
(2008) 05 GAU CK 0038
In the Gauhati High Court

Larsing M.

APPELLANT

Vs

Meghalaya Tourism Development Corpn. Ltd. and Another

RESPONDENT

Date of Decision : 12-05-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2009) 3 GLR 847 : (2008) 2 GLT 564

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—This writ petition is directed against the letter of intent (LOI) dated 23.6.2007 issued by the respondent No. 1 in favour of M/s Lessly Shylla, Nongrimbah, Bolck-K, Liatumkhrah, East Khasi Hills District, Shillong (the respondent No. 2), for finishing & furnishing, operating and maintaining the Crowborough Hotel-cum-Commercial Complex in Shillong.

2. The facts giving rise to the writ petition are that the Centre Point Group Enterprises represented by its Managing Director is a consortium of hotel enterprises, which claims to be one of the leading hotels and hospitality chains of Meghalaya and also claims to run a network of business and luxury hotels including Centre Point Hotel, Royal Heritage Tripura Castle at Shillong and Ri Kynjal Resort at Umium. The group is also stated to have a proven track record and expertise and experience in hotel and hospitality industry, and has strong financial resources in terms of net worth, solvency and turnover. The respondent No. 1 has for the past two decades been dealing with the project for development of a hotel complex known as Crowborough Hotel ("the Hotel" for short) at Police Bazar, Shillong, but due to litigation problems, the project could not see light of the day. After finally settling the litigation, the respondent No. 1, in the year 2005, took a decision to re-develop the partially constructed structure of the Hotel, which had been lying idle for over two decades. A decision was accordingly taken by the respondent No. 1 proposing that the Hotel be re-

developed by trying up with a developer/operator of national/international repute on Public Private Partnership (PPP) basis, which would undertake the exercise on build, operate and transfer (BOT) system. Towards this end, the respondent No. 1 vide the letter dated 22.1.2007 engaged M/s IL&FS Infrastructure Development Corporation Ltd., a consultancy firm, for selection of a private developer through transparent bidding process. It would appear that the bidding process contemplated two stages, namely, the stage of Expression of Interest (EOI) and thence the stage of Request for Proposal (RFP) and that in the first stage, an advertisement was to be issued inviting prospective bidders to express their respective interests and submit their bids for shortlisting on the basis of defined technical and financial criteria. After EOI's were received, the technical and financial capabilities of the bidders were to be evaluated on the basis of such defined technical and financial criteria, and the bidders who were so short listed in this process would then be issued the RFP documents. The second stage, namely, RFP stage was to involve financial bidding by the short listed bidders. Thus, the respondent No. 1 through IL&FS accordingly started the bidding process of the contract by undertaking the following exercises:

Milestone	Due	Date	SI.	Activity/ No.
Request for Proposal	14.05.2007	2. Submission of Bid	07.06.2007	3. Opening of Bids (Financial Bids)
11.06.2007	4. Issue of Letter of Intent to the preferred bidder	18.06.2007	5. Receipt of Letter of Acceptance from preferred bidder	25.06.2007
6. Signing of Lease Document	After all for-	malities are completed.		

3. The respondent No. 1 thereafter through their consultant (IL&FS) issued the advertisement for EOI in The Economic Times and The Telegraph dated 21.2.2007, with the following bidding criteria:

(a) Bidder may be reputed national/international hotel/hospitality/chain/companies/consortium (maximum two members) and preferably with participation of local party (s).

(b) In case of consortium between a developer and operator, there needs to be a valid management contract between them for operation and maintenance of the hotel for a minimum period of 10 years.

(c) The bidder would be required to utilize their own finances and resources to complete the building as a hotel and for its full operation, maintenance and management.

(d) Interested developers and/or operators willing to be a part of the project are requested to submit their EOI alongwith bidder's profile including management structure, key promoters, professionals, stakeholders, audited Financial Net Worth and Solvency from a nationalised Bank amounting to a minimum of Rs. 100 million.

4. It is the case of the petitioner that though the bid document requires the developer to ascertain certain minimum financial criteria on net worth and turnover for the last three years, the objective criteria for the same were nowhere laid down by the respondent No. 1, which is against the settled principles of law enjoining the latter to categorically and unambiguously lay down all the pre-qualification criteria in the bid documents. This is in terms of the instructions of the Office of the Central Vigilance Commissioner, Government of India contained in the Office Order No. 44.9.03 addressed to all Chief Vigilance Officers of the State to ensure transparency in awarding contracts. In response to the advertisement, a total number of fourteen firms/individuals submitted their Expression of Interest (EOI), which were then opened and scrutinized by the respondent No. 1 by preparing a comparative statement. Though technical criteria were clearly mentioned in the advertisement, according to the petitioner, no objective criteria were prescribed by the respondent No. 1 till that stage. After the respondent No. 1 made evaluation of technical and financial capabilities of the respective bidders, 11 bidders including the petitioner and the respondent No. 2 were short listed for issuance of the bid documents for the second stage of Request for Proposal (RFP). One of the bidders, namely, Unitech Ltd. was disqualified for their inability to submit a formal letter of association with a hospitality chain, while two other bidders, namely, Polo Towers and Reena Enterprises were not short listed for their inability to meet the criteria for turnover and net worth though the criteria for turnover and net worth were never formulated in the advertisement. It is contended by the petitioner that the respondent No. 2, who is a coal dealer by occupation, did not fulfill the eligibility criteria such as the requirement of being a reputed national/international hotel/hospitality chain, the requirement of having a valid management contract between operator and developer for operation and maintenance of the hotel for a minimum period of 10 years, the same deficiencies which led to the disqualification of Unitech Ltd. It is pointed out by the petitioner that the respondent No. 2 merely mentioned in the EOI that they were proposing to have a tie-up with T.K. International Ltd., but they never produced such valid management contract to that effect and, as such, the respondent No. 2 ought to have been disqualified like Unitech Ltd. on this ground.

