

(2009) 07 DEL CK 0422

In the Delhi High Court

Case No : Writ Petition (C) No. 9595 of 2009

Man Industries (India) Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 02-07-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
General Financial Rules, 1963 — Rule 160, 161

Citation : (2009) 162 DLT 489 : (2010) 8 RCR(Civil) 2048

Hon'ble Judges : Suresh Kait, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Dushyant Dave, Sudhir Nandrajog, Rakesh Kumar Garg and Rahul Khurana, for the Appellant; S.K. Dubey and Vanshdeep Dalmia for Respondent No. 1, Prag P. Tripathi and ASG, S.S. Ray and Rakhi Ray, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The present petition under Article 226 of the Constitution of India raises the questions relating to validity of tender process floated by Public Sector undertakings and calls upon this Court to examine the process followed by the Respondents and to adjudicate upon the same while exercising powers of Judicial review available under the constitution and thereby seeking interference of this Court by way of appropriate writ.

2. The writ petition is filed for issuance of writ of mandamus and certiorari or any other appropriate direction seeking the production of the records of tender for Dahej Vijaipur Pipeline Upgradation project and declaring the action of the respondents in inviting the fresh financial bids vide letter dated 8.6.2009, as illegal, arbitrary and violative of Article 14 of the Constitution of India, and to quash the letter bearing No. GAIL/ND/C&P/PRJ/DVPL-II/08-41/01, dated 08.06.2009, and consequently to direct the respondents to process the case of petitioner for award of contract and to pass such other suitable orders.

FACTUAL MATRIX:

3. Brief factual matrix of the matter can be enunciated and summarised as under:
4. The Petitioner is the company incorporated under the companies Act, 1956 and is the manufacturer of pipes. It is one of the bidder amongst the other in the Dahej- Vijaipur Pipeline Upgradation project as per the bids invited on 6.12.2008. The Respondent No. 1 is Union of India and Respondent No. 2 is GAIL (India) Limited is the government of India undertaking on whose behalf tenders were invited for by one Tratebel S.A. (T.E). The respondents are thus amenable to the jurisdiction of this Court.
5. The advertisement for floating of tender was issued on 6th December 2008 in the issue of The Times of India inviting the bids through the e-tendering process on international competitive bidding basis for Carbon Steel Bare Line Pipes for Dahej- Vijaipur Pipeline Upgradation project. Pursuant to the said advertisement, the petitioner submitted its bid after examining the tender document online and the bid was submitted online on 28.1.2009.
6. The petitioner was found to be qualified after the evaluation of the technical bids. Accordingly, as per the next steps, the price bids were opened on 24.3.2009 enlisting the qualified bidders and the position which emerged can be tabulated as under:

Item No. L-1 L-2 L-3
1. Jindal SAW Man Industries Welspun Rs.19095 \$ 486.49 \$ 500.49 (=\$ 378.49)
2. Man Industries Jindal SAW Ratnamani \$ 593.88 (\$ 602.68) \$ 616.35
- 3.1 Man Industries Jindal SAW Welspun \$ 736.31 (\$ 747.13) \$ 772.47
- 3.2 Man Industries Jindal SAW Welspun \$ 442.43 (\$ 448.75) \$ 464.12
7. The bid submitted by the petitioner was valid upto 28.4.2009 and the extension was sought on behalf of the Respondent No. 2 vide letter dated 17.4.2009 seeking extension of time on the ground that the bid of the petitioner is under active consideration and finalisation of the order will take some time. The said extension was duly granted by the petitioner vide its letter dated 8th May 2009.
8. The petitioner on 1st and 2nd June 2009 came across the news published in the newspaper regarding the Respondent No. 2 is considering of re-tendering of Dahej- Vijaypur Pipeline Upgradation project in the news clipping and statements by the official of the Respondent No. 2. The petitioner after going through the said consideration wrote the communication dated 5th June, 2009 explaining the position and their take on the reduction of steel price, which according to the petitioner, the respondent was aware of and asking the respondent to grant the order at the earliest.
9. The petitioner received the impugned letter No. GAIL/ND/C&P/PRJ/DVPL-

II/08-41/01dated 8.6.2009 whereby the respondent No. 3 conveyed their decision to invite fresh bids in view of the reduction of the steel prices and called upon the petitioner to submit its best quotes on tendering portal by 10th June 2009. The petitioner has therefore challenged this action of respondent No. 2 on the ground that the same is biased, arbitrary, unreasonable and actuated by malafides.

