page No.4, says that First Party (CPM Realty) shall on or before the commencement of work provide all required drawings and specifications, which indicates that the drawings and specifications were not provided to the petitioner at the time of execution of the agreement on 10.07.2018. The entire agreement does not contain any term / clause as to how and after what stages the payment will be made by CPM Realty to the petitioner. The chart at Annexure A of the agreement only denotes the value of the work and not the stages of payment, as a perusal of the same would demonstrate. The agreement does not disclose the names of the partners of CPM Realty, who are representing the Firm and have signed it. The agreement does not contain the usual clauses, which an agreement with the nature of work as stated therein is expected to have. Thus, in sum and substance, the agreement dated 10.07.2018, which has been submitted by the petitioner in support of his claim of satisfying the eligibility criteria, is totally vague and non-specific and does not appear to be genuine.

20.4. To demonstrate its genuineness, the petitioner could have placed even on record of the petition, some document, which could either be the drawings, plans, structural drawings, specifications, however, nothing has been placed on record. A reading of the agreement, shows that the completion date for RCC work upto terrace slab was February 2020 (approx) which would indicate to one that substantial work must have been completed, as of now, which could not be

possible without the drawings / plans being sanctioned. In spite of the plea of non genuineness of the agreement dated 10.07.2018, of the petitioner, having been raised by the respondents, there is no counter plea nor any supporting documents have been placed on record to substantiate that the agreement dated 10.07.2018 was genuine. Thus, though the agreement dated 10/07/2018 on a cursory perusal, may appear to be an agreement between the parties thereto for the nature and value of the work as enumerated therein, however, an in-dept consideration of the same does not inspire confidence.

20.5. Here it would be material to note that the eligibility criteria requires a tenderer to satisfy the same "with supporting documents related to work". This expression, in our opinion, has not been inserted merely for the sake of it, but has been deliberately used, so as to ensure that, the eligibility of a tenderer can be tested on the anvil of the documents, which normally, considering the law applicable, ought to come into existence axiomatically. Considering the nature of work, which was to be required to have been done/in hand, was related to construction, the building plans, commencement certificate from the Planning Authority, the structural/architectural drawings, the plumbing/ electrical drawings, as sanctioned and approved by the concerned Planning Authority, would naturally be the 'supporting documents related to work'. However, in the instant case, except for the bare agreement dated 10/07/2018, nothing else has been annexed to the same, to support the claim that the petitioner actually had the work in hand. No proof of a single farthing having passed hands under the agreement dated 10/07/2018, has been either annexed in support of the document or placed on record of the petition. One really wonders how the agreement dated 10/07/2018 could pass muster, for the Executive Engineer of the respondents No. 2 & 3.

20.6. It is further pertinent to consider that the petitioner, being a private contractor, was not required to submit a 'Contractor's Registration Certificate'. The 'Contractor's Registration Certificate', is normally issued to a contractor after the concerned department issuing it, has fully satisfied itself as to the antecedents and credibility of a contractor in respect of works already done by it. In this view of the matter, as the petitioner was not required to submit a 'Contractor's Registration Certificate', it was all the more necessary for it, to submit supporting documents relating to work, which would have unquestionably satisfied the eligibility criteria as laid down. As is evident, no such document had been submitted, which is to its own detriment, and now the petitioner cannot be permitted to cry foul.

21. The reliance placed on the letter dated 24.09.2018 (Exh- E) issued by the Executive Engineer of the respondent No.3, coupled with the Technical Bid Evaluation Statement (Exh-C) and the e-mails dated 15.09.2018, to contend that the petitioner was duly qualified in the Technical and Financial Bid, and his offer being lowest, was entitled to carry out the work as a contract had come into existence, is misconceived. This is for the two reasons. The first is that the letter

dated 24.09.2018 itself in the last para contains the following statement:

महणून, सदर न्युनतम निविदा महामंडळाच्या आर्थिक हिताची असल्याने मे. गुरुदत्ता इंफ्रास्ट्रक्चर, यांची न्युनतम निविदा - 11.50 : कमी दराची मंजुरीसाठी / स्विकृतीसाठी शिफारस करण्यात येत आहे. ै