5. It is also contended by the petitioner that the respondent No. 1, in addition to violating the terms and conditions of the advertisement with respect to technical criteria, has also contravened the law, norms and guidelines in short listing the bidders with regard to the financial criteria. It is alleged by the petitioner that the respondent No. 1 vide the letter dated 28.3.2007 had constituted a Committee with members from the respondent-Corporation, Government of Meghalaya and its consultant to evaluate, approve and select preferred bidders, and in the first meeting of this Committee held on 17.4.2007 to discuss the criteria for selection of bidders, the absence of definite parameters for selection with respect to Turnover and Net Worth was noticed whereupon it was decided therein that the criteria would be assessed on "point based scale" to be worked out by the said

consultant. This according to the petitioner, was contrary to the criteria formulated in the Draft Note circulated among the members of the Committee, namely, the "Turnover" of the bidders were to be fixed at Rs. 10 crores average annual turnover for the preceding three years, while the Next Worth was to be worked out on the basis of the average net worth of Rs. 5 crores for the preceding three years. The petitioner further states that in the second meeting of the Committee held on 4.5.2007, the need for finalizing the evaluation criteria regarding turnover and net worth was emphasized and that the representative of the consultant by the letter dated 24.4.2007 suggested the adoption of "point based scale" method by means of which a maximum of 5 marks was to be allotted for turnover and net worth and any bidder scoring a total of 5 marks or more was to be considered to have met the criteria with respect to turnover and net worth. The Committee was also stated to have considered the criteria for engineering project in which 30% was to be the turnover required while 15% would be the net worth, which would work out to be Rs. 8 crores and Rs. 4 crores respectively. According to the petitioner, the Committee, to broaden the participation, finally fixed the qualifying criteria at Rs. 5 crores (turnover) and Rs. 2.5 crores (net worth) by superseding the recommendation of the said consultant. The petitioner points out that in the matter of adopting the financial criteria for bidding, the guidelines issued by the panel on Infrastructure in the Prime Minister's Office (PMO) has prescribed that in all cases of public-private - partnership such as in this case, a bidder must have undertaken a similar project over the past five years (meaning experience) and must also have a net worth of not less than 15% of the total project costs. This is aimed at keeping non serious and predatory pricing or dummy bidders out as they often end up disrupting the process. It is further alleged by the petitioner that the respondent No. 1, nevertheless, decided to continue with the relaxed criteria of Rs. 5 crores (turnover) and Rs. 2.5 crores (net worth), and FRP documents were issued to the eleven selected bidders, which was ratified by the Committee on 11.6.2007, but, strangely, the question of financial criteria was again taken up and that the committee in a most arbitrary manner changed the aforesaid criteria and proceeded to follow the "point based scale" as suggested by the consultant vide the letter dated 24.4.2007. According to the petitioner, it was on the face of such illegalities that the second stage of the tender process, namely, RFP stage was continued and bids received. A total number of four bids were received, which are as under:

									Sl. No.	Avg. over a
Avg. Bid Value	Total No. of lease	Turn of 33	Net rental of years	(above value of 77	Rs.	mini- over the	worth	the mini- over a		
mum period										(Lakh)
Centre	12.92	19.81	46.00	9.61	Cr.	Point	Lakh	Group	Enterprise	1.
22.46	15.45	70.00	79.20	Cr.	Cements	Lakh	Ltd.		2. HM	
									3. Lessly	

13.17	1.87	98.23	98.99	Cr.	Shylla	Lakh
View	14.26	1.60	36.23	64.73	Cr.	Hotels
						4. City Lakh

6. On the basis of the aforesaid bids, according to the petitioner, the bid of the respondent No. 2 was found to be the preferred bid by completely losing sight of the fact that he is a coal trader with no technical experience or expertise in hotel or hospitality business and did not even satisfy the basic requisite minimal technical and financial criteria. Consequently, submits the petitioner, a bidder, who should have been disqualified at the very threshold, by the convoluted tender process resorted to by the respondent No. 1, has emerged as the preferred bidder. It is the further case of the petitioner that he has quoted a bid of Rs. 46 lakhs for the first year to be increased progressively in the subsequent years, and the same is based on economic feasibility and reasonable projections and that the bid of the respondent No. 2 is practically not feasible, which cannot be sustained in a long term spanning over 33 years so much so that there is a danger of jeopardizing the entire project in the long run. It is also asserted by the petitioner that though he has quoted a total project bid of Rs. 90.62 crores as against the bid of Rs. 98.99 quoted by the respondent No. 2, which is marginally short of the bid of the respondent No. 2, considering the other relevant factor such as experience, technical expertise, existing tieup with the leading national hotel chain, namely, ITC Welcome group, turnover, net worth and financial solvency, he has the highest technical and financial competence to undertake such a large project. Aggrieved by the aforesaid action of the respondent No. 1, the petitioner, on 25.6.2007, submitted his representation to the respondent No. 1 pointing out therein the illegalities, irregularities and procedural improprieties found in the tender process and requested them to reconsider the matter in accordance with law and award the contract in favour of a technically and financially competent and deserving bidder, but in vain. On the contrary, the respondent No. 1, on 23.6.2007, issued a letter of intent for award of the contract in favour of the respondent No. 2. The petitioner has now come to learn through local newspapers including Shillong Times that the respondent No. 1 had finally decided to award the contract in question to the respondent No. 2. It is thus contended by the petitioner that the action of the respondent No. 1 in awarding the contract in favour of the respondent No. 2 is illegal, arbitrary and discriminatory and is, therefore, liable to be quashed.

7. The writ petition is resisted by both the respondents by filing their respective affidavits-in-opposition. The case of the respondent No. 1 as pleaded in its affidavit-in-opposition is that IL & FS Infrastructure Development (HOC), New Delhi is a 100% subsidiary of the IL % FS, and is engaged in the project development process in the infrastructure section including hospitality segment and that for the redevelopment of the Crowborough Hotel, IIDC was mandated as the process manager to undertake the Bid Process Management (PM) for selection of a private developer/operator preferably with local participation on

Public-Private Partnership (PPP) basis. IIDC followed a competitive and transparent bidding process to select a qualified private developer/operator for redevelopment, operation and management of the Crowborough Hotel, which has been lying partially constructed for the last 20 years; such project will benefit the city of Shillong at large and the respondent-Corporation along with the Government of Meghalaya in particular. It is also stated by the answering respondent that the IIDC structured the bidding process in such a way that maximum benefit accrues to the respondent-Corporation, the owner of the property, which has taken the timely step of introducing Public-Private-Partnership concept in the State and the North Eastern Region in line with the practice followed elsewhere in India and abroad. The respondent No. 1 asserts that the Corporation was to receive an annual lease rental from the successful bidder to the tune of Rs. 98.99 crores during the lease period of 33 years where after the constructed property would revert to the Corporation in-as-it-is condition, and the project, in addition, would generate additional employment opportunity to local people besides improving the image of the City of Shillong thereby improving the prospect of tourism leading to all round development of the local population. The respondent No. 1 denies the sequence of events in the bidding process pleaded by the petitioner and asserts that the petitioner is trying to mislead this Court by inserting Clause E, which find no place in the EOI issued by the consultant. According to the respondent No. 1, the EOI does not contain any pre-qualification criteria in respect of the minimum net worth and turnover. It is pointed out by the respondent No. 1 that the petitioner has tried to confuse the issue by clubbing together the pre-qualification and evaluation criteria: pre-qualification criteria is required at the EOI stage as mentioned in the FOI document and that the evaluation criteria or sliding criteria take into account both turnover and net worth but without any minimum requirement for internal evaluation of the bidders : the evaluation criteria for final selection from the short-listed bidders were clearly mentioned in the bid document (RFP document), which is the highest license fee payer. While the respondent No. 1 maintains that all the conditions stipulated by the CVC circular have been followed, it also points out that the CVC itself came out with another circular stating that the pre-qualification criteria specified in the tender document should neither be made very stringent nor very lax to restrict/facilitate the entry of bidders and that the guidelines so issued are merely illustrative, which maybe suitably modified for specialized jobs/works, if considered necessary. The respondent No. 1 accuses the petitioner of fabricating comparative statement at Annexure-3, which is not on record, to derive undue advantage in order to espouse his cause. At this stage, it may be noted that the petitioner by filing additional affidavit conceded that no pre-qualification criteria in respect of minimum net worth and turnover was prescribed that Clause (e) inserted by it while reproducing the advertisement was nonexistent and should be read thus.