Subsequent Developments:

10. Before we proceed further with our discussion, it is pertinent to point out that the petition came up for hearing on 10th June, 2009 before this Court where notice was issued on the said date returnable on 15th June 2009 giving time to respondents to file their reply. In the meantime, the petitioner has filed additional affidavit raising additional pleas. Two significant facts were pointed out in the additional affidavit, one that the Respondent No. 2 has again sought extension of time for reconsideration of the bid of the petitioner upto 12.07.2009, secondly, that the petitioner was also called for post tender price negotiations vide letter dated 12.6.2009. The negotiations were accordingly held on 12th and 13th June 2009. After the said discussions, the petitioner has agreed to discount the proposed price of about 4%. Thereafter, the respondent No. 2 on 17th June 2009, has decided to go for re-tendering. We shall discuss the impact of the developments in the later part of this order.

Contentions of Petitioner

11. The petitioner has contended that the actions of the respondent No. 2 are bad, unreasonable, biased, arbitrary for manifold reasons which can be stated as under:

a) It is the contention of the petitioner that the actual close competition was between one M/s Jindal SAW who was the lowest bidder in the category one and the second lowest bidder in all other categories. Further, the price difference between the co-bidders is within narrow range of 2%. Thus, the petitioner submits that the respondent decision to recall the earlier bids and for inviting fresh ones given the fact that the category 1 of the same tender has already been ordered to be granted to Jindal Saw is backed by malafides and thus the same warrants the scrutiny of this Court.

b) It is further contended by the Petitioner that the grounds which is purported to be made by the respondent No. 2 regarding the reduction of the steel prices within the time period commencing 28.1.2009 during the currency of the bidding process is not abnormal, neither the recalling of the bidding is called for on the same account.

c) The reason assigned by the petitioner for its contention is that the prices quoted by the Petitioner which is the scale of per meter while submitting its bid is rather low than the prices which were estimated by the GAIL while inviting the tender. The comparison of the prices has been demonstrated by the petitioner in

a tabular form which is as under

Item No.	GAIL Estimated Price	Price quoted by the (Per Meter) Petitioner (Without excise duty and (Per Meter) VAT)	(Without excise duty and VAT)
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1.	\$ 433.99	\$ 424.10	
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2.	\$ 519.95	\$ 517.17	
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3.	\$ 666.40	\$ 641.88	
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4.	\$ 441.58	\$ 385.69	
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By citing the aforesaid table, the petitioner contends that once the prices quoted by the petitioner in the bid are itself lower than the prices estimated by the Respondent No. 2, then there cannot be any abnormality in prices. The reasons accorded by the respondent while recalling the earlier bidding and call for newer ones is baseless and is thus backed by malafides.

d) It is further submitted that the respondent No. 2 has itself written to someone in reply to the communication written by the individual dated 8.6.2009 filed along with the additional affidavit that the price issue regarding the fall in the steel prices was examined and it was noted the price variation was not abnormal. It is thus submitted by the petitioner that the stand taken by the Respondent No. 2 is contradictory to the reasons assigned to the petitioner while denying the contract. According to the petitioner, it further amplifies the submission that the price variation is actually not abnormal and nor it is affecting the respondents. Rather, according to the petitioner, the excuse is created by the Respondent No. 2 to deny the contract and negotiate with other bidders on this count. The said process according to the petitioner vitiates the entire decision making process and thus makes it arbitrary and discriminatory

e) It is contended by the petitioner that the acts of the respondents are actuated by the malafides as the Respondent No. 2 unjustifiably postponed the lowest bidder in 3 categories and rather awarded the contract to one Jindal SAW in category 1. Further, the respondent No. 2 for reasons best known to them have taken the extensions thrice to consider the same bid which shows the dilatory tactics of the respondent and their intention to deny the contract.

f) It is submitted and pointed out in additional affidavit that the acts of the respondent No. 2 to seek extensions of time thrice and further to declare fresh biddings is in contravention to the CVC guidelines issued by Central Vigilance Commission on tendering process dated 3rd March, 2007 and further circular dated 6th November, 2008. The said guidelines and circular mandates the timely processing of tenders. It is submitted that CVC feeling concerned about the delay in processing of the tender has written to Respondent on 9th June, 2009 to consider the original tender and refrain itself from opening the fresh price bids. The said letter is issued by CVC on receipt of the report on the developments of the tender. The petitioner thus submits that the decision to invite fresh price bids

is against CVC norms and is nothing but with bad motive.

g) It is submitted that the Respondent No. 2 attempted to go for snap bidding vide the impugned letter dated 8.6.2009 wherein CVC interdicted on 9.6.09 which clearly shows that Respondent No. 2 intended to discuss the lowest price with other prequalified bidders so as to cause prejudice to the petitioner and accommodate others.

Contentions of Respondents:

12. The respondent No. 2 has filed the reply on 17.06.2009 and the respondent has given the response to the petition by stating the following:

[a] The respondent No. 2 has not yet awarded the contract for Item Nos. 2, 3.1 and 3.2 [2, 3 and 4 as per writ petition] and, therefore, there is no concluding contract and no right of the petitioner has been infringed.

