
(2013) 01 MAD CK 0105

In the Madras High Court

Case No : Writ Petition No: 13183 of 2012 and M.P. No"s. 1, 2 and 5 of 2012

Misha Power Pvt. Ltd. Plot No: 3 Ganapathy Street
Vasantham Nagar Avadi Chennai - 600071

APPELLANT

Vs

Tamil Nadu Generation and Distribution Corp. Ltd. 5th floor,
NPKRR Maligai 144 Anna Salai Chennai-600002, The Chief
Engineer/Design Protection and Communication 2nd floor,
MLDC Block 144 Anna Salai Chennai-600002, Director R
APDRP Power Finance Corporation Urja Nidhi, Barakhamba
Lane Connaught Place New Delhi 110001 and M/s. Herodex
Power Systems Pvt. Ltd. Plot No: 38, MIDC Area Satpur
Nashik 422007

RESPONDENT

Date of Decision : 08-01-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 21, 226

Citation : (2013) 2 MLJ 129

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : S.R. Rajagopal, for the Appellant; G. Vasudevan, for Respondents. 1 and 2, Mr. AR. L. Sundaresan Senior Counsel for Mr. K. Govi Ganesan for 4th respondent, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Mr. V. Dhanapalan, J.—A corrigendum issued by the 1st respondent dated 18.02.2012 has been called in question in this writ

petition seeking to quash the same and for a consequential direction to the respondents to continue with the tender dated 08.01.2012 as per the

criteria stipulated therein. Petitioner is a Private limited Company incorporated under the Companies Act, 1956 and is engaged in the manufacture

of automatic power factor correction panels being its main object. Since 2009, petitioner company is actively involved in system integration of

Reactive Power Compensation Systems such as Contactor/Thyristor Switched Automatic Power Factor Correction (APFC) Panels,

Contactor/Thyristor Switched Automatic Passive Harmonic Filter Systems, Electronic Energy Meters (MFM), Trivector Meters (TVM),

Availability based Tariff Meters (ABT for Power Plant Applications), TVM s/ABT Meters for Windmill Applications, Metering Panels, Energy

Management System, Medium Voltage Panels. The petitioner also supplies Capacitor Banks and Fixed Passive Harmonic Filter Banks with

Capacitors and Reactors for LV and HV applications and provides services which includes conducting Power quality Audits (Harmonics Study),

Installation, Erection and Commissioning of all types of electrical panels, etc.

2. The 1st respondent is the Tamil Nadu Generation and Distribution Corporation Limited, in short referred to as TANGEDCO, and the 2nd

respondent is the Chief Engineer/Design, Protection and Communication of the 1st respondent. The 1st respondent floated a tender No: P & C

902 for Design, Engineering, Manufacture, Supply, Installation, Testing, Commissioning, Operation and Maintenance of Automatic Power Factor

Correction Panels (APFC) and associated materials for Dynamic Reactive Power Compensation System. The concept of the project is to reduce

the quantified AT & C losses at Distribution Transformer level by designing, supplying and installing APFC panels. The project is funded by the

3rd respondent namely M/s. Power Finance Corporation, New Delhi, under R-APDRP Part B Scheme (Promoted by Ministry of Power,

Government of India) with appropriate project cost as Rs. 128 crores i.e. based on the Earnest Money Deposit (EMD) generally being 1% of the

project cost. A tender specification along with the Bid Qualification Requirement (BQR) for the tender project was made available at the 1st

respondent's website. The due date for the receipt of the tender and opening of the tender was 22.02.2012 at 2.00 p.m. The sealed tender was to

be forwarded to the 2nd respondent and it was to be opened at the 2nd respondent's office. The tender system adopted was a two part open

tender and the period of contract has been stated as 7 years from the date of commissioning of the last batch of the materials.

3. The petitioner being a supplier of capacitor panels to various customers under the same concept and was in talks with one of the best

manufacturers of capacitor panels to form a consortium to fulfill the BQR. There was a pre bid meeting held on 24.01.2012 which was initially

fixed on 20.01.2012 and was subsequently altered by corrigendum 1.