8. The Respondent No. 1 asserts that the said Polo Towers and Reena Enterprises were not shortlisted for issuance of RFP documents on the ground that they did

not meet the Sliding Criteria in which both their bids did not receive the minimum requirement of 5 out of 10 marks and points out that the term "Sliding Criteria" basically means "point based scale" by taking into account both turnover and net worth of bidders without any minimum requirement, and marks are assigned against the turnover and net worth of the bidders and further that minimum qualifying mark is kept to ensure that serious players are selected for issuing RFP documents. The respondent No. 1 also denies that the respondent No. 2 did not fulfill the basic technical requirement and asserts that all the short listed tenderers including the respondent No. 2 submitted their respective letters of confirmation from their operators: the documents relied upon by the petitioner are false and fabricated documents. It is asserted by the respondent No. 1 that it is in possession of a valid letter from T.K. International (bearer of Toshila Resorts having two operational resorts/hotels at Shimla and Puri) for twenty years vide Annexure-B. Though the EOI so published clearly mentioned that the bidder should be a reputed hotel/hospitality chain/company/consortium, avers the respondent No. 1, an addendum was subsequently issued to all bidders notifying that an individual would also be allowed to participate in the bidding process, which was done in response to the query received from the petitioner himself; the petitioner himself participated in the bid in his individual capacity as the pre-qualification criteria did not require so provided that such a bidder has a valid tie-up with an operator. The respondent No. 1 maintains that the bidding process has been carried out with the sole intention of deriving maximum financial benefits to the Corporation and that the respondent No. 2, having fulfilled the criteria prescribed and quoted Rs. 50 lakhs per annum above the petitioner, was selected as the preferred bidder. The respondent No. 1 flatly denies the existence of the draft note as annexed by the petitioner and points out that in the first meeting of the Evaluation Committee held on 17.4.2007, it was, after detailed deliberation, agreed that the criteria were to be assessed on a "Point Based Scale", which were to be worked out by the consultant and the consultant thereafter acted upon decision of the Evaluation Committee and made evaluation. However, subsequent to the evaluation made by the consultant, a meeting of the Evaluation Committee was held on 4.5.2007 when the following words were inadvertently inserted, namely, "Given the criteria for engineering projects, 30% is the turnover required and 15% would be the net worth. This would work to Rs. 8 crores and 4 crores respectively. However to broaden the participation platform, the qualifying criteria has been kept at Rs. 5 crores and Rs. 2.5 crores respectively. The Committee discussed in detail approved criteria for shortlisting of bidders." This stipulation was to be confirmed in the third meeting of the Evaluation Committee. In the third meeting held on 11.6.2007, the Committee was apprised of the fact that since no minimum stipulation had been made in respect of the net worth and turnover in the EOI, the same could not be changed at the subsequent stage. The mistake was accordingly rectified, and the EOIs were thus evaluated on Point Based scale. It is pointed out by the respondent No. 1 that they are not bound by the said guidelines of the Government of India, and the petitioner also at no point time ever raised

objection to this procedure. The respondent No. 1 also reiterates that the petitioner confused himself in not distinguishing between pre-qualification criteria and evaluation criteria and explains that while pre-qualification criteria are fixed and declared earlier, evaluation criteria are internally prepared and are used for short listing of bidders at the EOI stage: these criteria are normally prepared after submission of bids at the EOI stage in order to avoid manipulation of pre-qualification process. It is further averred by the respondent No. 1 that the evaluation criteria for final selection of the successful bidder on hand was published to the short listed bidders because in this case it was a single criterion i.e. the highest license fee quote (the highest amount quoted above the minimum annual lease rental of Rs. 77.1 lakhs). It is also pointed out that there were no separate financial criteria except the sliding criteria and these criteria were made after approval of Evaluation Committee and prior to opening of EOIs on 18.4.2007 and the marking under the sliding criteria system is universally accepted. The seal financial bids were opened in the presence of the bidder's representatives and in the presence of the petitioner. The respondent No. 2 firmly rules out the possibility of manipulation since the record would show that the respondent No. 2 was the highest bidder while the petitioner was the third highest. It is pointed out that apart from the respondent No. 2, another bidder, namely, HM Cements Ltd. quoted a higher amount than the petitioner and that the respondent No. 2 has already deposited Rs. 173.33 lakhs by way of upfront security prior to the signing of the lease agreement and would further pay up Rs. 173.33 lakhs prior to the commercial operations date thereby making a total payment of Rs. 345.66 lakhs within one year of signing of the lease agreement.

9. It is also the case of the respondent No. 1 that as stipulated in the financial bid, the licence fee and annual lease rental is subjected to 10.5% escalation rate every fourth year, but the petitioner has quoted a cash inflow in favour of the Corporation amounting to only Rs. 70.31 crores for the entire lease period and not Rs. 90.62 crores as has been sought to be made out by him and that by taking into account all these factors, the bids of the petitioner is lower by nearly Rs. 20 crores as compared to that of the respondent No. 2. It is also pointed that the respondent No. 2 in terms of the letter dated 5.3.07 (Annexure-C) has entered into an agreement with T.K. International Ltd., which has more than twenty years of experience in operating, management, construction and development of hotels, which satisfies the stipulated criteria in the EOI. The respondent No. 1 reiterates that the draft minutes of the second meeting, namely the financial criteria of fixing a turnover of Rs. 5 crores and net worth of Rs. 2.5 crores being erroneous was suitably amended, which was confirmed on 11.6.2007, and the process was carried out prior to opening of the bids : in fact, the petitioner never raise any objection before the opening of the financial bid. According to the respondent No. 1, it was only when the petitioner realized that he was in the third highest bidder that he started raising objection: he, having qualified in the pre-qualifying stage is now estopped from raising such objection. The respondent No. 1, therefore, submits that the decision making process of

awarding the contract to the respondent No. 2 does not suffer from any illegality, arbitrariness or procedural impropriety calling for the interference of this Court.