[b] It is also submitted that the substantial fall in the international steel prices is legitimate and cogent ground for the respondent No. 2 seeking best reduced prices from all the techno-commercially qualified bidders and equal opportunity has been given to all. For the said purpose, the respondent has taken into consideration the practical considerations as well as public interest and the action is neither arbitrary nor perverse or lacking in rationality. [c] The petitioner has already participated in uploading its best reduced price bid by 1100 hrs IST on 10.06.2009.

[d] The respondent No. 2 had initially sought a limited re-tendering by inviting the six technically qualified bidders to review their prices and offer their best reduced prices. However, it is submitted that the respondent No. 2 as indicated by the CVC also negotiated with the petitioner for reduction in price on 12.06.2009 and 13.06.2009. It is contended in the reply that there is a background to the reason as to why the respondent No. 2 had invited all the six techno-commercially qualified bidders to review their prices and offer their best reduced prices as the global prices for steel had fallen drastically since January 2009 when the bids were submitted till date. The fall in the prices are so drastic that the respondent No. 2 being a public limited company owned by Government of India stands to save nearly Rs. 80 to Rs. 100 crores of public money. As approved by the CVC in terms of integrity pact, which forms part of GAIL tenders/contracts and which is envisaged in terms of Clause 46.1.3 of the Instruction to bidders and who are authorised to examine and consider all references made to it under the tender were of the considered opinion as recorded in the minutes of the meeting dated 04.05.2009.

It is further submitted that as far as Item No. 1 is concerned, Jindals was found to be L1 bidder and their price was 24.91% below the estimated price since the rates quoted regarding Item No. 1 was undisputed and well below the estimated price, the tender was awarded to L1 bidder for the said item. The petitioner was found to be L1 and was only 0.43% and 3.73% below the then estimated prices,

therefore, the petitioner has no reason to raise a grievance with regard to the said action of the respondent No. 2.

[g] It is for the respondents to decide till any point with respect to the lowest bid in terms of Clause 35 of the ITB, therefore, the letter of Mr. Vinod Mehta is irrelevant. With respect to the letter dated 17.03.2009, Mr. Vinod Mehta was aware that there is a possibility of re-tendering, therefore, it appears, he was creating evidence by writing one letter after another.

[h] It is submitted by the respondents that the snap bidding which was earlier proposed by Respondent in the letter dated 8.6.09 is no longer in force in view of the subsequent developments after the letter issued by CVC dated 9th June, 2009. It is submitted that pursuant to the letter of CVC, the letter was also sent on 15th June, 2009 pointing the outcome of the price negotiations held with the petitioner as L1 and it was stated that the negotiations have failed. It is thus submitted that the reply is issued by CVC on 16th June, 2009 whereby although it did not give support to snap bidding but has stated that it does not interfere with the tender process which is a part of organizational decision making. In view of this, the respondent submits that they took a decision of re- tendering instead, which is well within its rights as per Clause 35 of the Instructions to the Bidders which reads as under:

35 Purchaser's / Consultants right to accept any bid and to reject any or all bids

35.1 Purchaser / Consultant reserves the right to accept or reject any bid, and to annul the bidding process and to reject all the bids, at any time prior to award of contract, without thereby incurring any liability to the affect Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the ground for the Purchaser / Consultant action.

13. We have gone through the contentions raised by the parties. We shall now deal with the submissions made by the counsel for the parties.

14. Learned Senior Counsel Mr. Dushyant Dave appearing on behalf of petitioner submitted that the action of the respondent to go for re-tendering or for snap bidding and denying the award of the contract to the petitioner amounts to deviation from the clauses of the tender document and thus warrants the interference of this Court. The learned senior counsel for the petitioner submitted that the respondent No. 2 is fettered by the terms of the tender by not taking any decision to the contrary. Thus any decision which includes the decision to delay and to withhold or to deny the bid after fulfilment of all criterias is against the mandate of law as well as the terms of tender document. To buttress his argument, the learned senior counsel has relied upon the following clauses of the tender document:

i) Clause 10.2 provides that the unit price quoted by the bidder shall remain firm, fixed and valid till completion of the contract performance.

ii) Clause 16 of bid document provides that - This is a Zero Deviation Tender.

iii) Clause 22.2 stipulates that no bid shall be modified after the deadline for submission of bid.

iv) Clause 26 deals with Examination of bids and determination of responsiveness and Clause 27 (P.67) deals specifically with Price-Bid Opening.

vi) Clause 30.4.3 specifically provides that The lowest evaluated bid shall be considered for award of order and Clause 30.6 provides that based on above, order shall be placed.

vii) Finally Clause 33 in unequivocal terms stipulates that the contract will be awarded to those successful bidders whose bid has been determined to be substantially responsive, meets bid evaluation criteria and has been determined to be lowest evaluated bid.