This would clearly indicate that though the financial offer of the petitioner was lowest, the Executive Engineer, Aurangabad, did not have any power or authority to accept the same, so as to bind the respondent Nos.2 and 3. The Executive Engineer, as is apparent from the language, merely recommended the offers, as received and opened, to the higher authorities, for acceptance / approval. This is further evident from the communication dated 31.01.1991, placed on record as Exhibit RR-1, by the contesting respondents, which speaks of the resolution No.90.10.30 dated 24.10.1990 passed by the Board of respondent No.2, whereby powers, as conferred upon various officers were enhanced, as depicted in Annexure - A annexed thereto. A perusal of this Annexure -A reveals that Executive Engineer (Construction) does not have power to accept the offer. It is only the Tender Committee (Page 138) which has the powers to do so. In the instant case, as on 24.09.2018, the Tender Committee had not come into the picture at all, rather the Executive Engineer, had merely recommended the lowest offer of the petitioner for acceptance / approval. Thus, a mere recommendation by the Executive Engineer, cannot be considered to be a binding contract.

21.1. The second reason for not accepting this contention is the language of Clause 18 of the tender document, which is reproduced as under:

"18. Acceptance of tender will rest with the competent authority who reserves the right to reject any or all tenders without assigning any reason there for. The tenderer whose tender is accepted will have to enter in to a regular B-1 agreement within 10 days of being notified to do so. In case of failure on the part of Tenderer to sign the agreement within the stipulated time, the earnest money paid by him shall stand forfeited to the M.S.R.T.C. and the offer of the tenderer shall be considered as withdrawn by him."

A perusal of Clause 18, would demonstrate that merely being the lowest tenderer, would not create a contract, rather the contract would come into existence only when the tenderer whose tender is accepted enters into a regular B-1 agreement within 10 days of being notified to do so. It is obvious that this was so, for the reason that prior to this, the Tender Committee was to have examined and satisfied itself as to the matters, which were so required, before going the so ahead. In this case admittedly there was no such notification to the petitioner, in terms of Clause 18, resultantly no agreement was entered into, due to which no contract came into existence between the petitioner and respondent Nos.2 and 3.

22. It is thus trite that consequent to the letter dated 24.09.2018, the matter stood, still at the stage of the recommendation being forwarded to the higher

authorities and in light of the express language of Clause 18, as quoted above, it cannot be said that any contract came into existence. This is further fortified by term No.38 of the tender document which mandates that the agreement will be executed and work order will be issued for work thereby mandating that unless and until an agreement is writing was executed between the parties, a contract would not come into existence.

23. Thus, though the bid by the petitioner was found to be the lowest, however, as the agreement dated 10/07/2018 was found to be misleading and false by the Tender Committee of the respondent No.2, in light of the right reserved in itself, as reflected from the language of the Note at the end of clause 1 of the NIT, the respondent No.2 clearly had a right to reject the offer of the petitioner.

24. It is further material to note that the work in question relates to the reconstruction of S.T. bus stand at Beed, which is an amenity to be made available to the public at large. The work has already been allotted to respondent No.4 on 11/12/2018 which is the admitted position. Any interference at this stage, when already a year has passed, would naturally delay the project and affect adversely the public interest.

25. Much ado has been made by the respondents that there is no relief claimed in the petition, vis-a-vis the letter dated 11/12/2018 allotting the work to respondent No.4, in light of which the petition could not be entertained. Our attention was invited to the Civil Application No. 15094/2018, filed by the petitioner in which the following reliefs were sought amongst others:

(A) The applicant may kindly be permitted to bring on record the letter dated 11/12/2018 on record.

(B) By issuing an appropriate relief, order or direction, the letter dated 11/12/2018 issued by respondent No.3 may kindly be quashed and set aside.

(C)----- .

(D) -----

(E) -----

(F) -----

[We are not here concerned with the prayer clauses made in (C) to(F) ]

25.1. By an order dated 19/12/2018, this Civil Application No.15094/2018 was allowed in terms of prayer clauses (A) & (B), which order reads as under:

"P.C.

1. Heard learned Counsel appearing for the applicant. Perused averments made in the application.

2. Without prejudice to the rights and contentions of the parties and right to file

reply, civil application is allowed in terms of prayer clauses (A), (B). Necessary amendment be carried out on or before 21.12.2018.

3. List the writ petition on 21.12.2018."

The petitioner thereafter amended the petition by inserting prayer clauses (B) to (F) in the petition on 25/01/2019.