10. The Respondent No. 2 in his affidavit-in-opposition raises preliminary objection to the maintainability of the writ petition on the ground that the consultant (IL&FS), which is an integral, if not an indispensable, part of the entire tender process and, therefore, a necessary party, is not impleaded as party respondent in the case; the writ petition is thus liable to be dismissed at the very threshold on this ground alone. While substantially adopting the position taken by the respondent No. 2, he also questions the propriety of annexing internal official correspondences by the petitioner and further contends that the writ petition suffers from laches. The respondent No. 2 submits that if the petitioner has any grievance against the adoption of sliding criteria, as a prudent tenderer, he ought to have challenged the validity thereof without participating in the tender process and that it is well settled principle of law that the terms and conditions of a tender process cannot be challenged, and if any aspiring tenderer has any doubt over the adoption of a particular policy decision, he should have raised objection against the same at the first instance without waiting for the entire process to be over. The respondent No. 2 further avers that he submitted his management contract for 20 years with T.K. International (bearer of Toshali Resorts firm of significant repute - having two operational hotels/resorts at Shimla and Puri and one under construction at Bhubaneswar besides having tie-ups with a huge array of hotels/resorts of high magnitude), which is in the custody of the respondent No. 1 and has duly conformed to all the requisite details required by the tender process. The answering respondent also reiterates that in terms of the addendum circulated (incidentally on the query made by the petitioner himself) to all the bidders, an individual like him is also allowed to participate in the tender the petitioner himself participated in the tender process in his individual capacity and not as a company incorporated under the Companies Act, 1956. The said CVC Office order dated 4.9.2003 has been amended by the CVC memorandum dated 7.5.2004 for this kind of tender process and clearly states that it refers to the guidelines dated 17.12.2002 which, in turn, was issued essentially for relaxation of the tender process, and the same has been duly followed in the instant tender process. The consultant only followed the directives and developed a mid way to ensure maximum participation by relaxing the criteria and by providing sufficient shields whenever necessary to block the entry of fly-by-night operator. The respondent No. 2 disputes the very existence of the draft note annexed as Annexure-5 and claims that the same is a fabricated document. The respondent No. 2 further asserts that the point based scale/sliding criterion was discussed by the Evaluation Committee in the meeting dated 4.3.2007 and was approved, which was explained to all the bidders thereby making the entire tender process a very transparent one. While reiterating the contentions of the respondents No. 1, the respondent No. 2 points out that he has accepted the letter of intent issued to him in his communication dated 25.6.2007 by remitting demand drafts worth Rs. 77,43,000/- to facilitate the

signing of an agreement. Subsequently, the respondent No. 2 also received the letter dated 29.6.2007 from the respondent No. 1 urging him to come forward and sign the agreement, which he replied by his letter dated 4.7.2007 referring to the banker's cheque dated 3.7.2007 amounting to Rs. 173.33 lakhs submitted by him in favour of the respondent No. 1. The respondent No. 2 thus claims that he has already invested a huge amount of money after being guaranteed of leasing out the Hotel to him, and any move to foil the lease will cause irreparable loss to him besides causing him unbearable mental agony. The only criteria in the context of the tender in question is earning the highest possible revenue for the exchequer, the inevitable beneficiary being the State which is to gain through the annual lease amount, but the entire property being constructed at the expense of the respondent No. 2 is being returned to the respondent No. 1 after the expiry of the lease of period of thirty-three years. Again, according to the respondent No. 2, the project, when completed, will benefit the public at large in numerous ways as it will generate large scale employment opportunity to the locals, lucrative business avenues and offers a tremendous boost to tourism followed by an even larger enrichment of the allied industries. Although the technical qualifications were to a certain extent relaxed, yet there were several trigger points in the bidding process which ensures that the bidders were serious and qualified bidders and not fly-by-night operators. The fact that the respondent No. 2 has already paid Rs. 424.09 lakhs even before the commencement of commercial operation of the Hotel demonstrably shows that the respondent No. 2 is not a non-serious bidder. According to the respondent No. 2, the kind of contract which does not have any impact of pricing upon the public at large always calls for formulation of measures to ensure a bidding system which guarantees maximum revenue generation for the State, and mere quoting of a fancy or higher price per se does not by itself render the bid offer of any party an unviable one: it is the prudence and business acumen of the bidder which regulates his decision while quoting a higher offer. It is not for the State authorities to examine the viability of the rate quoted by the bidder since the interest of the State lies in generation of revenues. The respondent No. 2, while quoting his rate, has naturally viewed the viability of the rate quoted by him from all feasibility angles and workable parameters and thereafter finally decided that the lease period of 33 years offers him ample opportunities to recover the expenditures initially incurred by him and make good business profits by running the Hotel. The respondent No. 2 ridicules the doubts raised by the petitioner on his competence to run the hotel as he is a mere coal dealer and claims that an investor with adequate financial resources, be he a coal dealer or a transporter, can always successfully run a hospitality industry of any magnitude if he has proper operation and management tie-up with an existing hotel operator. The respondent No. 2 alleges that the writ petition has been filed by the petitioner with mala fide intention as he wants the Hotel, which is located in close proximity to his Centre Point Hotel, to remain non-operational so that his hotel business is not affected and that he, out of fear of healthy competition resulting from the operation of a star category hotel close to his own hotel, is determined to stall

the tender process with the intervention of this Court.

11. In the reply affidavit to the affidavit-in-opposition of the respondent No. 1, the petitioner asserts that as far back as on 28.4.2006 the consultant had already formulated the bidding criteria in discussion with the respondent No. 1 wherein pointed and explicit conditions had been laid down, but, strangely, the criteria stated in the EOI were vague and ambiguous. The petitioner also questions the property and questionable methods in engaging the IL&FS (IIDC) as the consultant. Referring to the minutes of the 1st meeting dated 17.4.2007 and of the second meeting dated 4.5.2007, the petitioner maintains that (a) the EOI of all bidders were opened prior to 17.4.2007 (before the first meeting and (b) a comparative statement was prepared and placed in the 2nd meeting of the Committee on 4.5.2007. The petitioner also highlighted the chronological events commencing from 21.2.2007 to 24.4.2007 to demonstrate that no financial criteria were fixed during that period and reiterate that on 4.5.2007 and 14.5.2007 when the bidders were shortlisted and RFP issued, the criteria in force were Rs. 5 crores for turnover and Rs. 2.5 crores for net worth and not point based scale and maintains that T.K. International, with which the respondent No. 2 proposed to have a tie-up, did not have equity stake of the respondent No. 2 and could not be treated as a consortium member. The petitioner contends that neither valid management contract between the respondent No. 2 and T.K. International nor any letter to that effect was ever submitted at the time of submission of EOI and that the letter to that effect at Annexure-B to the affidavit-in-opposition in an afterthought and was inserted subsequently any case, this letter cannot be construed as a valid management contract required by the pre-qualification criteria. Nor did the respondent No. 2 submit a solvency certificate worth Rs. 100 million as required by the EOI advertisement, but he was allowed to participate in the second stage of the bidding process. These deviations have been made to give undue favour to the respondent No. 2. The petitioner points out that the various illegalities and irregularities committed by the respondent No. 1 were known to it when the financial bids were opened, and the same came to light only when reports to that effect came out in various local dailies and after minutes of the meetings were available. It is contended by the petitioner that the mere fact that it had qualified in the pre-qualification stage does not bar it from challenging those acts of commission or omission inasmuch as they prejudicially affected its interest at the RFP stage. The petitioner submits that the point based scale adopted by the respondent No. 1 in the third meeting is highly defective inasmuch as no minimum cut off points have been prescribed for Turnover or Net Worth : the omission was done deliberately to make way for the respondent No. 2, who apparently did not qualify the criteria of Rs. 5 crores and Rs. 2.5 crores. The petitioner maintains that it has quoted a progressively escalating bid, the total whereof would come to Rs. 90.61 crores in 33 years and denies that its total bid value is only 70.31 crores. These are the sum and substance of the new facts pleaded by the petitioner in its reply affidavit.