15. The learned Senior counsel for the petitioner submitted that the decision to retender or snap bidding or otherwise is in contravention to the terms of tender and thus this Court can conveniently interfere to correct the error committed by the Respondent.

16. Per Contra Learned Counsel for the Respondent Mr. Prag Tripathi, Senior Advocate and ASG strenuously argued that the provisions cited by the learned Counsel for the petitioner relating to the deviation and modification of bids and other provisions do not assist the case of the petitioner and also does not impose any fetters upon the power of the respondent to accept or reject any bid and further call for re-tendering or rebidding in larger public interest. Mr. Tripathi, learned Counsel argued that the Clause 35 of the tender document gives ample powers to respondent No. 2 to accept or to reject the bids and the said clause has to be read along with the clauses cited by the petitioner which makes it unambiguously clear that there are no such stipulation limiting the powers of Respondent No. 2

17. We find merit in force of the learned Senior Counsel Mr. Tripathi in this respect. There is no doubt that the tender conditions are to be strictly adhered to by the parties. We cannot read one term of the tender in isolation without reading another one which is more specific and without giving meaningful reading to the same. It cannot be concluded that the Respondent No. 2 has deviated from the tender conditions. Unfortunately, none of the provisions cited by the petitioner support its contention and they are rather general in nature unlike clause 35 which is specific and empowers the respondent No. 2 to accept to reject any bid. Thus, the submission of the petitioner so far as it relates to contradiction with the tender conditions is rejected.

18. The next submission of the Mr. Dave, learned senior Counsel for the petitioner is that the terms of tender are to be looked into and further they are subject to the applicability of Article 14. Thus, the learned Counsel submits that while examining the terms, the court will also make the inquiry by applying the principles of the Article 14 of Indian Constitution. We shall deal with this

argument while examining the other facets of arbitrariness in later part.

19. The Learned Senior Counsel for the petitioner submits that the actions of the Respondent No. 2 are arbitrary, unfair and actuated by Malice on following counts:

- a) Despite the petitioner being L1 in case of 3 items under the subject tender, respondent No. 2 is postponing the award of the contract by seeking extension.
- b) Within the same tender in relation to Item No. 1, wherein the lowest bidder was Jindal Saw, the contract was awarded to the party on 8.5.09 unlike the petitioner with whom discriminatory treatment has been done who was eligible for other 3 items.
- c) Respondent No. 2 has itself written to someone in reply to the communication written by Mr. Mehta dated 8.6.2009 filed along with the additional affidavit that the price issue regarding the fall in the steel prices was examined and it was noted the price variation was not abnormal. It is thus submitted by the petitioner that the stand taken by the Respondent No. 2 is contradictory to the reasons assigned to the petitioner while denying the contract. According to the petitioner, it further amplifies the submission that the price variation is actually not abnormal and nor it is affecting the respondents. Rather, according to the petitioner, the excuse is created by the Respondent No. 2 to deny the contract and negotiate with other bidders on this count. The said process according to the petitioner vitiates the entire decision making process and thus makes it arbitrary and discriminatory
- d) The Respondent No. 2 attempted to go for snap Bidding vide the impugned letter dated 8.6.2009 wherein CVC interdicted on 9.6.09 which clearly shows that Respondent No. 2 intended to discuss the lowest price with other prequalified bidders so as to cause prejudice to the petitioner and accommodate others.
- e) It is submitted and pointed out in additional affidavit that the acts of the respondent No. 2 to seek extensions of time thrice and further to declare fresh biddings is in contravention to the CVC guidelines issued by Central Vigilance Commission on tendering process dated 3rd March 2007 and further circular dated 6th November 2008. The said guidelines and circular mandates the timely processing of tenders. It is submitted that CVC feeling concerned about the delay in processing of the tender has written to Respondent on 9th June 2009 to consider the original tender and refrain itself from opening the fresh price bids. The said letter is issued by CVC on receipt of the report on the developments of the tender. The petitioner thus submits that the decision to invite fresh price bids is against CVC norms and is nothing but with bad motive.

20. Mr. Dave, Learned Senior Counsel further argued that the Respondent decision is influenced by irrelevant consideration and biased on account of the fact that the justification of reduction in steel prices which was available only against the petitioner and not against the other awardee of the contract for item

No. 1. Further, the said biasness according to the petitioner can be seen when the letter was issued on 8.6.09 to invite the fresh prices from all the successful bidders. This according to the petitioner denotes biasness and that the decision of the respondent No. 2 is based on extraneous and irrelevant consideration. The last reason for the same is the Rule 160 GFR which does not permit any fresh bidding and Rule 161 which provides that the department should ensure the original validity of the bid.

