
(1996) 12 DEL CK 0015

In the Delhi High Court

Case No : Civil Writ Petition No. 2421 of 1996

Hindustan Construction Co. Ltd.

APPELLANT

Vs

National Highways Authority of India

RESPONDENT

Date of Decision : 20-12-1996

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1997) 1 AD 257 : (1997) 1 ARBLR 343 : (1997) 40 DRJ 827

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : P.N. Lekhi, S. Bhartari, D.N. Popal, S. Parti, B.V. Panjwani, D.D. Thakur, Shailender Swaroop, Ravindra Bana, A.K. Sinha, A.K. Vali and R.S. Suri, for the Appellant;

Judgement

C.M. Nayar, J.

(1) This petition is directed against the respondents for a writ of certiorari to quash the decision in the matter of issuance of letter of acceptance for award of the work under contract No.II allegedly already approved by respondent No.I, National High- ways Authority of India (hereinafter referred to as "the Authority") in favor of respondent No.4 and for issuance of a writ of mandamus for directing respondents I and 2 to give effect immediately to its own resolution for award of the work under the said contract to the petitioner and for further directions to respondent No.3 to exercise its powers u/s 33 of the National Highways Authority of India Act, 1988 (hereinafter referred to as "the Act") to ensure that preference granted to Indian citizens or Companies or Firms is not, in any manner, prejudiced or whittled down at the instance of any foreign body or agency which is detrimental to the interest of the Indian Bidders.

(2) The petitioner is a Company duly incorporated under the Indian Companies Act, having its registered office at Bombay and is engaged in the business of Civil Engineering Construction of Roads, Hydroelectric Projects, Nuclear Power Plants, Thermal Power Plants etc. Respondent No.1 is National Highway Authority of

India which is a statutory Authority, constituted under the Act and is responsible amongst others for construction and improvements of National Highways in the country. Respondent No.3 is the Ministry of Surface Transport, which is the concerned Ministry having the administrative control over respondent No.1. Respondent No.4 is a Joint Venture Company constituted for the purpose of bidding for this contract and is having its office at Hyderabad.

(3) The Government of India, it is alleged in the petition, received a loan of US\$ 245 million from Asian Development Bank (hereinafter referred to as "ADB") towards the cost of National Highways Projects in the country. The said loan is required to be utilised for the particular purpose only, namely, laying down of the Highways as well as ancillary work connected therewith. After receiving the loan from Adb respondent No.1 invited tenders in September, 1995 for five different works relating to construction of Highways at different places in the country. According to the bidding documents the bids were to be submitted by pre-qualified bidders only. The said bids were required to be submitted by December 16, 1995 which date was subsequently extended to January 5, 1996 and the bids were opened on this date in presence of the bidders.

(4) The petitioner submitted its bid for works relating to contract Nos.I, Ii and III.

THE petitioner was pre-qualified bidder as required by respondent No.1 in bidding documents. Except for bids for contract No.2, all other bids were invited for option A, viz; Bituminous Surface (Flexible pavement) whereas for contract No. Ii, the invitation was for option B, viz; cement concrete surface (Rigid pavement) or for option A, viz; Bituminous surface or for both. Option B is a more cost-effective option in the instant case. The present petition is regarding the bid submitted by the petitioner relating to contract No.II for the work of Four laning and strengthening of existing two lanes from Raniganj (Km.474.00) to Paragraph (Km-515.236) Section of NH-2 in West Bengal. The petitioner further alleges that on March 9, 1996 a special meeting took place of the Board of respondent No.1 wherein the said respondent after considering various evaluated bids, came to the conclusion that the bids submitted by the petitioner company was the lowest evaluated bid. Therefore, in this meeting, the bid of the petitioner was approved. The copies of the Minutes of this meeting are filed as Annexure "A" to the writ petition. The same may be reproduced as hereunder:

"MINUTES OF The Special Meeting Of The Authority Held On 9.3.1996 At 4.00 P.M. In Conference Hall, Maharani Bagh, New DELHI.

Chairman, presided over the meeting. Member (T)/DG (RD), Member (F&A) and Member (PI) attended the meeting.

2.General Manager I, General Manager Ii, General Manager Iii, General Manager (Finance); and Dgm (F&A) & Dgm (1&PS) were also present as invitees.

3.In this meeting the following decisions were taken:

1)Responsiveness of bids M/s Gammon India Ltd. and M/s Shankaranarayana

Construction Co. were considered as non-responsiveness because of their poor performance in the work of Sikar Pilani Road in Rajasthan under World Bank Loan Assistance and construction of Tunnel No. 9 of Konkon Railway Corporation Ltd., India, respectively. As such, the bids of M/s Gammon India Ltd.-Fili Continuo Jv and of M/s Grham Satyam Shankar anarayaria Jv have not been considered for further evaluation.

2)It was pointed out by Member (Technical) that as the bid prices are not clustered around the lowest quoted bids, it was decided to evaluate the 5 lowest bids in respect of each Contract. The bids were evaluated as per conditions in the bidding document. The bid evaluation report in respect of each of the 5 Contracts is enclosed at Enclosures I to IV. Based on the evaluation, the lowest evaluated bid for each of the Contract arc detailed below:

I)Contract I Birla GTM-Enterpose Ltd. (JV) Rs. 2,621,620,529

II)Contract Iii BSC-RBM Pati (JV) Rs.1,341,439,940

III) Contravt Iv Bridge and Roof India Lid. Rs. 587,170,632

IV)Contract V Madhucon Binapuri (JV) Rs.1,472,714,547

THIS was approved by Authority.

3)For Contract Ii, the Member (Technical) explained that the bids were invited and received for two options i.e. Rigid and Flexible Pavements. The bids in both the cases have been evaluated. The detailed comparative cost analysis of Rigid and Flexible Pavement based on life cycle period of 30 years has been done and it was found that the Rigid Pavement was cheaper in comparison to Flexible Pavement for the total life cycle, though it was initially costlier. The details are at Enclosure V. The lowest evaluated bid price amounting to Rs. 2,286,945,088.00 of M/s HCC-John Laing (CMF) for the Rigid Pavement option (at Enclosure VI) was approved by the Authority.

IT was, however, decided that if the Bank and the Government decide that the work is to be executed with the Flexible Pavement option then the low- est evaluated bid amounting to Rs. 1,610,795,084.00 was of M/s B.S.C.- R.B.M.- Pati (vide Enclosure Vii enclosed). Both the evaluated options should be sent to Adb for consideration. It was decided that these Minutes Along with Bid Evaluation Report will be sent to the Adb for their concurrence. The meeting ended with a vote of thanks to the Chair."

(5) The petitioner contends that in total violation and disregard of the resolution referred to above, the contract for the work is likely to be awarded to respondent No.4 which necessitated filing the present petition.