12. Mr. H.S. Thangkhiew, the learned Counsel for the petitioner, submits that in a

competitive bids such as the one here, it is incumbent upon the respondent No. 1 to incorporate in an unambiguous term all pre-qualification criteria including financial criteria, performance criteria and evaluation criteria in the bid documents so as to ensure transparency in the tender process and inasmuch as no financial criteria either in terms of turnover and net worth were indicated by the respondent No. 1, the EOI is demonstrably defective and against the settled principles of law as well the guidelines issued by the Central Vigilance Commission. The entire tender process culminating in the letter of intent issued to the respondent No. 2, so submits the learned, is vitiated. In support of his submission, the learned Counsel relies on the decisions of the Apex Court in (a) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , (b) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and (c) W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Ors. (2001) 2 SCC 451 . The second contention of the learned Counsel for the petitioner is that the respondent No. 2 did not fulfill the eligibility criteria as he is a coal dealer without any past experience in hotel industry and does not possess a valid management contract with a competent operator : non-fulfillment of such essential qualifications renders his bid non-responsive and his bid ought to have been rejected at the very threshold. It is next contended by the learned Counsel that though the respondent No. 1 on 14.5.2007 had finalized the financial criteria and had fixed the same at a minimum of Rs. 5 crores for turnover and Rs. 2.5 crores for net worth, they on 11.6.2007 again changed these criteria and reformulated the same on a point based scale for the turnover and the net worth in order to accommodate the respondent No. 2, which is arbitrary and discriminatory and, therefore, impermissible. It is thus his submission that once the tender conditions have been laid down, they cannot be altered at the whims and caprice of the respondent No. 1. Strong reliance is placed by him on the decisions of the Apex Court in (a) M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, , (b) G.J. Fernandez v. State of Karnataka (1990) 2 SCC 287 and (c) Laxmi Sales Corporation Vs. Bolangir Trading Company and Others, . Refuting the contentions of the learned Counsel for the petitioner, Mr. T.T. Diengdoh, the learned Counsel for the respondent No. 1, submits that the petitioner has never challenged the EOI at the relevant time and cannot at this belated stage question the same even if the EOI is not done in accordance with the procedure prescribed by law, more so, after he failed to secure the work order. According to the learned Counsel, the subsequent letter dated 7.5.2004 of the CVC has clarified that the pre-qualification criteria specified in the tender document should neither be very stringent nor very lax so as to restrict/facilitate the entry of bidders and that the guidelines issued by the CVC are merely illustrative, which can be suitably modified for specialized jobs/work, if considered necessary. Drawing my attention to the letter dated 5.3.2007 of the Welcome Group, ITC as well as the solvency certificate submitted by the petitioner, the learned Counsel for the respondent No. 1 pointed out that the petitioner does not have any valid management contract with any operator nor is the solvency certificate of the Bank in question

issued in the name of the Centre Point Group Enterprises, but is issued in the name of Shri Prabhat D. Sawian. It is thus submitted by him that the petitioner itself is not eligible to participate in the bid. It is further contended by the learned Counsel that the first criteria as per the EOI that the bidder may be a reputed national/International Hotel/Hospital Chain is qualified by the terms consortium between a developer and operator and, so understood, the agreement dated 5.3.2007 entered into between the said T.K. International Ltd. and the respondent No. 2 constitutes a valid management contract to make their relationship a consortium. On the contention of the petitioner that the financial criteria were changed to accommodate the respondent No. 2, the learned Counsel submits that the parameters for selection of bidders with respect to turnover and net worth are for the purpose of internal assessment by the Evaluation Committee and are not the criteria prescribed in the EOI. The learned Counsel for the respondent No. 1 concedes that on a bare perusal of the various minutes of the Evaluation Committee, there were seemingly some contradictions and ambiguities therein, but he submits that these discrepancies had been clarified in the 3rd meeting, and necessary amendment to that effect was accordingly made. The learned Counsel thus maintains that there has been no substantial deviation from the bidding criteria as published in the EOI. Finally he submits that the tendering process was done by the respondent No. 1 with only one aim in mind, namely, to earn maximum revenue for the State. Contending that the impugned tender process does not suffer from any illegality, procedural impropriety or arbitrariness, the learned Counsel for the respondent No. 1 strenuously urges this Court to dismiss the writ petition. The learned Counsel for the respondent No. 1 cites the following cases:

(a) New Horizons Limited and Another Vs. Union of India (UOI) and Others, , (b) Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, , (c) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , (d) B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, , (e) M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , (f) Association of Registration Plates Vs. Union of India (UOI) and Others, , (g) Continental Construction Ltd. Vs. Tehri Hydro Development Corpn. Ltd. and Another, and Tata Cellular v. Union of India (1994) 6 SCC 651, to buttress his various contentions. Mr. D. Das, the learned Counsel for the respondent No. 2 while adopting the submissions of the learned Counsel for the respondent No. 1, however, adds that it is settled principle of law that the terms and conditions of tender are in the realm of contract and cannot be challenged in a writ petition, and if any aspiring bidder has any objection against the adoption of a particular policy decision, he should do so at the first instance without waiting for the entire process to be over. He further points out that the respondent No. 1 subsequently, on the query of the petitioner itself, clarified by addendum that an individual would be allowed to participate in the tender process and, therefore, rejects the contention of the petitioner to the contrary. In fact, according to the learned Counsel, the petitioner himself participated in the bidding process in his capacity

as an individual and not as a company incorporated under the Companies Act, 1956. The learned Counsel for the respondent No. 2 finally contends that the writ petition is mala fide and has been filed with the oblique motive of preventing the establishment of a rival hotel at its doorstep to complete with it.