25.2. Respondents No.2 & 3 on 01/02/2019 moved an application vide Civil Application No. 2142 of 2019 in Civil Application No. 15094/2018 seeking modification of the order dated 19/12/2018 as passed in C.A. No. 15094/2018 contending that the intendment behind C.A. No. 15094/2018 was for bringing the letter of allotment dated 11/12/2018 on record, however, the effect of granting prayer clause (B) in C.A. No. 15094/2018 could be considered as having allowed the same, which was not the intention of the Court, as is reflected from the language used in para 2 of the order dated 19/12/2018. It was, thus, prayed that the order dated 19/12/2018 be modified. The matter was heard and by a reasoned order dated 11/04/2019 the Court recalled the order dated 19/12/2018 in C.A. No. 15094/2018 to the extent of deleting prayer clause (B) from paragraph 2 of the order. The net result of this is that the order permitting amendment for inserting prayer clause (B) which raises a challenge to the letter dated 11/12/2018 allotting work to respondent No.4, stands recalled, consequently, there is no relief claimed in the petition vis-a-vis the letter dated 11/12/2018. Though much argument was raised that in absence of challenge to the letter dated 11/12/2018, though the respondent No.4 was a party respondent to the petition, no relief could be granted to the petitioner, we do not see any substance in the same, for the reason that had the original prayer clause (C) in the petition been granted that would have resulted in the award of the work to the petitioner, which could only have been done after a due consideration and nullification of the letter dated 11/12/2018.

26. The contention by the learned counsel for the petitioner, that there was no mechanism in the tender document to disqualify a bidder after acceptance of the bid does not hold much water, for two reasons, the first being that in the instant case, the bid of the petitioner was only recommended to the higher authorities for acceptance and was not accepted. The second being that the right to reject any offer, even after acceptance, when it has culminated into a contract, must be held to be inherent, in the terms of the tender and with the authority, otherwise, even in a case where, it is subsequently found that the tenderer, has played fraud upon the authority, by submitting forged and fabricated document, and if there was no clause in the agreement/work order for termination for past actions, the authority would not be in a position to terminate the same and would be saddled with an inept and inefficient tenderer, which would adversely affect public interest. This in our opinion, is impermissible in law and thus the right to refuse / reject the lowest offer, or for that matter to get out of the contract, if at all the same can be said to have come into existence, would always be available to the authority, where it is found that a fraud has been

practiced upon it. In fact as held in W.B.Electricity Board (supra) the authority is not bound to accept the lowest offer. An authority in a given case, depending on the situation arising can even, scrap the NIT and reissue a fresh one, for reasons given.

27. The next contention of the learned counsel for the petitioner, is that the rejection / disqualification was never communicated to the petitioner. The rejection was communicated to the petitioner, only 10.01.2019 (Ex. R-3 / 74), however, mere delay in communication of the rejection, by itself would not confer any right upon the petitioner.

28.The learned counsel for the petitioner has placed reliance upon:

- a) FCI/Kamdhenu Cattle Feed Industries (1993) 1 SCC 71,
- b) Madras City Wine Merchants Association / State of Tamil Nadu (1994) 5 SCC 509
- c) M.P. Oil Extraction / State of M.P. (1997) 7 SCC 592.
- d) UOI/Hindustan Development Corporation (1993) 3 SCC 499.

to contend that, the petitioner, along with the other tenderers, ought to have been called for negotiations, and negotiation, with the respondent No.4 alone was discriminatory and unfair and also violated the reasonable expectation of the petitioner who was the lowest bidder.

28.1.In the case of FCI / Kamdhenu (supra), it was held that:

"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

10. From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent

reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case.

Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good."

28.2. Madras City Wine Merchants Association (supra), was a case of change in policy for grant of liquor vending licence, by way of statutory provisions, Rule notifications, which was challenged on the plea of being violative of Article 14 of the Constitution of India, wherein it was held that the doctrine of legitimate expectation arises only in the field of administrative decisions. If the plea of legitimate expectation relates to procedural fairness there is no possibility whatever of invoking the doctrine as against the legislation as otherwise the power of the state will be fettered not to repeal a particular law, however much public interest may require the repeal. The principle of non-arbitrariness cannot also apply to a change of policy by legislation.

28.3. In the case of M.P. Oil Extraction (supra) it was held that although to ensure fair play and transparency in state action, distribution of largesse by inviting open tenders or by public action is desirable. It cannot be held that in no case distribution of such largesse by negotiation is permissible.