There were more than nine companies which attended the pre-bid meeting. The petitioner was one among them. In the said meeting the potential

vendors had raised various queries towards technical specification for Remote Monitoring, Qualification criteria, Payment Clause, Capacitors,

Control on the Project Cost, guarantee, etc. While so, the 1st respondent has issued Corrigendum 2 dated 18.02.2012 along with the clarification

for queries raised in the pre-bid meeting. The corrigendum 2 and the clarifications which was issued along with it had completely deviated from the

original BQR and had indicated substantial changes to the qualification for participation in the bid for the tender including removal of static VAR

compensation panels, however, the due date remained unchanged as 27.02.2012. The specification in Corrigendum No: 2 were not a detailed one

due to which certain clarifications were sought for from the 1st respondent by the vendors who were intending to bid for the tender. Thereby, the

BQR was made very stringent vide corrigendum No: 2 and diluted in terms of certain terminologies on technical aspect to favour the bidders who

have participated in the tender. The clarifications provided by the 1st respondent on 22.02.2012 and 24.02.2012 contained certain essential

requirements which were to be fulfilled by a qualified bidder to qualify for the bid and it would require substantial amount of time.

Even though several requests were made to the 1st respondent by the petitioner vide letter dt. 25.02.2012 and other interested bidders, he refused

to extend the due date which is unreasonable and unjustified.

4. The details of the original BQR and the modifications made by the subsequent corrigendum are as follows :-

(I) Section II of the Original BQR

The bidder should have experience in design, manufacture, supply, installation, testing and commissioning of Static or Dynamic VAR compensation

panels of cumulative capacity of atleast 240 MVar in the past 5 years.

Clarification annexed with Corrigendum 2 dt. 18.02.2012 :

Capacitors which are controlled through a controller only will be accounted for.

Clarification dated 22.02.2012 for Corrigendum 2 :

Capacitor panels which are installed, commissioned and controlled by any means such as under voltage, over voltage, lead power factor relay and

such other protective relays and current sensing relay besides PF based controller will be taken into account.

As per the technicalities of static and dynamic capacitors, it is stated that, Static capacitors are not controlled through a controller and only

Dynamic capacitors are controlled by a controller. The 1st respondent, by stating that the capacitors which are controlled through a controller only

will be accounted for the BQR, means the bidders who have experience in static capacitors shall not be considered for the bid. It confirms that it is

Automatic (Dynamic) Power Factor improvement to favour certain specific vendors. Thus, the qualification criteria is diluted to favour some

specific vendor.

(II) Section II of the Original BQR The static or dynamic VAR compensation panels of cumulative capacity of atleast 100 MVR supplied by the

bidder should have been in satisfactory continuous service for atleast one complete year during the last three years from the date of tender opening.

Clarification annexed with Corrigendum 2 dt. 18.02.2012 :

Capacitors which are controlled through a controller only will be accounted for.

Clarification dated 22.02.2012 for Corrigendum 2 :

Capacitor panels which are installed, commissioned and controlled by any means such as under voltage, over voltage, lead power factor relay and

such other protective relays and current sensing relay besides PF based controller will be taken into account.

It is stated that capacitors which are controlled through controller only would be accounted for the second BQR also has again excluded qualified

vendors experienced in static capacitors from the bid, though there was no such exclusion in the tender document.

III. Section VI. Technical Specifications Clause 5.0 Capacitors; Sub Clause 5.1 Capacitor Design :

Original BQR :

The capacitor used for coarse and fixed correction should be of three phase having APP type (All Polypropylene film i.e. film + foil) complying

with IS 13585/1994 (with latest amendments)

Corrigendum 2 dated 18.02.2012 :

The capacitor used for coarse and fixed correction should be of three phase having APP/MPP type complying with IS 13585/1994/IS 13340,

13341 & IEC 831-1/2 (with latest amendments).