(6) It may be necessary at this stage to reproduce the relevant clauses of the bidding documents with regard to the contract in question which incorporates General Conditions of Contract, Instruction to Bidders and Conditions of particular application. The relevant clauses read as follows:

"INVITATION for Bids

1.THE Government of India has received a loan from the Asian Development Bank towards the cost of the National Highways Project and it is intended that part of the proceeds of this loan will be applied to eligible payments under the contract for Four laning and Strengthening of existing two lanes from Raniganj (Km 474.00) to Panagarh (Km 515.236) Section of NH-2 in West Bengal. Bidding is open to all requalified bidders for the National Highways Project under Adb Loan Assistance (Loan No.1274 IND)

2.THE National Highways Authority of India invites scaled bids from pre-qualified bidders for the construction and completion of Four laning and Strengthening of existing two lanes from Raniganj (Km 474.00) to Panagarh (KM 515.236) Section of NH-2 in West Bengal with the alternatives of bi-luminous pavement or cement concrete pavement. The bids may be submitted for one or both the alternatives. The period of completion for the Works is 42 calendar months.

Instructions to Bidders

1.The National Highway Authority of India hereinafter termed "the Employer" wishes to receive bids from requalified bidders for the construction and completion of Four Laning and strengthening of existing two lanes from Raniganj (KM 474) to Panagarh (KM 515.236) section of NH-2 in West Bengal as defined in these bidding documents, hereinafter referred to as "the Works".

1.1.1The works shall, inter alia, include the following, as specified or as directed

A)Road Works

A)conducting confirmatory sub-soil exploration including analysis, interpretation and reporting of the results thereof in accordance with the provisions of IRC 78-1983 (Indian Roads Congress Standard Specifications and Code of Practice for Road Bridges- Section VII- Foundations and Sub structures). IRC-.75-1979 (Guidelines for the design of High embankments) and IRC Special Publication 19 (Manual for survey, investigation and preparation of Roads Projects).

B)site clearance, removal of tree slumps and dismantling of obstructions etc. before commencement of the Works.

C>true and proper setting-out and layout of the Works, setting of bench marks, preparation of working drawings and provisions of all necessary labour, instruments and appliances in connection therewith.

D)widening of the existing carriageway and strengthening including camber corrections.

E)construction of new road/parallel service road and/or widening of the existing highway inclusive of all earthwork, sub grade ,pavement, drains.

F) remodelling construction of major and minor intersections, bus stops and lay byes .

G)construction of bolsters, gabions and other anti-erosion works and the final cleaning of the site.

H)supply and erection of fences, gates and a cattle grids.

I)construction of cross drainage works, bridges, approaches and other related items of works.

J)provision of road markings, road signs and kilometer stones.

K)provision of suitably designed protective works for roads/bridges including reinforced earth retaining walls.

L)any other item of work as may be required to be carried out for completing the road works in all respects in accordance with the provisions of the Contract.

B)Bridge Works

C)Other Works-General

A)during the period of the Contract the Right of Way and all existing roads shall be kept open for traffic and maintained in a safe and usable condition. Residents along and adjacent to the Works are to be provided with safe convenient access to their properties at all times. Traffic control and traffic diversions shall be used as necessary to protect the Works and maintenance will be carried out as directed by the Engineer and provided in the Contract.

B)all aspects of quality assurance of various components of the work.

C)clearing of site and handing over of the Works.

D)rectification of the defects in the completed works during the Defects Liability Period.

E)submission of Completion Drawings and other related documents.

F)provision and maintenance of fully furnished and equipped residential accommodation for the Engineer and the Employer together with fully furnished and equipped site office and laboratory for testing, including the supply of testing equipment and consumables; all as described in the relevant specifications.

G)supply and maintenance of vehicles for use by the Engineer and the Employer.

H)provision and maintenance of wireless communication system for the Engineer and the Employer.

THE successful bidder will be expected to complete the Works within 42 months from the date of issue by Registered Air Mail of the notice to commence the work.

2.Source of Funds

2.1The Government of India has received a loan from the Asian Development Bank (hereinafter referred to as "the Bank") equivalent to US\$ 245 million

towards the cost of the National Highways Project (Loan No.1274 IND) and intends to apply part of the proceeds of this loan to eligible payments under the contract (hereinafter referred to as "the Contract") for which this invitation for bids is issued. Payment by the Bank will be made only at the request of the borrower and upon approval by the Bank in accordance with the Loan Agreement and will be subject in all respect to the terms and conditions of that Agreement. Except as the Bank may specifically otherwise agree, no party other than the borrower shall derive any rights from the Loan Agreement or have any rights to the loan proceeds.

28.Examination of Bids and Determination of Responsiveness

28.1Prior to the detailed evaluation of bids, the Employer will determine whether each bid (i) meets the eligibility criteria of the Bank (ii) has been properly signed; (iii) is accompanied by the required securities; (iv) is substantially responsive to the requirements of the bidding documents; and (v) provides any clarification and/or substantiation that the Employer may require pursuant to Sub-Clause 15.4

28.2A substantially responsive bid is one which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation. A material deviation or reservation is one (i) which affects in any substantial way the scope, quality or performance of the Works; (ii) which limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the bidder's obligations under the Contract or (iii) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.

28.3If a bid is not substantially responsive it will be rejected by the Employer and may not subsequently be made responsive by correction or withdrawal of the non-confirming deviation or reservation.

32Preference for Domestic Bidders

32.1In comparing domestic bids with foreign bids, a margin of preference will be granted to eligible domestic contractors, as defined below in accordance with the following provisions:

(A)For application of domestic preference all responsive bids will first be classified into the following two categories:

(I)Category I bids offered by domestic contractors and joint ventures eligible for the preference in accordance with the criteria set forth in Sub-Clause 32.2 below; and

(II)Category II bids offered by other contractors The Employer will review each bid to confirm the appropriateness of, or to modify as necessary, the Category to which the bid was assigned by the bidder in preparing it.

(B)The lowest evaluated bid of each Category will then be determined by

comparing all evaluated bids in each Category among themselves.

(C) Such lowest evaluated bids will next be compared with each other and if, as a result of this comparison, a bid from Category 1 is found to be the lowest, it will be selected for the award of contract.

(D) If, however, as a result of the comparison under (c) above, the lowest bid is found to be from Category II, it will be further compared with the lowest evaluated bid from Category 1. For the purpose of this further comparison only, an upward adjustment will be made to the lowest evaluated bid price of Category II by adding an amount equal to seven and one-half per cent (7 1/2%) of the bid price. If, after such comparison, the Category I bid is determined to be the lowest, it will be selected for the award of contract, if not, the lowest evaluated bid from Category II will be selected.

32.2 Domestic contractors and joint ventures between a domestic contractor(s) and its foreign partner (s) shall meet a following minimum criteria for eligibility of the Domestic Preference Scheme

(A) Domestic contractors(s)

(I) firms are registered in India.

(II) firms have majority ownership by nationals, and

(III) firms will not subcontract to foreign contractors more than fifty per cent (50%) of the total value of their work.