21. Lastly, Mr. Dave has submitted that the decision to re-tender by the respondent No. 2 in fact goes against the public interest. He submits that the project has already been delayed by Respondent No. 2 for three months by seeking an un-necessary bid validity extension and then deciding for cancellation of tender. The retender and finalization of order against that would take another three months. As per estimates, each month delay would cause loss of Rs. 40 Crore to Respondent No. 2 and figure of loss would be substantially higher to the nation by way of development and loss of revenue and taxes.

22. According to Mr. Dave, Learned Senior Counsel for the petitioner because of the aforementioned submissions from his end, the present case warrants interference under Article 226 of Indian Constitution of India and the court can quash the impugned decision dated 8.6.09 and further decision to go for re-tendering. In order to Support his contentions, the learned Senior Counsel relied upon the following judgments wherein in appropriate cases, the courts have interfered in the decision making process.

(i). New Horizons Limited and Another Vs. Union of India (UOI) and Others, a tender process ignoring the terms of the tender and awarding the contract on irrelevant consideration is violative of Article 14 of the Constitution of India.

(ii). Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non existing fact or circumstances. This is clearly unreasonable and such an action cannot be said to be done in bad faith.

If a discretionary power has been exercise for an unauthorized purpose, it is material whether its repository was acting in good faith or in bad faith.

(iii). Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, the court would quash such decision which is tainted by decisive error.

(iv) State of Kerala Vs. Zoom Developers Pvt. Ltd. and Others, the terms of the tender has to be adhered to. Any attempt to circumvent the same is an arbitrary exercise of power.

(v). Tata Cellular Vs. Union of India, - principle of judicial review and principle led down in Article 14 has to be kept in view while accepting or refusing a tender.

(vi). Puravankara Projects Ltd. Vs. Hotel Venus International and Others, - doctrine of fairness and reasonableness cannot be invoked to amend, vary, alter

the express terms of contract.

(vii). ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, Court can review award of contract.

(viii). Union of India and Others Vs. Dinesh Engineering Corporation and Another etc., The authorities do not have power to reject any bid offered by a party merely because it has that power. It is not open to the authorities to rely upon this power to reject any or every offer that may be made by the writ petitioner while responding to the tender.

(ix). Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, - In the matter of judicial review the basic test is to see whether there is any infirmity in the decision making process and not in the decision itself. The principal of judicial review cannot be denied even in contractual matter or matters in which Government exercises its contractual powers but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest.

23. Before going into our discussion, we shall deal with the rival submissions made by the Learned Senior Counsel, Mr. Prag Tripathi. Mr. Tripathi, learned Senior counsel and ASG firstly replied to the submissions made by the petitioner in the following manner:

a) There is no biasness or arbitrariness in the actions of the respondent. The award of the contract to L1 in item No. 1 has been awarded as per its own merit as there was substantial price difference between the proposed bid at least of 24.91% from that of the estimated price by the Respondent unlike in the case of the petitioner, wherein despite the reduction of steel prices and repeated negotiations, it did not yield any result and the price difference is very meagre which is 0.43% and 3.73% from that of the estimated price. Thus, the petitioner cannot make out any case of unfairness and more so when the respondent has not yet awarded the contract to any one so far and has rather going for the re-tendering, wherein the petitioner may also participate. b) Mr. Tripathi argued that the respondent has demanded valid and legitimate extensions in the interest of the parties including the petitioner and has made all their endeavours to negotiate with the petitioner and thereby considered their proposal. Further, the said extensions were duly granted by the petitioner. The said extensions being in the interest of parties duly granted by the petitioner itself cannot now be used against to contend any arbitrariness. This is furthered by the fact that despite all the endeavours from the end of the respondent, the petitioner is again open and invited for re-tendering. Thus, there is no question of any biasness so far as extensions are concerned.

c) Mr. Tripathi further argued and stated that someone namely Mr. Mehta has been implanted by the petitioner to collect evidence. Even otherwise, there is no contradictory stand at all in the letter dated 8th June 2009 from the respondent side and with the respondent. Mr. Tripathi argued that the petitioner has not

disclosed the source of procuring the document against respondent which is relevant consideration in the matters wherein public interest is involved.

d) Mr. Tripathi replied to the submission of snap bidding by stating that there is no overt motive to go/ to consider to go for snap bidding except the compelling public interest as there is substantial reduction of prices of steel during the consideration of bids. Further, it is submitted that the respondent No. 2 has considered the suggestions given by CVC and thereafter called the petitioner for negotiations on 12th and 13th June 2009 and has now not going for snap bidding and rather proposing for re-tendering instead, for which even CVC has stated that they do not intend to interfere with the process. In short, the thrust of the submission is that the argument of snap bidding fails as the respondent No. 2 has decided against the snap bidding in view of the subsequent developments.

e) Mr. Tripathi has argued that there is neither contradiction with the tender document nor there is any violation of CVC norms or GFR norms. Mr. Tripathi stated that the power of decision making vests with the purchaser and the limited guidelines are applicable of CVC and GFR which are even other wise not violated. He has stated that it is established law that the right to pick and choose or to refuse the lowest or other tender is always available with the government. Thus, there are no such absolute fetters which restrain the government/ respondent No. 2 to refuse the lowest bidders.