The MPP capacitors, being cost effective modern technology, it was considered appropriate for the project. The interested vendors for the bid

had requested for clarification for MPP capacitors from the 1st respondent. The clarification was provided on 22.02.2012 vide Annexure A to the

clarification which stated the specification of Reactors only for 3 KVAR, 6 KVAR, 12 KVAR, and 18 KBAR only skipping 9KVAR. Moreover,

the requirement for series reactor was introduced in the bid specification only vide this annexure. Since the specification for 9KVAR was not

provided, again a clarification for the same was sought for from the 1st respondent which was issued only on 24.02.2012. Since the project is for a

term of 7 years and the technical and commercial bid had to encompass every possible aspect for the entire term and to ensure the capacitors met

the specifications, two days were insufficient, leaving no doubt that the second corrigendum and the clarifications were issued at the nick of time to

ensure that the tender would go to the participating bidders favoured by the 1st respondent who may have had the knowledge of the changed

specifications prior to the same being made available in the public domain.

5. It is contended that out of three bid qualification requirements, the first two bid qualification requirements were modified by the clarification

which were issued along with corrigendum 2 dated 18.02.2012 without any reasoning which is unjustified and arbitrary. The original BQR and the

corrigendum 2 was drafted in such a ambiguous manner leaving the interested bidders uncertain as to what was required. It is stated that the

ambiguity was created with a malafide intention to provide shorter time span to the interested vendors to the bid so that by the time the interested

vendors to the bid would get a clarification and analyze as to how they would achieve the requirements, a few of the bidders who are favoured by

the 1st respondent and being pre informed about the requirements would have already structured their bid to win the tender. The 1st respondent

had wantonly issued the corrigendum 2 with vague terms and specifications on

18.02.2012 which is after 24 days from the pre bid meeting and 9

days before the due date to ensure that a class of bidders who were not favoured by the 1st respondent will not be able to meet the BQR by the

due date. The acts of the 1st respondent has raised suspicion as to the possibility of collusion between the 1st respondent and three interested

bidders (out of which two bidders are of same group companies and one from another group of company) who have planned the entire tender as a

make belief for a public tender whereas it was actually favourable to a specific vendor. None of the participants, in the absence of any prior

knowledge or information, could have submitted their bid or could submit it. In this process, the prime motive of the project to be implemented

through initiation by Ministry of Power (MoP) has been defeated. The BQR has been made stringent to ensure elimination of open competition and

dilution of online monitoring and other technical features, thus favouring some specific vendors. Thus, it is alleged that the issuance of corrigendum

is tinged with bias and malafides and the same is in abuse of process/power.

6. The petitioner had made arrangements to form consortium to meet all the qualifications required under the original bid qualification requirement

specifications. However, due to the modification, the petitioner was put to distress and was forced to search for a consortium partner having

expertise in Dynamic capacitor panels at a short span of time which is ideally a time consuming process. Therefore, the petitioner challenged the

corrigendum 2 on the ground that it is illegal, unconstitutional, violative of principals of natural justice, arbitrary, beyond the powers conferred on

the respondents and with an intention to accommodate the pre selected individuals and hence, it is liable to be set aside.

7. The respondents 1 and 2 have filed their counter affidavit, stating, inter alia, as follows :

8.1. The writ petition is not maintainable since the petitioner only participated in the pre bid meeting and was not an applicant and, therefore, the

writ petition is liable to be dismissed in limine. More over, the tender process was finalized and Letter of Award (LOA) was issued to M/s.

Herodex Power Systems Pvt. Ltd. in respect of 3 items namely 18 KVAR APFC Panel, 27 KVAR APFC Panel and 72 KVAR APFC Panel

and to M/s. Shreem Electric Limited in respect of one item namely 36 KVAR APFC

Panel. The work orders have been issued on 02.06.2012 to M/s. Herodex Power Systems Pvt. Ltd. and M/s. Shreem Electric Limited which were acknowledged by them on 04.06.2012. When the petitioner is having a remedy under the Tamil Nadu Transparency in Tenders Act 1998 and Tamil Nadu Transparency in Tenders Rules, 2000, the writ petition is not maintainable. According to these respondents, the petitioner, having only participated in the pre-bid meeting and made queries and thereafter, has not chosen to participate in the tender and make bid, has no locus standi to maintain this writ petition.