(B) A joint venture between a domestic contractor(s) and its foreign partners) will be eligible for the preference only if:

(I) the domestic partner(s) are individually eligible for the preference according to the criteria stated above.

(II) the domestic partner(s) would not qualify for the works on technical or financial grounds without the foreign participation; and

(III) the domestic partner(s) will, under the arrangements proposed, carry out at least fifty per cent (50%) of the Works measured in terms of value.

32.3 Bidders applying for the preference shall provide all evidence, including details of ownership, necessary to prove that they are qualified for the preference according to the criteria set forth in Sub-Clause 32.2

32.4 If the Contract is awarded to a bidder who has received the preference pursuant to the foregoing provisions, such contractor shall not subcontract to foreign contractors more than fifty per cent (50%) of the total value of their work.

33. Award

33.1 Subject to Clause 34, the Employer will award the Contract to the bidder whose bid has been determined to be substantially responsive to the bidding

documents and who has offered the lowest Evaluated Bid price, provided that such bidder has been determined to be

(I) eligible in accordance with the provisions of Sub-Clause 3.1 and

(II) qualified in accordance with the provisions of Clause 5.

34. Employer's Right to Accept any Bid and Reject any or all Bids

34.1 Notwithstanding clause 33, the Employer reserves the right to accept or reject any bid and to annul the bidding process and reject all bids, at any time prior to 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."

(7) Respondents 1 and 2 have filed their counter affidavits to the writ petition wherein it is reiterated in paragraph 2 as follows:

"II. The Petitioner has deliberately concealed true, correct and material facts from this Hon'ble Court. Briefly stated true and correct facts relevant for the purposes of this case are as under:

(I) For the purpose of executing certain National Highway Development Projects in the State of Haryana and Rajasthan, West Bengal, Bihar and Andhra Pradesh on the application of the Government of India, Asian Development Bank (hereinafter referred to as "ADB") agreed to give to the Government of India a Loan No. 1274 Ind of Us \$ 245 Million bearing interest @ 6.89% per annum and repayable over 20 years after a moratorium of 4 years (hereinafter referred to as the "ADB Loan" and in respect of which the Government of India subsequently entered into a Loan Agreement dated March 22, 1995 (hereinafter referred to as "Loan Agreement").

(II) The terms of the Adb Loan required, inter alia, that all goods and services to be financed out of Adb Loan proceeds are to be subject to the "Guidelines for Procurement under Asian Development Bank Loans" as amended from time to time (hereinafter referred to as "ADB Procurement Guidelines").

(III) Relevant provisions of the said Adb Procurement Guide lines read as below:

"General

2.01 The purpose of international competitive bidding is to provide the borrower with a wide range of choices in selecting the best bid from competing suppliers/ contracts and to give to all prospective bidders from eligible source countries fair, and equal opportunity to bid on goods and works which are being procured bank loans. To achieve this, the Bank requires its borrowers to observe certain guidelines in preparing bidding and contracts and to follow certain procedures in advertising bid invitations and in accepting opening, and evaluating bids. In addition, draft tender documents, bid evaluation reports, and proposed awards of contract are subject to prior review and approval by the Bank "as stipulated in

Chapter Iv of these Guidelines".

IV.REVIEW Of BORROWERS"

"4.01The following provisions set forth standard arrangements for the review by the Bank of procurement actions taken by borrowers in cases where international competitive bidding is required in the procurement of goods of works. These provisions should apply to all such cases except as otherwise agreed by the Bank in particular cases."

"BID Packaging

4.02Before the commencement of any procurement, the borrower should furnish to the Bank for approval a list or lists of the goods to be procured, the proposed grouping of these goods, and the proposed number and scope of civil works contract to be awarded."

"PRE QUALIFICATION Procedures

4.03 Pre qualification of bidders is subject to the following procedures:

(A)Pre qualification invitation. The pre qualification invitation and all documents (including the proposed pre qualification methodology and criteria) should show the loan number and should be approved by the Bank before they are issued. For this purpose, three copies of the draft pre qualification invitation and all related documents should be submitted to the Bank. The draft pre qualification invitation, to be submitted to the bank for approval, should show the proposed time for submission of pre qualification application.

(B)Issue of Pre qualification invitation. As soon as the pre qualification invitation has been advertised and transmitted as required in paragraph 2.09, the Bank should be furnished wi a report on the advertising and transmittal procedures followed. Such report should show, inter alia, the name of the newspaper in which the invitation was advertised; the dale of such advertising; a list of the addresses to which invitation as transmitted; how it was transmitted (locally, by hand or surface mail and abroad, by air mail); and the pre qualification invitation as issued and a copy of the newspaper advertisement as published should also be enclosed with the report.

(C)Proposal for Pre qualification. As soon as the pre qualification applications have been evaluated, approval of the Bank should be obtained to the results of the evaluation before such results arc communicated to the applicants for pre qualification. For this purpose, the Bank should, promptly after the evaluation of pre qualification applications, be furnished with three copies of (i) a summary and evaluation of application; and (ii) the proposal for pre qualification (together with the consultants" recommendations where applicable). Copies of any pre qualification applications and any information on such application should be made available to the Bank upon request."

"INTERNATIONAL Competitive Bidding Procedures

4.04 International competitive bidding is subject to the following procedures.

"(A) Invitation to Bid and Tender Documents. The invitation to bid and all related tender documents (including bidding instructions and conditions, specifications form and conditions of contract) should show the loan number and should be approved by the bank before they are issued. For this purpose, three copies of the invitation to bid and all related tender documents should be submitted to the Bank. The draft tender documents to be submitted to the bank for approval should show all important conditions of tender including the proposed tendering period and the proposed delivery period.

(B) ISSUE of Invitation to Bid. As soon as the invitation to bid has been advertised and transmitted as required in paragraph 2.06, the Bank should be furnished with a report on the advertising and transmittal procedures followed. Such report should show, inter alia, the name of the newspaper in which the invitation was transmitted; how it was transmitted (locally, by hand or surface mail and abroad by air mail); and the date of such transmittal. A copy of the invitation to bid as issued and a copy of the newspaper advertisement as published should also be enclosed with the report.

(C) Proposal for Award". As soon as the bids received have been evaluated, approval of the Bank should be obtained to the proposal for award of contract before a contract is awarded or a letter of intent is issued. For this purpose, the Bank should, promptly after the bid evaluation but at least 30 days prior to expiration of bid validity, be furnished with three copies of

(1) AN account of the public opening of the bids (together with the opening minutes);

(II) a summary and evaluation of the bids;

(III) the proposal for award (together with the consultants' recommendations, where applicable);

(IV) a draft contract or a draft letter of acceptance if such draft differs substantially from the draft previously submitted to and approved by the Bank; and

(V) an appropriate certificate of the eligibility of the proposed contract where required by the Bank."