24. In addition Mr. Tripathi, Learned Senior Counsel has made several independent submissions which can be crystallised as under:

(i) it is argued that the lowest bidder can not enforce as a matter of right against the government. (ii) It is further argued that there is reduction in the steel prices. This is further extended to the fact that the petitioner itself suo moto realising the said reduction wrote a letter to the Respondent dated 5.6.09 and offered a discount and further negotiated upto 4 %. Thus, the petitioner cannot probate and reprobate at the same time.

25. It is argued that the enquiry by the courts in the policy decisions such as that of tender process is not of the decision but with the decision making process. Mr. Tripathi mainly highlighted the Wednesbury principles wherein it is stated that the scope of judicial scrutiny is extremely limited unless there is case of glaring corruption, biasness, accommodation, arbitrariness which is absent in the present case. Rather, the respondent in the interest of public monies is intending to get the best price of the bid in the time of recession. The said decision which enables the petitioner to participate again in the re-tendering cannot be faulted with. The Learned Senior Counsel further argued that the court while examining the said decision making process does not sit as a court of appeal rather the enquiry is extremely limited.

26. Learned Counsel for respondent No. 2 has contended that the action of the respondent is neither arbitrary, discriminatory nor with malafide intention but it was taken in the interest of public because it involved public money. Therefore,

there is no biasness or favouritism to any party by canceling the said bid. Thus, in view of the well settled law on the subject his contention is that the said decision is not open for judicial review.

27. To deal with the submission of the learned Counsel for the respondent is that the lowest bidder in a bid does not have any vested right to get the tender. In support of his submission, the learned Counsel for the respondent has referred to two decisions in the case of Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, and Exmar NV v. Union of India 2006(86) DRJ 610 at Para 21. In the case of Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, to (d) the courts have specifically held that if a decision to go for re bidding is actuated on account of desire to get the best price or the best quotation; there can be no question of involvement of Article 14 of the Constitution of India.

28. The next submission of the learned Counsel for the respondent is that where a decision making involves public revenue then it automatically relate to public interest. Learned Counsel for the respondent has referred to the two decisions of the Apex court reported in New Horizons Limited and Another Vs. Union of India (UOI) and Others, and Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others,

29. Learned Counsel for the respondent has argued that where a decision has been taken by the Government in public interest, normally the courts would not interfere. (B.S.N. Joshi v. Nari Coal Services Ltd. 2006 9 SCC 548 Paras 56, 66 and 69).

30. Lastly the learned Counsel for the respondent has stated that even if the petitioner is able to make out a legal point the court should exercise its discretionary power under Article 226 only in furtherance of public interest and not merely on making out a legal point. See: Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, Learned Counsel for the petitioner during the course of the argument has admitted that the petitioner has not alleged factual malafide nor there is any pleading in this regard.

31. It is argued that the state and its instrumentalities must have a free hand setting in the terms of the tender and the Court would not subject the terms of tender to judicial scrutiny as the same is in the realm of a contract. Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,

32. It is submitted by the Counsel that the doctrine of the fairness or to duty to act fairly or reasonably cannot be invoked to amend, alter or vary the express terms of the contract between the parties Assistant Excise Commissioner and Others Vs. Issac Peter and Others, , United India Insurance Company Limited Vs. Manubhai Dharmasinhbhai Gajera and Others,

33. It has been held in the various decisions as stated above that the terms of invitation of tender are not open to judicial scrutiny. The court would interfere

with the administrative policy decision only if it is arbitrary, discriminatory, malafide or actuated by bias. The court cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or malafide.

34. At the outset, we would like to state that there is no *res integra* to the proposition that the scope of judicial scrutiny in the government contract is extremely limited. The parameters for determining the infringement of Article 14 are confined to examining the decision making process and not the decision itself. The said decision making process can be interfered with only exceptional cases where the same is vitiated by biasness, favouritism and the same is against the public interest. The judicial review cannot take away the powers of the government to accept or to reject any bid on the grounds of the public interest. The government contracts are a matter of the public policy and thus public interest is paramount in such transaction rather than the commercial interests of competitive bidders.