8.2. The tender under Specification No: P & C 902 was floated by the office of the 1st respondent for Design, Engineering, Manufacture, Supply, Installation, Testing, Commissioning and Operation & Maintenance of Automatic Power Factor Correction (APFC) panels and associated materials for dynamic reactive power compensation system in L.T. Distribution lines. This work has been covered under Restructured Accelerated Power Development and Reforms Programme (R-APDRP) Part-B, promoted by Government of India. This is partly funded (as grant) by Government of India and balance amount given as loan, with a view to reduce the Transmission & Distribution losses. The time frame given by PFC for APFC panels under Part-B is that the first phase of the project shall be completed by 18.12.2012 and the entire project shall be completed on or before 21.11.2013. If the works are not completed by the State Electricity Board (SEB) within the time frame then the grant will be covered as loan and shall be repaid by the SEB.

8.3. The Bid Qualification Requirement (BQR) conditions are as follows :

The Bidder shall have previous experience in Design, Engineering, Manufacture, Supply Installation, Testing and Commissioning of Static or Dynamic VAR compensation panels of cumulative capacity of atleast 240 MVAR in the past five years from the date of tender opening which should have been supplied to power utilities/SEB's/Power distribution companies in India. Necessary testimonials in this regard should be furnished i.e. Proof of manufacturer, proof of purchase orders/contracts and supply confirmation by end user, commissioning reports/ certificates.

In case the bidder outsources capacitor for the proposed APFC panels then the bidder shall also furnish along with their bid an exclusive backup

guarantee obtained from the principal manufacturer of capacitors.

The Static or Dynamic VAR compensation panels of cumulative capacity of at least 100 MVar supplied by the bidder to any of the power

utilities/SEB's/Power distribution companies in India should have been in satisfactory continuous service for atleast one complete year during the

last three years from the date of tender opening. Necessary end user certificate should be furnished for this performance requirement.

Annual turnover of the bidder shall be minimum Rs. 33 crores during any one of the last three years. The tenderer shall furnish either the Annual

Turnover Certificate by the Chartered Accountant or Audited Annual Statement of Accounts (or) the attested copy of Income Tax return filed by

the bidder (or) the attested copy of sales tax clearance certificate (or) the attested copy of enlistment certificate issued by the NSIC certifying

turnover details of the bidder for the respective period as above said as proof for annual turnover.

The procurement for APFC panels for dynamic VAR compensation comprises of Capacitors and Control elements for effecting dynamic VAR

compensation.

The original BQR Clause (1) and (2) also calls for experience in VAR compensating panels and not capacitors alone. For Static or Dynamic VAR

compensation panels Capacitors are the same and only the control elements differ. In the static VAR compensation panels under voltage/ over

voltage/ earth fault/current sensing elements are employed. In dynamic VAR compensation panels Power Factor Controllers are employed. As per

the corrigendum-2 and clarification dated 18.02.2012 experience in static or dynamic VAR compensation panels have been maintained as per the

original BQR Cl.(1) & (2). The petitioner himself under Para 1 Page 103 of the petition has stated that most of the capacitors are used for

improvement of power factor through some sensing relay and this sensing relay along with other control elements only has been given in the

clarification. As such the BQR clauses (1) & (2) have been given in detail in the clarification dated 18.02.2012 and there is no modification in the

original BQR. Hence, there is no requirement to give time extension. In the MPP capacitor specification furnished on 22.02.2012 it has already

stated that series reactor of 1% of the rating of capacitor step shall be used.