(IV) The Adb Loan thus required that for any person to be eligible to bid for the work being funded by the Adb Loan to first pre-qualify and for which purpose the Borrower was required to evaluate the pre qualification applications and to obtain approval of Adb to the results of such pre qualification evaluation before the same are communicated to the applicants for pre qualification. Subsequent thereto, i.e. after such pre qualification the applicants who have been thus pre-qualified are issued invitation to bid for award of the work in question and upon receipt of their bids, the same are to be evaluated and Borrowers

recommendation for award of contract or issue of Letter of Intent submitted to Adb for approval before the same are issued by the Borrower and only after the Adb has approved of the recommendation that the Contract is awarded or the Letter of Intent issued to the bidder who has been thus approved by ADB. If this procedure is not followed the Adb loan would not be available.

(V)The Government of India appointed Nhai as the agency to undertake inter alia, the activities and actions required to be followed and/or complied with for availing the Adb loan.

(VI)The Ministry of Surface Transport, Government of India consequently issued on behalf of Nhai an invitation for pro-qualification of contractors (hereinafter referred to as the "Pre-qualification Document") for the following five contracts:

"CONTRACT1 - Haryana and Rajasthan States, National Highway No.8

4.Landing, including strengthening of existing 2 lane pavement, between Gurgaon in Haryana State and Kotputli in Rajasthan State (Km.36.63 to Km 162.50).

CONTRACTII- West Bengal State, National Highway No.2.

4Landing, including strengthening of existing 2 lane pavement, between Raniganj and Panagarh (Km 474.0 to Km 516.0).

CONTRACTIII- Bihar State, National Highway No.2

4 Landing, including strengthening of existing 2 lane pavement, between Barwa Adda and Barakar (Km 398.75 to Km 441.44).

CONTRACTV-Andhra Pradesh State, National Highway No.9

STRENGTHENING of existing 2 lane pavement, between Nandigama and Vijaywada (km 217.0 to Km 265.0), including 4 laning between Km 252.0 and 265.0.

CONTRACTV- Andhra Pradesh State, National Highway No.5

STRENGTHENING of existing 2 lane pavement between Vijaywada and Eluru (Km to Km 53.8 & Km 69.2 to Km 75.0) including 4 laning between Km 3.4 and Km 13.0 and a by pass for Eluru town (Km 53.8 to Km 69.2)"

(THE above referred contracts I to V are hereinafter collectively referred to as the "Contracts").

(VII)The present petition relates to the Contract No. II (hereinafter referred to as the "Contract No. 1I") namely West Bengal State National Highway No.2 for four laning including strengthening of existing 2 lane pavement, between Raniganj and Panagarh (Km 474.0 to Km 516.0)

(VIII)The petitioner being found eligible was requalified to submit its bid for said Contract No.II in response to the Invitation for Bids which is at Annexure P-2 to

the petition. Clause 2 of the said Invitation For Bids (hereinafter referred to as the "Tender") reads as below: "The National Highways Authority of India invites sealed bids from requalified bidders for the construction and completion of Four laning and strengthening of existing two lanes from Raniganj (Km 474.00) to Panagarh (Km 515.236) Section of NH-2 in the West Bengal with the alternatives of bituminous pavements or cement concrete pavement. The bids may be submitted for one or both the alternatives. The period of completion for the works is 42 calendar months".

(8) As would be apparent from the above, the tender invited bids for two alternatives and the bidders could submit their bids for one or both of the alternatives i.e. for Bituminous Pavement (hereinafter referred to as "Flexible Pavement" or "Option A") and/or Cement Concrete Pavement (hereinafter referred to as "Rigid Pavement" or "Option B") As would be apparent from the above the bids were for two alternatives and not that it had to be only the alternative in which the petitioner was the lowest. It may not be out of place to mention here that as stated by the petitioner, himself in para 10 of the petition that in the case of contract No.II there were 2 alternative options namely Flexible Pavement or Rigid Pavement for which the bids were invited by the Tender.

(IX) Clause 2.1 of "Instructions to the Bidders" forming part of the Tender (hereinafter referred to as the "Instructions") expressly states that the Government of India (hereinafter referred to as the "Government") has received the Adb loan and intends to apply part of the proceeds of the loan to payments under said Contract No. II and that payment will be made by Adb at the request of the Government and upon the approval of Adb in accordance with the Loan Agreement and will be subject in all respects to the terms and conditions of the Loan Agreement. The said clause 2.1 of Instructions reads as below:

"THE Government of India has received a loan from the Asian Development Bank (hereinafter referred to as "the Bank") equivalent to US\$ 245 million towards the cost of the National Highways Project (Loan No.I274-IND) and intends to apply part of the proceeds of the loan to eligible payment under the contract (hereinafter referred to as "the contract") for which this invitation for bids is issued payment by the bank will be made only at the request of the borrower and upon approval by the bank in accordance with the loan agreement and will be subject in all respects to the terms and conditions of that Agreement except as the bank may specifically otherwise agree no party other than the borrower shall derive any rights from the loan agreement or have any rights to the loan proceeds."

(X) Clause 31.3 of the said Instructions further expressly reserved the right of Nhavi to accept or reject any alternative offer. The said clause 31.3 reads as below:

"THE Employer reserves the right to accept or reject any variation or alternative offer Variations deviations alternative offers and other factors which are in excess

of the requirements of the bidding documents or otherwise result in the accrual of unsolicited benefits to the Employer shall not be taken into account in bid evaluation."

(XI) Further the clause 34.1 of the said Instructions reads as below:

"Notwithstanding Clause 33, the Employer reserves the right to accept or reject any bid and to annul bidding process and reject all bids at any time prior to 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."

(XII) The petitioner submitted its bid for the both the alternatives. The bids were received on 5.1.1996 and opened on the same day. For option of Flexible Pavement 12 bids were received and for Cement Concrete option 9 bids were received. Bids were evaluated as per conditions of bidding documents. Bid of the petitioner was found as lowest evaluated bid for Cement Concrete option and the bid of Respondent No.4 was found as lowest evaluated bid for Flexible Pavement option."

(9) The learned counsel for the petitioners has made elaborate reference to the provisions of the Act to reiterate the proposition that the Authority has to act on "business principles" as contemplated by Section 10 and there can be no agreement with Adb which will amount to by-passing the laws made by Parliament. The following provisions of the Act have been cited:

3. Constitution of the Authority.- (I) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf, there shall be constituted for the purposes of this Act an Authority to be called the National Highways Authority of India.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall by the said name sue and be sued.

(3) The Authority shall consist of-

(I) a Chairman;

(II) not more than Five full-time members; and

(III) not more than four part-time members, to be appointed by the Central Government by notification in the Official Gazette.

7 Meetings

(1) The Authority shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings, including the quorum thereat, as may be provided by regulations.

(2) If for any reason the Chairman is unable to attend any meeting of the authority any other member chosen by the members present at the meeting shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes of the members present and voting, and in the event of an equality of votes, the Chairman, or in his absence the person presiding, shall have and exercise a second or casting vote.