13. I have given my thoughtful consideration to submissions made by the learned Counsel appearing for the rival parties. I have also gone through the materials on record as well as the tender files placed before me by the learned Counsel for the respondent-Corporation. The first point for determination in this writ petition is whether the respondent No. 2 is ineligible to participate at the stage of Expression of Interest (EOI). At this stage, it will be useful to refer to the relevant portion of the Expression of interest (Annexure-1 to the writ petition), which are as follows:

Bidding Criteria:

? Bidders may be reputed national/international hotel/hospitality chain/companies/consortium (maximum two members) and preferably with participation of local party (s).

? In case of consortium between a developer and operator, there needs to be a valid management contract between them for operation and maintenance of the hotel for a minimum period of 10 years.

? The bidders would be required to utilize their own finances and resources to complete the building as a hotel and for its full operation, maintenance and management.

? Interested developers and/or operators to be a part of the project are requested to submit their EOI along with bidder's profile including management structure, key promoters, professionals, stakeholders, audited financial Net Worth and solvency from a nationalized Bank amounting to a minimum of Rs. 100 million.

Interested bidders should have valid trade license etc. as applicable in the State of Meghalaya for undertaking this nature of business.

14. Admittedly, the respondent No. 2 is a coal trader and has no experience whatsoever with hotel or hospitality industry, nor does he claims to be so. Whether to be a hotelier is the eligibility is then the moot point. The EOI says that the bidder should be a national hotel or an international hotel or a hospitality chain or companies or can even be a consortium provided it has a maximum of two members, preference being one having the participation of local party (s). In other words, it is obvious that the bidder need not necessarily be a national or international hotel. It need not also be a hospitality chain or companies. There is no dispute at the bar that the respondent No. 2 is not a national hotel or international hotel or a hospitality chain or companies. The case of the respondent No. 2 is that he along with the hotel industry under the name and style of "T.K. International Ltd. has a tie-up to undertake the project in

question and that he has executed a valid management contract for the tie-up with this firm, which was submitted by him to the respondent authorities. The term "consortium" has many dictionary meanings. One of them is "(T) or more parties acting together as a partnership of joint venture"" (See "Advanced Law Lexicon" by P. Ramanatha Aiyar, 3rd Edn.). The bidding criteria, among others, stipulates that in case of consortium between a developer and operator, there needs to be a valid management contract between them for operation and maintenance of the hotel for a minimum period of 10 years. In the tender file, it is found that there is an agreement dated 5.3.2007 executed between the respondent No. 2 and the said T. K. International Hotel Ltd. indicating therein that the latter would be responsible to lead the project (Crowborough Hotel) for providing management consulting services as well as manage and operate the hotel after its renovation and refurbishment at Shillong for a period of 33 years. In my opinion, the fact that the respondent No. 2 is a coal dealer and has no experience as a hotelier is not ground for disqualifying him for the EOI bid so long as he has a tie-up with a reputed hospitality company like T.K. International Ltd. It is nobody's case that the said T.K. International Ltd. is not a reputed hotel industry. Incidentally, it is the petitioner which is liable to be disqualified at the very threshold inasmuch as it did not submit the solvency certificate issued in the name of Centre Point Group Enterprise as stipulated in the bidding criteria: it was, rather, issued in the name of "Prabhat D. Sawyan". That apart, though the petitioner claims that it set up a consortium/partnership with ITC Welcomgroup a leading national hotel chain, it never submitted any valid management contract entered into by it with the ITC Welcomgroup. In fact, the letter dated 5.3.2007 of the ITC Welcomgroup found in its tender documents does not appear to be a management contract, but is merely an offer to consider the proposed tie-up "subject to a mutual agreement on the terms and conditions pertaining to such an alliance". A preacher is rather found in a brothel! The petitioner must succeed in his case on the strength of his own case and not on the weakness of his opponent. Therefore, the petitioner itself did not conform to the bidding criteria and should have been disqualified at the EOI stage itself. Any judicial relief at the instance of a party which does not fulfill the requisite criteria seems to be misplaced (See Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others,). The writ petition is thus liable to be dismissed at the very threshold on the sole ground that the petitioner has no locus standi to challenge the tender process.

15. Coming now to the next contention of the petitioner that the EOI is defective and is against the principles of law which enjoins that all pre-qualification criteria must be categorically laid down, the submission is to be noted only to be summarily rejected. The reason is that the petitioner never challenged or raised objection against such omission, if there be any. Whenever the petitioner entertained any doubt on the bidding criteria, it was not slow in raising such issues as can be seen from his letter dated 23.5.2007 (Annexure-C to the counter-affidavit of the respondent No. 1) wherein it had sought clarification as

to the meaning of the word " "Company"" before submission of RFP bids. If the pre-qualification criteria were really vague and was, therefore, likely to cause prejudice to it, it ought to have challenged the same in an appropriate manner. Having proceeded to participate in the bidding process knowing fully well such alleged defective criteria, it cannot at the belated stage turn around and say that the bidding process is unfair or arbitrary or vague. I find considerable force in the contention of the learned Counsel for the respondents that the petitioner challenged the bidding process only when it failed to secure the contract. Coming now to the meat of the matter, it is the contention of the petitioner that though the respondent No. 1 had on 14.5.2007 finalized the financial criteria and had fixed the same at a minimum of Rs. 5 crores for the turnover and Rs. 2.5 crores for the net worth, it changed these criteria again on 11.6.2007 and reformulated the same on a point based scale for the turnover and net worth in order to accommodate the respondent No. 2. To verify the correctness of this contention, I have carefully perused the tender file produced by the respondent No. 1. It appears that in the first meeting of the Evaluation Committee held on 17.4.2007, the Committee agreed that the financial criteria were to be assessed on a point based scale, which was to be worked out by the consultant. It is the case of the answering respondents that the parameters adopted for selection of the bidders with respect to the turnover and the net worth were for the purpose of internal assessment by the Committee, and the same were never prescribed in the EOI itself. Undoubtedly, it is a settled position of law that once tender conditions have been laid down, such conditions cannot be altered at the sweet will of the tendering authority. The question then is whether any financial criteria have been laid down in the EOI? The answer is a clear "No". The petitioner itself admitted it. However, the genesis of the confusion can be traced to the second meeting of the Evaluation Committee held on 4.5.2007 when it was recorded, among others, that "given the criteria for engineering projects, 30% is the Turnover required and 15% would be the net worth which would work out to Rs. 8 crores and Rs. 4 crores respectively. However, to broaden the participation platform, the qualifying criteria has been kept at Rs. 5 crores and Rs. 2.5. crores respectively. The Committee discussed in detail and approved the criteria for shortlisting of bidders". It is the contention of Mr. H.S. Thangkhiew, the learned Counsel for the petitioner that the criteria of Rs. 5 crores for turnover and Rs. 2.5 crores for net worth were fixed only in the second meeting of the Committee, which was again changed to the point based scale in the third meeting and that the respondent No. 1 initially omitted to fix the pre-qualification criteria before the start of the bidding process and subsequently, in an attempt to cover up the said omission, resorted to those criteria after the bids were open and all financial and technical information were by then already known to the respondent No. 1. According to the learned Counsel, the whole exercise was undertaken by the respondent No. 1 to make way for the respondent No. 2, who would not have been awarded the contract at all had these financial criteria been not changed. Assailing the manner in which the bidding process were clubbed together, the learned Counsel points out that the bidding process is clearly demarcated into

two stages, namely, the first stage being evaluation of technical and financial capabilities on the basis of the stipulated criteria and the second stage being financial bidding and process to submit that the financial bidding becomes relevant only when the bidder satisfies the pre-qualification technical and financial criteria and submits his financial bid, and the respondent No. 2 was illegally allowed to take part in the financial bid when he did not satisfy the technical and financial criteria. The learned Counsel finally contends that the point based scale adopted by the respondent No. 1 also suffers from incurable defect inasmuch as no minimum cut off points have been prescribed for either the turnover or the net worth, which resulted in enabling the respondent No. 2 to take part in the financial bid and eventually grab the contract illegitimately.