Moreover in technical specification Cl. 5.2 it has been stated that the capacitor rating table provides a conceptual design of the KVar assigned for the capacitors within each stage for the application, however, the bidder may propose alternate Configuration of KVar assigned to various stages but the total KVar capacity should be the same as in the table. As such 5 days time is available for participating in the tender. It is also stated that in case of bidder outsourcing the capacitor, the back up guarantee towards supply, erection, testing & commissioning and after sales service for the entire contract period for the materials supplied by them to be obtained from the principal manufacturer and furnished by the bidder. The back up guarantee format given is also a standard format in vogue in TANGEDCO. The clarification given on 22.02.2012 on the back up guarantee and consortium is just an interpretation of Cl. 3.2 of Section IV, stating that No member can be a member of more than one consortium and not a modification. The quantity of minimum supplies has been arrived as per the standard practice invogue in TANGEDCO. Remote monitoring is not in the scope of this part of the project as clarified on 18.02.2012.

8.4. The clarifications on most of the main issues were issued on 18.02.2012 itself and only the clarification on consortium was issued on

22.02.2012. Only the following minor issues were clarified on 24.02.2012 :

Specification for APP capacitors requested which was given in the original specification.

Reactor for 9 KVAR capacitor In the MPP capacitor specification furnished on 22.02.2012, it has already been stated that series reactor of 1%

of the rating of capacitor step shall be used.

Reactor for fixed capacitors In the MPP capacitor specification furnished on 22.02.2012, it has already been stated that series reactor shall be

used for limiting the switching inrush current in panels used with MPP Capacitors to improve its life.

Extension of due date Replied in clarification dated 22.02.2012.

Hence it may be noted from the above that the clarifications on the main issues have been issued on 18.02.2012 itself. The minor points were also

addressed on 22.02.2012 itself.

8.5. The project is a time bound project and as per the PFC guidelines the first phase of the project shall be completed by 18.12.2012 and the

entire project shall be completed on or before 21.11.2013, failing which the grant amount given by Government of India to SEB will be converted

as loan amount and shall be repaid and this will attribute loss to the TANGEDCO. Accounting 18 months time from the date of issue of order for

completion of the project, the order has to be released by May 2012. Since the time extension sought was not found reasonable and in view of the

time frame stated above no extension was given. Therefore, they prayed for dismissal of the writ petition.

8. The 4th respondent who is the successful bidder has filed its counter affidavit, detailing as under :

9.1. The tender process was finalised and Letter of Award dated 02.06.2012 was issued to their Company in respect of 3 items, namely, 18

KVAR APFC Panel, 27 KVAR APFC Panel, 72 KVAR APFC Panel and to another Company by name M/s. Shreem Electric Limited in

respect of one item, namely, 36 KVARAPFC Panel. Pursuant to the Letter of Award issued on 02.06.2012, the 4th respondent already

commenced all the preparatory works. Further, the petitioner Company is also not a participant in the Tender and has no locus standi to file the

above Writ Petition. The Petitioner Company not having real grievance, has filed the above Writ Petition just to harass them and delay the works.

9.2. The petitioner has challenged the Corrigendum dated 18.02.2012 issued by the 1st respondent alone which is issued by the buyer in

furtherance of and for betterment of the project. Challenging a part of a tender is a mischievous attempt by the petitioner, which is impermissible in

law. The writ petition is filed on certain assumptions and presumptions. The petitioner, in one place of the affidavit admitted that the issue of

Corrigendum dated 18.02.2012 raised doubts and he has not stated any instance of arbitrariness to show that the said Corrigendum caused any

prejudice to him to participate in the tender. In fact, it is apparent that the writ petition has been filed with ulterior motive and for ostensible

reasons. Pursuant to the tender price bid opening, the 4th respondent was found to be eligible and accordingly, the 2nd respondent, following the

procedures, issued Letter of Award (LOA) on 02.06.2012. Pursuant to the Letter of Award, the 4th respondent had started all the preparatory

and ground works in terms of the contract involving substantial sums of money. The fourth respondent has already commenced the following

preparatory/ground works:-

- i) Identification of site office
- ii) Experienced and skilled staffs have been put on the task of the work.
- iii) Preparation of drawings, etc.
- iv) Complete designs have been submitted by this respondent to the 1st respondent for approval.
- v) Site survey is in progress.
- vi) Samples have been sent for testing for field trials.
- vii) Materials have been ordered for about 100 panels for Sample implementation plan.
- viii) Negotiations have been done and rates have been finalized with prospective suppliers for entire quantity.