10. Authority to act on business principles- In the discharge of its functions under this Act, the Authority shall act, so far as may be, on business principles.

14. Contracts by the Authority- Subject to the provisions of Section 15, the Authority shall be competent to enter into and perform any contract necessary for the discharge of its functions under this Act.

15. Mode of executing contracts on behalf of the Authority. (1) Every contract shall, on behalf of the Authority, be made by the Chairman or such other member or such officer of the Authority as may be generally or specially empowered in this behalf by the Authority and such contracts or classes of contracts as may be specified in the regulations shall be sealed with the common seal of the Authority:

PROVIDED that no contract exceeding such value or amount as the Central Government may prescribe in this behalf shall be made unless it has been previously approved by that Government;

Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty years and no other contract exceeding such value or amount as the Central Government may prescribe in this behalf shall be made unless it has been previously approved by that Government.

(2) Subject to the provisions of sub-section (1), the form and manner in which any contract shall be made under this Act shall be such as may be provided by regulations.

(3) No contract which is not in accordance with the provisions of this Act and the regulations shall be binding on the Authority.

16. Functions of the Authority.-

(1) Subject to the rules made by the Central Government in this behalf, it shall be the function of the Authority to develop maintain and manage the national highways and any other highways vested in, or entrusted to, it by the Government.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the Authority may, for the discharge of its functions-

(A) survey, develop, maintain and manage highways vested in, or entrusted

(B)construct offices or workshops and establish and maintain hotels, motels, restaurants and rest-rooms at or near the highways vested in, or entrusted to, it;

(C)construct residential buildings and townships for its employees;

(D)regulate and control the plying of vehicles on the highways vested in, or entrusted to, it for the proper management thereof;

(E)develop and provide consultancy and construction services in India and abroad and carry on research activities in relation to the development, maintenance and management of highways or any facilities there at;

(F)provide such facilities and amenities for the users of the highways vested in, or entrusted to, it as are, in the opinion of the Authority, necessary for the smooth flow of traffic on such highways;

(G)form one or more companies under the Companies Act, 1956 (1 of 1956), to further the efficient discharge of the functions imposed on it by this Act;

(H)engage, or entrust any of its functions to, any corporation or body corporate owned or controlled by the Government;

(I)advise the Central Government on matters relating to highways;

(J)assist, on such terms and conditions as may be mutually agreed upon, any State Government in the formulation and implementation of schemes for highway development;

(K) COLLECT fees on behalf of the Central Government for services or benefits rendered u/s 7 of the National Highways Act, 1956 (48 of 1956), as amended from time to time, and such other fees on behalf of the State Government on such terms and conditions as may be specified by such State Governments; and

(L)take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by this Act.

(3)Nothing contained in this section shall be construed as

(A) AUTHORISING the disregard by the Authority of any law for the time being in force; or

(B) authorising any person to institute any proceeding in respect of a duty or liability to which the Authority or its officers or other employees would not otherwise be subject under this Act.

33.Power of the Central Government to issue directions-(1) Without prejudice to the other provisions of this Act, the Authority shall, in the discharge of its functions and duties under this Act, be bound by such directions on questions of policy as the Central Government may give to it in writing from time to time.

(2)The decision of the Central Government whether a question is one of policy or

not shall be final." The main contention of the petitioner is that its bid was approved by respondent No. 1 in the special meeting of the Authority held on March 9, 1996 wherein it was categorically stated that "the detailed comparative cost analysis of Rigid and Flexible Pavements based on life cycle period of 30 years has been done and it was found that the Rigid Pavement was cheaper in comparison to Flexible Pavement though it was initially costlier. The details are at enclosure V. The lowest evaluated bid price amounting to Rs. 2,286,945,088.00 of M/s HCC-John Laing (CMF) for the Rigid Pavement option (at Enclosure VI) was approved by the Authority." In view of the above, respondent No. 1 had no option but to award the contract to petitioner herein as the bid of the petitioner was approved. The facts, as alleged in the petition, clearly indicated that the bid of the petitioner for Rigid Pavement option was the lowest whereas the bid of respondent No.4 was the lowest for Flexible Pavement option. The Authority decided to award contract in favor of the respondent and the petitioner has felt aggrieved in respect thereof. It is, however, not denied that the petitioner also submitted bids for both the options.

(10) The following contentions raised by the learned counsel for the petitioner, Therefore, arise for consideration:

(1)The respondent Authority has clearly recommended and approved the petitioner for laying down of Rigid Pavement option in special meeting held on March 9, 1996. The respondents cannot go behind that approval and reject the bid of the petitioner.

(2)The alleged guidelines for award of contract as issued by Adb cannot take precedence over the approval as granted by respondent No.1 in favor of the petitioner. Moreover, these guidelines as framed were not incorporated as part of bidding documents, Therefore, no reliance can be placed upon the same.

(3)The functioning of the respondent Authority is controlled by the provisions of the Act. In Section 10 it is clearly specified that in the discharge of its functions, the Authority shall act, so far as may be, on business principles. Moreover, elaborate details with regard to functions have been specified u/s 16 of the Act and the Authority is bound to follow the same. Section 33 also empowers the Central Government to issue directions.

(4)The law is well settled that in case of conflict between International Law and Municipal Law, the Court must follow the Municipal law. In the present case, the Authority is bound to act on business principles and award contract to the petitioner which has been duly approved.

THE following pleas on the other hand are taken by respondents 1 and 2.

(A)It is submitted that where bids have been invited for alternative options, selection and choosing of one option or the other is purely an administrative matter within the sole discretion of the employer and no bidder has a vested right that the employer must opt for that option in which it is the lowest even

though the other alternative is cheaper which in this case means a saving of over Rs.67 crores.

(B)The evaluation of bids was considered by a special meeting of the Authority held on March 9, 1996 and lowest evaluated bids for both options i.e. lowest evaluated bid in the Rigid Pavement option of the petitioner and the lowest evaluated bid for the Flexible Pavement of respondent No. 4 were resolved to be sent to the Adb and that it was the Adb and the Government of India which were to decide the option under which the work was to be executed. The tender expressly provides for alternative option and it is lawful for the employer to choose either option and its discretion cannot be fettered by any bidder or otherwise in law.

(C)the approval made on 9th March, 1996 by respondent No.1 does not bar consideration of flexible pavements. The recommendations of the meeting held on March 9, 1996 clearly left it open for acceptance of either option. The following paragraph may be reproduced as follows:

"It was, however, decided that if the Bank and the Government decide that the work is to be executed with the Flexible Pavement option then the lowest evaluated bid amounting to Rs.1,610,795,084.00 was of M/s B.S.C., R.B.M.- Pati (vide Enclosure Vii enclosed). Both the evaluated options should be sent to Adb for consideration."