28.4. In UOI / Hindustan Development Corporation (supra) it was held that legitimate expectation only operates in public law field and provides locus standi for judicial review and its denial is a ground for challenging the decision / action. It has also been held that denial does not by itself confer an absolute right to claim relief, which could only be limited to cases where denial amounts to denial of any right or where decision / action is arbitrary, unreasonable and not in public interest.

28.5. There cannot be any quarrel whatsoever with the salutary principles laid down in the above decisions. However, what is to be seen is whether, the petitioner, had acquired any legitimate expectation or for that matter any right in the matter of its offer / tender. The answer in our humble opinion has to be in the negative, for the reasons, that in the matter of satisfying the eligibility criteria the doctrine of legitimate expectation would not apply. The parameters of the eligibility criteria having been laid down in the NIT and the terms and conditions as contained therein, the tenderer would be bound to satisfy the same. Non conformity with the eligibility criteria, cannot generate any expectation in the tenderer, legitimate or otherwise. The authority floating the NIT has every right to ensure that the eligibility criteria as laid down is fulfilled, as that factor, materially affects the work to be performed, under the NIT. That apart, in the instant case being L-1 also did not confer any right upon the petitioner as that was always subject to scrutiny by the Departmental Tender Committee (DTC) which rejected the offer of the petitioner on the ground that the petitioner did not satisfy the eligibility criteria for reasons already recorded above. Thus on any count whatsoever, the petitioner could not claim any legitimate expectation in its favour. As pointed out above, the acceptance of the technical bid of the petitioner, was always subject to the satisfaction of the DTC, which having found it unsuitable, was justified in rejecting its offer. Thus the principle of legitimate expectation is clearly not applicable, in the facts of the present case and the judgments relied upon by the petitioner are therefore of no assistance to it.

29. The petitioner, has not alleged malafides while addressing us. It is contended by the petitioner that it, and the other bidders, ought to have been invited for negotiations, which contention in so far as the petitioner is concerned, as it did not satisfy the eligibility criteria, the question did not arise. In so far as to the other tenderers are concerned, the petitioner has no locus standi to raise this issue being unable to satisfy the eligibility criteria. None of the other tenderers, have come forward to raise any challenge to the work awarded to the respondent No.4.

30. It would further be material to note that the offer of the petitioner was Rs.12,72,83, 505.18 whereas that of the respondent No.4 was Rs.12,92,87,029.85. The respondent No.4, who was found to be satisfying the eligibility criteria, had in negotiations, agreed to perform the work at the price as quoted by the petitioner. Thus there was no financial loss to the respondents 2 and 3, whatsoever.

31. The matter of acceptance can also be considered in light of the provisions of Section 7 of the Contract Act, 1872, which reads as under:

"7. Acceptance must be absolute.-In order to convert a proposal into a promise, the acceptance must-

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance."

That apart the acceptance, ought to be by a person / authority competent to do so. A perusal of the letter dated 24.09.2018, clearly indicates that the (a) it was not an acceptance at all but merely a recommendation and (b) the person issuing it, namely the Executive Engineer, Road Transport, Aurangabad was not the Competent Authority, but merely had forwarded the bids as received by him, with his recommendation, to the Managing Director, Mumbai of the Respondent No.2, who, in turn as per the circular at Exh.RR-1, was to place it before, the Department Tender Committee (DTC), as the power to accept or reject the same solely vested with the DTC. This has also to be viewed in light of clause 18 of the NIT, which states that the acceptance of the Tenders will rest with the Competent Authority. Admittedly, in any case, the Competent Authority, was not the Executive Engineer, who had written the letter dated 24.09.2018, of which even the petitioner was also aware of, as the language of the letter dated 24.09.2018, categorically reflected. Thus, even a plea of acceptance is not available to the petitioner.

32. Though reference to the Government Resolution dated 27/09/2018 was made by the learned Counsel for the petitioner, however, in the instant case, as the petitioner has been found to be ineligible, on the basis of the documents as submitted by it, the question of calling the petitioner for giving any explanation in respect thereof, did not arise at all.

33. We, therefore find that on the principles as stated above, the action of rejection of the bid of the petitioner, therefore does not call for any interference and the writ petition being without any merits, is hereby dismissed.

34. In view of the dismissal of the petition, Civil Application No. 6319/2019 and C.A. No. 3911 of 2019 do not survive and are accordingly disposed off.

35. Rule is discharged.

36. Before we part, we put on record our appreciation for the assistance rendered by respective learned Counsel for the parties.