Under these circumstances, the challenge to the Corrigendum dated 18.02.2012 is not maintainable and deserves to be dismissed.

9.3. It is a registered company under the provisions of Indian Companies Act, 1956. Subsequent to Pre-bid meeting, the participants were asked

to submit queries in the prescribed format on or before 31st January, 2012 as communicated by Chief Engineer (P&C) vide Letter No: CE/P&

C/SE/D/P& C/EPC-3/AEE5/Specn. No. P & C 902/D.4/12 dated 25.01.2012. In view of the above, Suggestions/Requests /queries were sent

to Chief Engineer (P & C) in the prescribed format on 30th January 2012 by the 4th respondent. Other interested bidders also followed the same.

It is learnt that the petitioner did not even register its suggestions/ambiguities with the 2nd respondent as was done by the prospective participants.

This apparently discloses that the petitioner is not an interested bidder for the tender. At any stage of the tender, the petitioner did not show any

serious interest in the tender. The Chief Engineer/ P & C Chennai of the 1st respondent replied to the queries/suggestions/requests from the

prospective bidders on 18.02.2012 vide Corrigendum 2 dated 18.02.2012. As such, it is manifestly clear that there was no arbitrariness, malafide,

favouritism in issuing the impugned Corrigendum. It is pertinent to note that though, the petitioner had name sake participated in the pre-bid

meeting on 24.01.2012, they did not submit any queries/remarks/ suggestions/ ambiguities in the prescribed format as done by the interested

bidders and this act of the petitioner discloses that petitioner is not at all interested in the tender and therefore, petitioner is disentitled to challenge

the tender on the ground that there was no sufficient time for submission of tender documents.

9.4. Pursuant to the issuance of impugned corrigendum, the 1st respondent, in order to give an opportunity to the prospective interested bidders,

postponed the date of submission of tender documents from 22.02.2012 to 27.12.2012. Clause 5.10 of Section IV of Instructions to Tenders

mandates that if any of the Tenderer finds any ambiguity in any of the terms and conditions stipulated in the specifications, he shall get it clarified at

least 48 hours before opening of the tender. As such, the petitioner had an opportunity to raise doubts regarding any ambiguity in any of the terms

and conditions stipulated in the specifications, to get it clarified by the Buyer as per this clause, which the petitioner has failed to do. As such, it is

evident that the interested bidders have been given sufficient opportunity at every stage of tender. The interested bidders have submitted tenders on

27.02.2012. Price-bid opening as schedule was opened on 4th May, 2012 at office of the Superintending Engineer (Design) TANGEDCO in the

presence of Tender Committee members holding high positions with technical knowledge. Thereupon, the 4th respondent and other eligible

bidders were invited for Price Negotiation on 09.05.2012 by the respondents vide letter CE/ P & C/ SE/D/ P& C/ EPC-3 AEE5/Specn. No: P&

C 902/D.10(a)/12 dated 07.05.2012. Price Negotiation took place in the presence of Director Finance, Director Distribution of TNEB & Chief

Engineer (P & C) on 09.05.2012. On completion of the entire tender process in a transparent manner the 2nd respondent issued Letter of Award

on 02.06.2012. There was no modification as alleged by the petitioner in the Bid qualification Requirement (BQR). The petitioner is attempting to

mislead the Hon'ble Court as to the meaning of the Static Capacitor instead of Static VAR Compensation Panel. The meaning of the Static

Capacitor and Static VAR Compensation Panel is within the knowledge of the petitioner since the petitioner claims to be in the field since, 2009.