16. In the first meeting of the Evaluation Committee held on 17.4.2007, the Committee itself observed that there were no definite parameters for selection with respect to the turnover and the net worth though such parameters were necessary for assessment of the credibility of the bidders and ultimately decided that both the criteria (technical and financial criteria) were to be assessed on the basis of "point based scale", which were left to be worked out by the consultant. At that stage, 14 bids had already been received. Then, in the next meeting held on 4.5.2007, the Committee decided that the evaluation criteria with respect to turnover and net worth be fixed at Rs. 5 crores and Rs. 2.5 crores for short listing of bidders respectively so as to ensure broader participation. These evaluation/financial criteria are not obviously based on point based scale referred to in the first meeting. However, these criteria were not admittedly adopted in the third and final meeting held of the Committee held on 11.6.2007. What actually transpired in that meeting was that the financial criteria of the bidders were assessed on the basis of sliding/point based criteria as against the criteria agreed upon by the Committee in the second meeting, namely, a turnover of Rs. 5 crores and a net worth of Rs. 2.5 crores as the basis for evaluating the financial capability of the bidders. The justification for this development appears to be that the consultant had recommended sliding criteria in the letter dated 24.4.2007 for short listing of the bidders and that the Committee thereafter fixed the qualifying marks of 5 out of 10 on the two criteria. The Committee noted that the facts had not properly presented earlier and accordingly agreed to amend the minutes of the meeting. To understand the meaning of the terms "sliding or point based scale criteria", it may at this stage be appropriate to reproduce hereunder the said letter dated 24.4.2007 of the consultant:

Chairman, 24.4.2007 Evaluation Committee for Selection of Developer/Operator of Crowborough Hotel Shillong, Meghalaya

Subject: Fixing of evaluation criteria regarding turnover & net worth for short listing of developer & operator for development of Crowborough Hotel at Shillong, Meghalaya

Sir,

Please refer to the discussion held during the first committee meeting in your office on 17th April, 2007 on the subject matter.

As deliberated in the meeting, the evaluation criteria with respect to the minimum turnover and net worth figure for the short listing of bidders are as under:

A	Turn	Over:	Total	marks	05
SI. Av. Turnover for last 3 years Marks No. ending 31st March 2006 Assigned Range Between (In Rs. Crore)					
_____	_____	_____	_____	_____	1. 0
and 1.0	0	_____	_____	_____	2. 1.0
and 2.5	1	_____	_____	_____	3. 2.5
and 5.0	2	_____	_____	_____	4. 5.0
and 7.5	3	_____	_____	_____	5. 7.5
and 10	4	_____	_____	_____	6. Above
10	5	_____	_____	_____	

B.	Net	Worth:	Total	marks	05
SI. Av. Turnover for last 3 years Marks No. ending 31st March 2006 Assigned Range Between (In Rs. Crore)					
_____	_____	_____	_____	_____	1. 0 and
0.5	0	_____	_____	_____	2. 0.5 and
1.25	1	_____	_____	_____	3. 1.25 and
2.5	2	_____	_____	_____	4. 2.5 and
3.75	3	_____	_____	_____	5. 3.75 and
5.0	4	_____	_____	_____	6. Above 5.0
5	_____	_____	_____	_____	Any of the

bidders scoring 5 marks or more (A&B combined) during evaluation will be considered to have met the criteria with respect to turnover and net worth requirements.

The same may kindly be approved at the earliest for undertaking the next activity in selection process.

With Warm regards,

Yours sincerely Sd/- S.K. Mahanta Asstt. Vice President.

17. In the third meeting of the Evaluation Committee, four bidder, namely, (i) City View Hotels Pvt. Ltd., (ii) H.M. Cements Ltd. (iii) Centre Point Group Enterprise (the petitioner herein) and (iv) M/s Lessly Shylla were found to be responsive, which were then opened in the presence of the Committee members and the bidders. The Committee observed that though the Centre Point Group quoted Rs. 90.61 crores, as per escalation criteria in the RFP documents, its bid stood reduced to Rs. 70.31 crores. The Committee thereupon found the respondent No. 2, who quoted Rs. 98.99 crores, to be the preferred bidder and accordingly recommended his bid for approval and ratification by the respondent

No. 1. The proposition of law with respect to the power of judicial review over contractual matter is now no longer *res integra*. It is not every deviation from the precise path of best practice that warrants judicial review. Judicial review, as repeated *ad nauseam*, is exercised to rein in an unbridled executive functioning. 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. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy. It must be remembered that a writ court does not have the material or expertise in a matter involving a commercial contract to assess the correctness of the judgment of the Evaluation Committee. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , the Apex Court observes:

Public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amounts to implementation or projection of policies of the Government. In contract having commercial elements, some more discretion has to be conceded to the authorities giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms, so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired although not strictly following the norms laid down by the courts, are upheld on the principles laid down by Justice Holmes, that courts while judging the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with the plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. But even in such matters they have to follow the norms recognized by courts while dealing with public property, though the decision taken in a bona fide manner although not strictly following the norms laid down by the courts, are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

(underline mine)

18. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , the Apex Court also observes that even when some defect is found in the decision making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point, that the court should always keep the larger public interest in mind in order to decide whether its intervention is called

for or not and that only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very carefully to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers (See *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*,). The law relating to the contractual power of the Government and the inherent limitation of judicial review in connection therewith have been thoroughly examined by a three-Judge Bench of the Apex Court in the leading and epoch-making case of *Tata Cellular v. Union of India* (1994) 6 SCC 651, and the following principles can be culled out therefrom:

1. It is not for the court to determine whether a particular policy or 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 (i) Illegality, which 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. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

2. 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. A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. 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."