35. The law relating to exercise of judicial review coupled with Judicial restraint in government contract has been extensively discussed in the celebrated case of *Tata Cellular Vs. Union of India*, of Apex Court wherein your lordships hold the view that:

85. 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 favoritism. 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.

86. Judicial quest in administrative matters has been to find that right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

89. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the order covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of

judicial control over administrative action.

93. 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.

94. 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.

36. The same very issue once again came up before the Supreme Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, where in the Hon'ble Apex Court observed:

The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

37. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an

administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias, it is entitled to pragmatic adjustments which may be called for by the particular circumstances. It is also clear that merely because of adjustments or non compliance of some conditions or incomplete compliance of the conditions does not lead to striking down of tender if otherwise it is not against public interest.

38. Further, logical corollary can also be drawn from the above principles that if the government has right to select the best bid then, it is obvious that the lowest bidder cannot enforce against the government merely because he is found to be the lowest bidder. The said law has also been laid down by the Apex Court in the case of Asia Foundation (Supra) in para 9 and Exmar Nv (Supra) at para 21.

39. The said principles are comprehensive enough to the extent that the law laid down in Tata Cellular (Supra) is successively followed and all the government contracts and administrative decisions are examined by the courts within these parameters. The said legal principles find their places in later judgments of Apex Court which can be enlisted as under:

1. Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others,
2. Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another,
3. Rajasthan Housing Board and Another Vs. G.S. Investments and Another, In the case of auction.
4. Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,

40. It is well settled law that judicial review of administrative decisions is limited to examining whether the decision making process is vitiated by any illegality, procedural irregularity or perversity. The court does not sit in appeal over the decisions, so long as the process leading to the same is found to be satisfactory and free from any one of the infirmities mentioned above.

41. In cases where the decision making process involve technical expertise, the scope of review gets further reduced. That is because the courts are not equipped with the expertise necessary to sit in judgment over the decisions taken by the experts. Even otherwise, the scope of judicial review in the matters involving challenge to the tender condition is very limited. The nature of the scope of judicial review has been the subject matter of long list of decisions rendered by the Supreme Court including the two decisions referred by Mr. Prag Tripathi, Senior counsel and ASG in the case of Director of Education and Ors. v. Educom Datamatic Ltd. 2004 24 SCC 19 at Page 24 Para, Para 11 and 12 and Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another,

42. Lastly, the tests of arbitrariness, biasness and malafides are the basic tests for judging the infringement of Article 14. In the commercial contracts by the governments, the Apex Courts have time and again cautioned that the judicial review can be invoked considering paramount nature of public interest involved in the matter and private interests are to be discouraged as against the public interest and the entire transaction has to be measured from the public interest perspective and its reasonableness and comparative prejudice caused to the public and to the private parties.

43. Recently, The Hon'ble Apex Court in Jagdish Mandal Vs. State of Orissa and Others, has laid down the importance of public interest in commercial contracts by making following observations:

Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached."

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article

226. Cases involving black-listing or imposition of penal consequences on a tendered/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

44. Thus, the public interest examination is a separate test independent from that of arbitrariness, unfairness in the decision making process of the government. We will now proceed to examine the present case as to whether it calls for any interference of this Court as per the legal framework discussed above.

Our Discussion:

45. Firstly, in relation to the argument of the petitioner on biasness on the counts like seeking number of extensions by the Respondent No. 2 for considering the petitioners contract and at the same time granting the contract to one Jindal Saw, we hold that the said justification is not forceful to establish any element of biasness. We find force in the argument of Mr. Tripathi that L1 in category 1 i.e. Jindal Saw has been awarded contract as per its own merit as the price difference of 24.91% was substantial which is favourable to respondent No. 2 and in the interest of the public. The same stand is taken even in reply to third party when the petitioner attempted to collect the said evidence through third party.

46. Thus, we find that merely because one party in another category of the same tender has been awarded the contract because of its own peculiar price offer as against the petitioner, the biasness cannot be inferred on this count, rather it shows the private interest or commercial competency between two competitors more so when the respondent is willing to negotiate with the petitioner and also offering its participation in re-tendering on its own merits.

47. The related discussion is with respect to seeking three extensions. We again concur with the submissions of Mr. Tripathi that the extensions are taken in the interests of the parties so that the best bid may be accepted. It is pertinent to mention that in all extensions, the respondent has shown the concern that the petitioners bid is under active consideration. Pursuant to the third extension, the petitioner was called for negotiation on 12th and 13th June 2009 for price negotiation.

48. All these circumstances reveal that the extensions were taken to consider the petitioner rather than to prejudice the petitioner. In these circumstances, it is difficult to infer any prejudice or biasness merely on account of seeking legitimate extensions from the respondents end and when the respondent is offering immediate re-tendering with the petitioners participation.