As such, the BQR always remain the same and the allegation to that effect is unfounded. Similarly, there was no modification or alteration in the

eligibility criteria prescribed in the subject tender. The clarifications are issued in respect of BQR in a simplified manner based on specific queries

submitted by the interested Bidders in the prescribed format by 31.01.2012. The petitioner never had eligibility/qualifications to meet the

requirement criteria prescribed in the Bid Qualification Requirement of the 1st respondent for the subject tender. Clause No: 5.10 of Section IV of

the Instructions to Tenderers is as follows :-

If the tenderer finds any ambiguity in any of the terms and conditions stipulated in this specification, he shall get it clarified, at least 48 hours before

opening of the tender, from the Chief Engineer/Protection & Communication, 5th floor, NPKRR Maaligai, Electricity avenue, 144, Anna Salai,

Chennai 600 002, if this is not done and subsequent to the opening of the tenders, it is found that the doubt about the meaning or ambiguity in the

interpretation of any of the terms and conditions stipulated in the specification are raised by the tenderer, either in this tender or by a separate letter,

the interpretation or clarification issued by the Chief Engineer/ Protection & Communication, TANGEDCO Ltd. Chennai -2, on such of those

terms and conditions of the Tender Document as may be raised by the tenderer shall be final and binding on the tenderer.

Accordingly, the 4th respondent has prayed for dismissal of the writ petition.

9. Mr. S.R. Rajagopal learned counsel for the petitioner has mainly contended that the Corrigendum which seeks to modify the eligibility criteria

and restrict the same to a particular class of people is arbitrary, unreasonable and tinged with bias. The petitioner, who was legitimately expected

to participate in the tender, was successfully prevented by issuance of corrigendum to eliminate the competition and in any event, corrigendum

cannot modify the eligibility criteria stipulated in the tender. The learned counsel pointed out that in between the date of the clarification and the

date of submission only two days were left and therefore, the action of the 1st respondent in not extending the date of submission is an arbitrary

exercise of power. In support of his case, the learned counsel has relied on the following decisions:

(i) Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries,

7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which

non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for

public good. This imposes the duty to act fairly and to adopt a procedure which is fairplay in action. Due observance of this obligation as a part of

good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its

instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of

non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the

persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart

from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness.

Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial

review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to

consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate

expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant

factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the

context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in

larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the

claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand

judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this

extent.

10. From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while

inviting tenders to reject all the tenders, yet the power to reject all the tenders

cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good.

(ii) Tata Cellular Vs. Union of India,

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review.

Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or

any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while

accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best

quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose

the exercise of that power will be struck down.

73. 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 other 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.

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

decision-making process itself.

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

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

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only

concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put,

the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

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

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a

matter of fact, in R. v. Secretary of State for the Home Department, ex Brind²⁸, Lord Diplock refers specifically to one development, namely, the

possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, consider whether something

has gone wrong of a nature and degree which requires its intervention.

78. What is this charming principle of Wednesbury unreasonableness? Is it a

magical formula? In R.v. Askew, Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences.

They gained greater value two centuries later :

It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practise this profession is trusted to the College of Physicians and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike.

(iii) Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others,

10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are

concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of

the court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and

circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied

justifying Court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr. Parasaran,

learned Senior Counsel that the High Court committed a factual error in coming to the conclusion that Respondent 1 was the lowest bidder and the

alleged mistake committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and the contention of Mr.

Sorabjee, learned Senior Counsel that it has been conceded by all parties concerned before the High Court that on corrections being made

Respondent 1 was the lowest bidder. As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the

contract though ordinarily the authorities concerned should accept the lowest bid. Further we find from the letter dated 12-7-1996 that Paradip

Port Trust itself has come to the following conclusion:

The technical capability of any of the three bidders to undertake the works is not

in question. Two of the bids are very similar in price. If additional commercial information which has now been provided by bidders through Paradip Port Trust, had been available at the time of assessment, the outcome would appear to favour the award to AFCONS.