Therefore, the Authority has carefully considered, the matter and has not merely acted on the recommendation of ADB. The functions of the Authority as specified in Section 16 do not, in any manner, debar the Authority to accept the option of Flexible Pavements. There is complete unanimity with the Central Government and no fault can be found in opting out for an option which is comparatively cheaper and as good as the one submitted by the petitioner.

(D)The concept of business principles has to be co-related in the light of funds which are made available to the Authorities as the Highways have to be developed on the basis of loans available and Section 10 of the Act clearly specifies that the business principles shall be followed "so far as may be". In any case, it is not conceded that the option which has been accepted by the Authority is devoid of any merit as Bituminous surface which is widely accepted in this country is equally good. The same is economically viable and it is one of the major considerations for not accepting the bid of the petitioner;

(E)There is no compromise with the sovereignty of this country and the question of Municipal Law taking precedence over the International Law is hardly an issue which can be adjudicated in contractual matters. The principle laid in the Act has been fully followed and the present arrangement with Adb is not in the nature of treaty which usually is entered between two sovereign Governments.

(F)It is denied that the Authority is acting under duress and coercion as alleged. If the petitioner's contention is to be accepted it would amount to amending the

Tender Conditions which is not permissible in law. The petitioner cannot compel the Authority to accept only that option in which it is the lowest and ignore the other option in which it is not the lowest.

(11) Elaborate reference is made by learned counsel for the petitioner to Satow's Guide to Diplomatic Practice 5th Edition to reiterate the proposition that the Adb is established as an International Financial Organisation and by an agreement to raise loans perform certain other functions. Paragraph 40.11 reads as follows:

"40.11 The international financial organisations have followed a somewhat different pattern. In the Agreements which established the International Monetary Fund and the International Bank for Reconstruction and Development (the Britton Woods Agreements of 1944) it was recognised that if the Bank (usually known as the World Bank) was to be able to raise loans and perform certain of the other functions envisaged for it on international markets, it could not be accorded a general immunity from suit. Its immunity from suit was Therefore limited to actions brought by member states or by persons acting for or deriving claims from member states. Ordinary commercial lenders could bring actions in the ordinary way to recover their loans, and this made the Bank a credible borrower in the market. The scale of privileges and immunities both for the Fund and for the Bank was in other ways notably more restrictive than the United Nations scale, for example no privileges or immunities were accorded to representatives of member states, or to experts, nor was "high officer" treatment accorded even to the executive head of the Bank. On the other hand the Bank was given certain tax privileges- such as immunity for the collection or payment of any tax or duty and certain tax exemptions any obligation or security issued by the Bank- which are peculiar to international agreements establishing financial organisations. The precedents of the World Bank and the International Monetary Fund were followed in the case of the International Finance Corporation, the International Development Association, the Asian Development Bank and the Caribbean Development Bank among others. The first four of these organisations are also covered by the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations (although not all members have undertaken to apply the Specialised Agencies Convention to them)."

(12) Similarly, reference is made to the role of Adb to reiterate that its establishment is in the nature of treaty between various countries as stated in "Treaties and Allowances of the World by Kessing's Reference Publications. The following paragraph has been cited:

ASIAN Development Bank Headquarters: Pasay City, Manila (Philippines).

MEMBERS: To date 43 countries have joined the Bank, of which 29 are regional and 14 non-regional countries.

REGIONAL Members :Afghanistan, Australia, Bangladesh, Burma, Cook Islands, Fiji, Hong Kong, India, Indonesia, Japan, Kampuchea, Kiribati, Republic of Korea,

Laos, Malaysia, Maldives, Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Singapore, Solomon Islands, Sri Lanka, Taiwan, Thailand, Tonga, Vietnam, Western Samoa.

NON-REGIONAL Members: Austria, Belgium, Canada, Denmark, Finland, France, Federal Republic of Germany, Italy, Netherlands, Norway, Sweden, Switzerland, United Kingdom, United States.

ON Dec. 4, 1965, 21 countries signed the Charter of the Asian Development Bank, a financial institution set up under the auspices of the United Nations Economic Commission for Asia and the Far East (CAFE)-since 1974 for Asia and the Pacific ESCAP). The agreement came into force on August 22, 1966.

FUNCTIONS and Organization

THE Charter laid down that membership of the Asian Development Bank would be open to members and associate member of CAFE as well as to other regional countries and non-regional developed countries which were members of the United Nations or any of its specialised agencies.

THE Bank now has 12 directors, of whom eight represent Asian or Pacific countries. The Bank's functions are to further investment in development projects within the region, to contribute to the harmonious economic growth of the whole area, to assist Asian member countries in preparing and co-ordinating their development plans, and to provide technical aid for the preparation, financing and execution of individual development projects.

IT was laid down that 90 per cent of the bank's capital could be used for "hard" loans (at 5.5 per cent interest for 25-30 years) and 10 per cent for "soft" loans (low-interest and long-term). Member countries such as Australia, Japan and New Zealand, which, though members of CAFE, were not underdeveloped countries, would not be entitled to draw any loans. A provision in the Charter authorised the bank to administer trust funds for use as "soft" loan money.

THE decision making organ of the bank is the Board of Governors, on which each member country is represented. The executive organ is the Board of Directors.

THE bank was inaugurated on November 24, 1966, and began operations on December 19, 1966. By the end of 1978 its authorised capital was \$9,407 million, of which \$8,741 million had been subscribed.

IN June 1974 an Asian Development Fund was established to provide a systematic mechanism for mobilizing and administering resources for the bank to enable it to grant loans on concessionary terms. By the end of 1978 the total resources of the fund were \$1,839,224."

IT is argued that the Municipal Law as laid down in the Act will take precedence over the International Law and respondents 1 and 2 have to comply with the provisions of the Act and ignore any directions from ADB which is an International institution governed by International law.. It is, accordingly, reiterated that

various clauses of "Instructions to Bidders" confer the power on the employer (respondent No.1) only to award contract and this power is not controlled or required approval of any outside Agency. The authority to take a decision under the Act rests in respondent No.1 and for that purpose the said respondent has to conduct itself strictly in accordance with Section 10. The role of Adb is inconsequential and its advice is not binding on respondent No. 1.

THERE is no dispute about the proposition that in case of conflict between International Law and Municipal Law the Court must follow the later. In the present case, the petitioner has submitted its tender for entering into contract with the respondents for which funds have been supplied by ADB. The question will now arise as to whether the above principle has any application to the facts of the present case. Reference has been made to the judgment of the Supreme Court as reported in *Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey and Others*, . Paragraph 5 of this judgment is cited to reiterate the proposition as slated above which reads as under:

"5.THERE can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no Municipal Law must prevail in case of conflict. National Courts cannot say "yes" if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid confrontation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield."