49. We find some force in the argument of Mr. Dave that there is inconsistent stand in the media regarding the fall in the steel prices in the market taken by the Respondents. However, it cannot be lost sight that the steel prices have

actually fallen down. This is itself evident from the fact that petitioner voluntarily wrote the letter dated 5.6.09 to the respondent and thereafter reduced the prices by 2 % and later during negotiations by 4% from the proposed prices. Thus it is not in dispute that prices have fallen, however what is disputed is to what extent the prices have fallen.

50. The rise and fall in prices are on day to day basis. The reports in media given by the officials of the respondent cannot be assumed as correct stats. But suffice it to say that at this time of global recession, the prices in steel have certainly fallen and more so when the petitioner voluntarily offers discount and further with the fact that the prices of another competitor Jindal Saw is stated to be 24.91% lower than the estimated ones, shows, the public interest in this case demands the necessity to uphold the decision of Respondent No. 2 .

51. We have also considered the submission of Mr. Dave, Learned Senior Counsel for the petitioner regarding strict adherence to the terms of the tender. The said submission is extended that the tender conditions are to be complied with, are also to be examined within the purview of applicability of Article 14 of the Constitution. In short his argument was that the observance of the tender conditions by the respondent are also to pass the tests of Article 14. We agree with the submissions of the petitioner senior counsel and there is no quarrel to that extent that the tender conditions are to be adhered to and further they should not also lead to any arbitrariness while its observance.

52. This argument was raised on two fold grounds one regarding the extensions which has caused delay and prejudice according to the petitioner and second relating to the decision of respondent to conduct rebidding or re-tendering which according to the petitioner is another non observance of the conditions. We feel that the submission although is correct, but we are not able to find any arbitrariness or any biasness or malice in the decision making process on both these grounds.

53. We have already while in our earlier finding observed that the extensions were taken in the interest of the parties and were duly consented by the petitioner. Thus the said extensions are just minute adjustments. In relation to decision to reject or accept any contract, we again state that the said right of the respondent specifically flows from Clause 35 of the tender conditions. The additional submissions regarding CVC guidelines and GFR provisions are guiding factors and cannot take the power of the government/ respondent to accept or to reject any contract.

54. Thus under the garb of the said conditions, this Court cannot take away the freedom of the respondent to contract, which is against the dicta of Tata Cellular (Supra) of Apex Court. Hence, there is no material inconsistency with the tender conditions by the respondent.

55. We have also taken note of the submission of the petitioner that the respondent decision to go for snap bidding in the letter dated 8.6.09 is violative

of tender conditions and norms of CVC and the concern shown by CVC to it. We find force in the submission of the Counsel for the petitioner. However, the subsequent developments after the letter of CVC to Respondent No. 2 and thereafter the letter of the Respondent No. 2 to the petitioner to call them for further price negotiation and dropping the snap bidding and going for re-tendering has sufficient impact upon the present proceeding. Once the respondent has now fairly stated on record in their reply to additional affidavit and written submissions that they are not going for the snap bidding and will be going for re-tendering subject to the outcome of this petition, then the issue on this account has become redundant and is not material.

56. With respect to the argument that respondent No. 2 has written to someone in one letter dated 8.6.2009 regarding the price difference being not abnormal, we would again say that it is like going into nitty gritty and the letter if at all favours the petitioner does not convince us to infer any biasness or arbitrariness in the decision making.

57. This is also because when the petitioner is called for further negotiation at the later date on 12th and 13th June 2009, the price difference with estimated price was meager as in comparison with another L1 in Category 1 , thus the bias element or any arbitrariness cannot be said to be made out.

58. For the reasons we have stated above , there is no case of any biasness, unfairness, arbitrariness or any malice is made out, thus the authorities cited by the petitioner are not applicable to the facts and circumstances of the present case.

59. Lastly applying the public interest test, we find that by no reason, it can be stated that the decision making of the respondent No. 2 is against public interest. It can be conveniently observed that the respondent is making their endeavours to find the lowest bid at the time of this fall of prices in relation to their intended goods which also includes consideration of bids proposed by the petitioner.

60. The impugned decision making does not contravene public interest and rather the public interest would be sub served if the respondent No. 2 is allowed to conduct the said re-tendering with the fair opportunity to consider the bids of all the bidders including the petitioner.

Conclusion

61. For reasons stated above, we find that the impugned letter No. GAIL/ND/C&P/PRJ/DVPL-II/08-41/01 dated 8.6.2009 does not suffers from any infirmity except the portion of the snap bidding which is already given up by the Respondent No. 2 and is now proposing for re- tendering instead. Accordingly, we dispose off this petition with the observation that the respondent No. 2 may conduct fair re-tendering and also consider the bids of the bidders including petitioner in all fairness. The writ petition is dismissed of accordingly. No cost.