(emphasis mine)

3. The modern trend points to judicial restraint in administrative action.
4. The court does not sit as a court of appeal but merely reviews the manner in which the decision is made.
5. The court does not have the expertise to correct the administrative decision. If a review of administrative action is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
6. 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 a process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
7. 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 unreasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
8. Quashing decisions may impose heavy administrative burden on the administrative and lead to increased and unbudgeted expenditures.
19. It is against the backdrop of the aforesaid legal principles that I propose to examine the contentions of the learned Counsel for the petitioner. As already noted by me, the fundamental issue pertains to the unhappy manner in which the sliding criteria or point based criteria came to be adopted by the Evaluation Committee in its third meeting. In the second meeting, an impression was given by the Evaluation Committee that the yardstick for assessing the financial criteria was worked out at Rs. 5 crores for the turnover and Rs. 2.5 crores for the net worth. The respondent No. 1 explained in paragraph No. 15 of the counter that these financial criteria had been erroneously recorded in the second meeting of the Evaluation Committee and that the fact that point based scale was being adopted had already been indicated in the first meeting, for which the consultant was instructed to undertake the exercise. The result of the exercise was reflected in the letter of the consultant dated 24.4.2007, which was referred to earlier. The minutes of the third meeting approved these criteria and further recorded that this fact was not properly presented in the minutes, for which it was agreed to amend the minutes. In my opinion, the net result of the amendment is that the sliding/point based scale criteria, and not the criteria fixing Rs. 5 crores for the turnover and Rs. 2.5 crores for the net worth, came to be adopted for assessing the technical financial capability of the bidders. In the absence of particular criteria being prescribed in the EOI, it cannot be said that there was deviation from the terms and conditions of the tender. A fortiori, in the absence of specific criteria laid down in the EOI, the Evaluation Committee was not precluded from adopting the sliding criteria in the third meeting, though this was already

indicated in the first meeting. After all, as pointed out by the respondents, the adoption of point based criteria was only for the purpose of internal assessment by the Evaluation Committee, which were never prescribed in the EOI. As already held earlier, if the petitioner was really aggrieved by the omission to specify the parameters for judging the technical and financial capability of the bidders, it ought to have challenged the same before the commencement of the tender process. Moreover, no mala fide or, at any rate, no specific material on this behalf, against the respondent authorities is alleged by the petitioner. In addition, no substantial prejudice to the petitioner has been established by reason of adoption of the sliding criteria. The respondent No. 2 has demonstrably outbidded the petitioner by Rs. 8.38 crores? Even if the qualifying criteria of Rs. 5 crores for the turnover and Rs. 2.5 crores for the net worth were adopted, the average turnover and net worth of the respondent No. 2 for the preceding three years, on the own showing of the petitioner, would still be Rs. 13.17 crores and Rs. 1.87 crores respectively. True the average net worth of the respondent No. 2 would be Rs. 63 lakhs short of the required Rs. 2.5 crores. But then, on overall consideration of the admitted profiles of the respondent No. 2 such as the price quoted by him vis-a-vis the petitioner and of the valid management contract he has with T.K. International Ltd. and also keeping in mind the fact the petitioner itself did not fulfill the eligibility criteria in the EOI, the respondent No. 1 would be well within its discretion to waive such deficiency and then proceed to award the contract in favour of the respondent No. 2.

20. True, the respondent No. 2 is a coal dealer and has admittedly no past experience in hotel or hospitality management. But what cannot be overlooked is that he has a valid management contract with T.K. International Ltd., Which is undoubtedly a hotel industry of repute. As observed by the Apex Court in *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , the requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. This is a case in which the respondent No. 2 has set up a consortium with an experienced hotel industry, whose earlier experience can certainly be taken into consideration. Again, as observed in *New Horizon Ltd. (supra)*, while considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent-businessman. When a businessman enters into a contract where under some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would not go by the name of the company but by the persons behind the company. It is also true that the petitioner has impeccable credence in so far as hotel management is concerned, and can be

considered to be one of the best in this field in the entire North East India. But then, as already noted, it did not fulfill the eligibility criteria. Therefore, any judicial relief at the instance of a party which does not fulfill the requisite criteria seems to be misplaced. The procedure adopted by the respondent No. 1 in the decision-making process, as conceded by themselves, has left a lot to be desired, for which the consultant, the so-called expert, which has reportedly been paid hefty consultant fees, is squarely to be blamed. Nevertheless, the modern trend in contractual field appears to be that though a public authority does not have an unfettered discretion to ignore the norms recognized by the courts, but at the same time if a decision has been taken by a public authority in a bona fide manner, although not strictly following the norms laid down by the courts, while adjudging the constitutional validity of executive actions, must grant a certain measure of freedom of "play in the joints" to the executive. Ultimately, the yardstick for interference by a writ court in a contractual matter is whether something has gone wrong of a nature and degree which requires its intervention or whether the decision taken by the respondent No. 1 in awarding the LOI in favour of the respondent No. 2 or in ignoring the bid of the petitioner is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. In my judgment, the answer is an emphatic "No". If there can be two possible views on a dispute, this Court cannot interfere with the view taken by the executive authorities on the ground that the other view could have been a better view, for that will amount to substituting its view for the view of the executive authorities. Even when some defect is found in the decision-making process, this Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere-- See B. S. N. Joshi & Sons Ltd. (supra). In the instant case, the petitioner has miserably failed to make out that public interest is likely to suffer by the impugned decision. On the contrary, the bid of the respondent No. 2 at Rs. 98.99 crores is admittedly higher than that of the petitioner, which is at Rs. 90.61 crores. The tendering process was obviously done with an eye on augmentation of revenue and to secure the highest license fee for the Corporation. By selecting the respondent No. 2 as the preferred bid, the object of the tender appears to have been achieved, which can be said to have served public interest. In my opinion, on the facts and circumstances of the case, there can be no overwhelming public interest warranting the interference of this Court in the impugned action of the respondent No. 1. Finally, it is also not the specific case, supported by evidence of the petitioner that the impugned action is vitiated by "bribery, corruption, implementation of unlawful policy and the like". On the contention of the learned Counsel for the petitioner that no valid management contract between the respondent No. 2 and T.K. International Ltd. was submitted

by the respondent No. 2 at the time of submission of his bid and that the so-called management contract found in the tender file is an afterthought and was subsequently planted by the respondents, it is not possible for a writ court to verify the correctness of such contention inasmuch as the same is in the realm of disputed question of facts. Determination of this contention will necessarily require adduction of oral and/or documentary evidence by the parties, which cannot be done in a summary proceeding like Article 226 of the Constitution.

21. It is a settled law that a party can invoke the writ jurisdiction of this Court for the purpose of enforcement of established legal and constitutional rights and not for establishing legal and constitutional rights. Therefore, this contention must also meet the same fate.

22. In the view that I have taken, there is no merit in this writ petition, which is hereby dismissed. However, on the peculiar facts obtaining in this case, I direct the parties to bear their respective costs. The interim order dated 6.7.2007 stands vacated.