THE Authority has not been shown to act in any manner which will amount to bypassing the provisions of the Act. In this background it cannot be said that the rules of International law have been made to prevail over the provisions of the Act. This consideration will only arise when the Rules of International law run into conflict with Acts of Parliament. In the present case, no such conflict has been pointed out. It is always open even for the International body to enter into contracts with any Government and the terms and conditions of contract as

incorporated in the Agreement will prevail. The arrangement with Adb and the Government of India is in the realm of contract and there is no question of any provision of Municipal law, such as, National Highway Authority Act being violated. The provisions as contained in the contract and the guidelines have to be followed before loan amount is disbursed but that will not imply that business principles have been sacrificed in accepting the other option.

Moreover, the respondents are expected to follow business principles so far as may be.

(13) The learned counsel for the petitioner has next referred to various documents to reiterate that flexible pavement is not cheaper in the long run considering the expectation of the life span of 30 years. It is accepted in the road-building that rigid pavement is more technically sound and economically cheaper option. This fact is acknowledged by Central Road Research Institute (CRRI) as well. Copy of the report is filed with the rejoinder as Exhibit A. It is argued that the most effective method of comparing the costs of pavement types is by life-cycle cost analysis. This considers initial and future costs (maintenance and overlays) of each alternative by taking into account both the effects of inflation and interest rates over a specified period. Similar reference is made to other documents which have been filed by the petitioner to support that Rigid Pavement option for which the petitioner submitted the tender was definitely more sound and relatively cheaper in the long run.

(14) The law is well settled that the State can carry all executive functions by making a law or without making a law and enter into contract with any person it chooses and no person has a fundamental right to insist that the Government must enter into contract with him. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling. The judgments of the Supreme Court as reported in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Ram and Shyam Company Vs. State of Haryana and Others*, and *U.P. State Road Transport Corporation and another Vs. Mohd. Ismail and others*, are cited to support the proposition that exercise of discretion is not absolute and it has to be guided by consideration that public service rendered has to be efficient and effective. The Authority is a public utility organisation where efficiency and effectiveness of public service are the basic concepts that cannot be sacrificed in public administration by any statutory corporation. This criteria is clearly established by the provisions of the Act, particularly Section 10 which states that the action of the Authority must be guided by "business principles". Paragraphs 20 and 21 of the judgment in *Ramana Dayaram Shetty (supra)* read as follows:,"

"20.NOW,obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether byway of

giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance."

"21. THIS rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, and *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory : it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, Therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, where the learned Chief Justice pointed out that "the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part Iii of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting -. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to) is lawful calling - It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods." It must, Therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground."

Similar reference may be made to paragraph 12 of the judgment in the case of Ram and Shyam Company (supra) which read as follows:

"12. LET us put into focus the clearly demarcated approach that distinguishes the use and disposal of private property and socialist property. owner of private property may deal with it in any manner he likes without causing injury to any one else. But the socialist or if that word is jarring to some, the community or further the public property has to be dealt with for public purpose and in public interest. The marked difference lies in this that while the owner of private property may have a number of considerations which may permit him to dispose of his property for a song. On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficent activities by the availability of larger funds. This is subject to one important limitation that socialist property may be disposed at a price lower than the market price or even for a token price to achieve some defined constitutionally recognised public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as personal attachment, or affinity, kinship, empathy, religious sentiment or limiting the choice to whom he may be willing to sell, may permit him to sell the property at a song and without demur. A welfare State as the owner of the public property has no such freedom while disposing of the public property. A welfare State exists for the largest good of the largest number more so when it proclaims to be a socialist State dedicated to eradication of poverty. All its attempt must be to obtain the best available price while disposing of its property because the greater the revenue, the welfare activities will get a fillip and shot in the arm. Financial constraint may weaken the tempo of activities. Such an approach serves the larger public purpose of expanding welfare activities primarily for which the Constitution envisages the setting up of a welfare State. In this connection we may profitably refer to Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, in which Bhagwati J. speaking for the Court observed (at pp. 1637-38):-

" IT must ,Therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences etc. , must be confined and structured by rational, relevant and

non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

(15) At another place it was observed that the Government must act in public interest, it cannot act arbitrarily or without reason and if it does so, its action would be liable to be invalidated. It was further observed that the object of holding the auction is generally to raise the highest revenue. The Government is entitled to reject the highest bid if it thought that the price offered was inadequate. But after rejecting the offer, it is obligatory upon the Government to act fairly and at any rate it cannot act arbitrarily. Following this line of thought, in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, while upholding the order of the Government of Jammu & Kashmir dated April 27, 1979 allotting to the second respondent 10 to 12 lacs blades annually for extraction of resin from the inaccessible chir forests in Poonch, Reasi and Ramban Divisions of the State for a period of 10 years on the terms and conditions set out in the order, observed as under (at p. 2000):-

"WHERE any governmental action fails to satisfy the test of reasonableness and public interest discussed above and it is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, Therefore, cannot for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so."

At one stage, it was observed that the Government is not free like an ordinary individual, in selecting recipient for its largesse and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-settled that the Government need not deal with anyone, but if it does so, it must do so fairly and without discretion and without unfair procedure. Let it be made distinctly clear that respondent No. 4 was not selected for any special purpose or to satisfy any Directive Principles of State Policy. He surreptitiously ingratiated himself by a back-door entry giving a minor raise in the bid and in the process usurped the most undeserved benefit which was exposed to the hilt in the Court. Only a blind can refuse to perceive it.

(16) The question now arises as to whether the contentions as stated above, will apply to the facts of the present case. The petitioner sought to submit its tender for both the options, Rigid as well as Flexible. The same was duly considered by respondents I and 2 and in the first instance the tender with regard to the Rigid

option as submitted by the petitioner was approved. The matter was referred to the Adb and ultimate decision was taken in favor of Flexible option in which the petitioner was not the lowest bidder. The role of Adb which indeed is an International organisation is to provide funds for execution of project in this country. Certain guidelines have been framed and an agreement entered into between Adb and the Government of India is on record. There is no bar in any International body from entering into agreement with another Government. That position is not in doubt. Can it be said that the provisions as contained in the National Highways Authority of India Act, 1988 in particular Section 10 have been by-passed in accepting the proposal of Adb to accept the contract in favor of Flexible option? The provision merely states that in discharge of its functions the Authority shall act, so far as may be, on business principles. The petitioner has placed reliance on the Minutes of the Board meeting of March 9, 1996 by which its option was approved but the same Minutes also reiterate that in case it was decided that if the Bank and the Government decided that the work was to be executed by the Flexible pavement option, then, the lowest evaluated bid was of respondent No.4. Both the evaluated options were sent to Adb for consideration. There is, Therefore, no positive approval in favor of the petitioner. Assuming if it is accepted that the bid of the petitioner was approved the matter was not closed and it was open for Adb and respondents 1, 2 and 3 to apply their minds and consider the matter at length before the ultimate award of the contract. The other considerations, such as, paucity of funds, the nature of loans available and the Flexible surface being economically cheaper involving an immediate saving of about Rs.67 crores can be said to be other relevant factors which have influenced the decision of the respondents. In this background it cannot be said that there was compromise with the Sovereignty of the country as the Authority has carefully applied its mind and decided in favor of Flexible option for the reasons as indicated above. The contention of the learned counsel for the petitioner that the Municipal law has been superseded and blanket power has been vested on Adb to accept or reject the contract is not based on any material and is liable to be rejected.

(17) There is another aspect which can be noticed at this stage. The petitioner chose to participate and submitted its tender for both the options and now it is being said that the option in which the petitioner is the lowest tenderer should be accepted as it is the best and has been approved by the Authority. In case the petitioner had been the lowest tenderer for the Flexible option, he may have chosen not to agitate the matter. Reference may be made to the judgments as reported in Jagatjit Cotton Textile Mills Ltd., Phagware Vs. Industrial Tribunal, Patiala and Others, ; Jadunandan Puri Vs. The President, Board of Secondary Education and Others, and New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others, . Paragraphs 47 and 48 of the Judgment Mis New Bihar Bin Leaves Co. and others (supra) read as follows:

"47.Secondly, in entering into a contract of purchase of the notified estimated yield in terms of standard bags, the discretion and volition of the tenderer or

bidder, also, plays an important part in calculating the minimum price payable for the estimated yield from that particular unit. According to the impugned condition (13) of the Tender Notice, which also forms a part of the prescribed Form in which tenders are invited, the successful tenderer or bidder whose tender or bid is accepted by the Department has to pay a minimum royalty, also described as "revenue" or price, which will be 75 per cent of the notified estimated yield in terms of standard bag by the tenderer or bidder. Thus, the volition of the purchaser also plays a prominent part in Fixing the rate or price payable by him. By means of his offer in the Tender Form or by bidding at the auction, the purchaser binds himself to pay this minimum royalty even if by the end of the year, the number of bags collected is less than the notified estimated yield. The purchasers form their own estimates of the expected yield from a particular unit for a particular year and then make their offers of rates in the prescribed Tender Form, or when the disposal is by public auction, the purchasers make their bids subject to the terms published in the Tender or Auction Notices. If, according to the estimate of an intending purchaser, the unit concerned is not likely to yield the quantify notified, it is open to him either not to submit any tender or offer or rates at all, or not to offer a bid or an amount higher than that which, according to his own estimate or calculation, would be a reasonable price of the bargain. In other words, if a person with his eyes open tenders the highest rates per standard bag or offers the highest bid at public auction, as the case may be, of his own accord it will be assumed that he did so because in his own estimation the acceptance of the contract at those rates and subject to the notified terms and conditions would afford him a reasonable scope for making profit. Furthermore, under the scheme of the Bihar Act and Rules, the sales is not restricted to any particular class of persons as in Rashbihari case. Anyone who wants to do business of purchase of Kendu leaves can submit his tender of rates in the prescribed Form, or offer his bid at the auction, as the case may be, subject to the. notified conditions of the Tender Notice/Auction Notice.

48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbatio non reprobato* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., *Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co.*; see *Douglas Menzies v. Umphelby* ; see also *Stroud's Judicial Dictionary*, Vol. I, page 169 3rd Edn:)"

(18) The Authority, Adb and the Government have chosen not to accept the tender of the petitioner on the ground that they have re-evaluated the matter

and also on the basis that the other option was more viable. The main plea which has been taken by the petitioner is that the tender of the petitioner was approved in the First instance and, Therefore, despite the fact that the other option was cheaper, it had to be accepted as it was the best option. The question now arises as to whether the Authority was bound to accept the option submitted by the petitioner or could also consider the other option for which lesser price was quoted. The decision has to be examined by determining as to whether it can be termed as unfair or arbitrary. The judgment of the. Supreme Court in Tata Cellular Vs. Union of India, highlights the proposition as stated in paragraph 94 which reads as under:

"94.The principles deducible from the above are:

- (1)The modern trend points to judicial restraint in administrative action.
- (2)The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3)The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible:
- (4)The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking) the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, Such decisions are made qualitatively by experts.
- (5)The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6)Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

Similarly, the Court proceeded to examine the grounds which could be available to exercise powers of judicial review. Paragraphs 70,74, 77, 80 and 81 read as follows:

"70.It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the Finances of the State. It is expected to protect the Financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the

Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

"74.Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."

"77.The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
- 2.Committed an error of law,
- 3.Committed a breach of the rules of natural justice,
- 4.Reached a decision which no reasonable tribunal would have reached or,
- 5.Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(I)Illegality : This means the decision-maker must understand correctly the law that regulates his decision- making power and must give effect to it.

(II)Irrationality, namely, Wednesbury unreasonableness.

(III)Procedural impropriety.

THE above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R.v. Secretary of State for the Home Department, ex Brind , Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

"80.At this stage, The Supreme Court Practice, 1993, Vol. I, pp. 849-850, may be quoted:

"4.WEDNESBURYprinciple. - A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority

properly directing itself on the relevant law and acting reasonably could have reached it. (*Associated Provincial Picture House Ltd. v. Wednesbury Corpn.*, per Lord Greene, M.R.)"

81.TWOOther facets of irrationality may be mentioned.

(1)It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in *Emma Hotels Ltd. v. Secretary of State for Environment*, the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see on what basis the Secretary of State had reached his conclusion.

(2)A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in *R.v. Barnet London Borough Council, ex p Johnson* the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down."

Coming back to the facts of the present case the decision not to award contract in favor of the petitioner has to be tested on the grounds as stated above. The Court has to confine itself to the question of legality and as to whether the decision making Authority exceeded its power or committed error of law, the decision was reached by breach of the statutory rules and the rules of natural justice arid whether the Authority has abused its power. The initial approval was made in favor of the petitioner but the Authority did not close the matter there but proceeded to add in its Minutes of meeting held on 9th March, 1996 that in case the option for which the petitioner was the lowest bidder was not accepted the other option was liable to be considered. The matter was taken up again with Adb and the Authority analysed the whole issue and came to the conclusion that the option of the petitioner was not viable for various reasons, such as, low cost and initial saving as well as that other contracts had also been approved for Bituminous surface. It is open for this Court to review the evaluation of facts to determine whether the decision is arbitrary, irrational and the Authority has abused its powers. The facts of the case do not indicate any such lapse on the part of the respondents to hold as such. The provisions of the Act have been followed and the respondent Authority has not committed any illegality in exercising its discretion. Moreover, the primary question which arises for consideration in this petition is as to whether it is open for this Court to go into the desirability of having Bituminous surface or Concrete surface as it is a matter of policy and the Courts do not possess the expertise to determine such

question. The Court, Therefore, cannot sit as a Court of appeal to review such matters. The decision of the Authority approving the decision of the Adb cannot be held to run contrary to the provisions of the Act and the rules of natural justice and it is open to accept one option as against the other.

(19) In view of the above, there is no merit in this petition. The same is dismissed. There will be no order as to costs.