(iv) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others,

9. 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 of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving

engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the

job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services. Even when the State or a public body

enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same.

However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of

public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services

which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities.

(3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously.

(4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods

can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in

redoing the entire work thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in

commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the

general public and substantial cost escalation.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes and the court is

satisfied on the material before it that the allegation needs further examination, the court would be entitled to entertain the petition. But even here,

the court must weigh the consequences in balance before granting interim orders.

(v) M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others,

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action

is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd.

because it had not fulfilled the conditions relating to clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of

acceptance of the tenders. If that is so, the arguments advanced on behalf of Konark Infrastructure (P) Ltd. in regard to the allegation of mala fides

of the Commissioner of the Municipal Corporation in showing special favour to Monarch Infrastructure (P) Ltd. or the other contentions raised in

the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of Monarch Infrastructure

(P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of Konark Infrastructure (P) Ltd. The

High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of

the game after it had begun and, therefore, if the Government or the Municipal

Corporation was free to alter the conditions fresh process of tender

was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by

reason of deletion of a particular condition a wider net will be permissible and a larger participation or more attractive bids could be offered.

(vi) Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others,

36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the

proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of non-discrimination. However, it is not a

free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article

21 refers to right to life. It includes opportunity. In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho

v. State of T.N. 3, Articles 21 /14 are the heart of the chapter on fundamental rights. They cover various aspects of life. Level playing field is an

important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case.

When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of level playing field.

We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept

in mind. The doctrine of level playing field is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the

said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. Globalisation,

in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the

concept of globalisation. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of level playing field

embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of equality should not be read as a

stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs

to be mentioned in the matter of implementation of the aforesaid doctrine of level playing field. According to Lord Goldsmith, commitment to the rule of law is the heart of parliamentary democracy. One of the important elements of the rule of law is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of reasonableness, then such an act or decision would be unconstitutional.

(vii) *Uflex Limited Vs. State of Tamil Nadu*,

18. Moreover, the terms of the contract are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise the Courts 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 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. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision making process, the Court has to necessarily 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 the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest. This is the law laid down by this Court in the cases of *Ion Exchange Waterleau Ltd.* and *P.*

Ramadas, cited *supra*.

10. Mr. G. Vasudevan, learned counsel appearing for respondents 1 and 2, would submit that as per Rule 17 of the Tamil Nadu Transparency in Tenders Act, 1998 the respondents being the tender inviting authority, may make any change, modifications or amendments to the tender

documents and shall sent intimation of such changes to all those who have purchased the tender documents & upload corrigendum for the

information of those who have downloaded the tender documents from the website. Therefore, the respondents have got ample right to issue the

corrigendum. Further the question of arbitrariness does not arise since even as per the Corrigendum 2, the bidder can supply APFC panels either

with APP type capacitors or with MPP type capacitors. He also pointed out that as per the law laid down by the Supreme Court in Tata Cellular

Vs. Union of India, mere power to choose cannot be termed arbitrary as Government has an interest in selecting the best and further held that

while Court cannot interfere with Government freedom of contracts, invitation of Tender and refusal of any tender which pertains to policy matter

and further held that the power of Judicial review is not an appeal from the administrative decision and Courts cannot substitute their decision since

they do not have the necessary expertise to review. The learned counsel questioned the petitioner's action the ground that public interest has to

prevail over private interest and power of judicial review over administrative action and the Court has to confine itself to the question of legality.

The Court has to see whether the action of Tender inviting authority is legal, rational or whether there is any impropriety and it is not for the Court

to see whether particular policy or decision is fair but it is concerned only with manner in which such decisions are taken. Power of Judicial review

must not be exercised to protect private interest at the expense of public interest or to decide contractual disputes. To substantiate his stand, the

learned counsel has relied on a decision of this court reported in Ion Exchange Waterleau Ltd. Vs. The Commissioner, Madurai Municipal

Corporations, , wherein it has been held as under :

18. The learned Senior Counsel appearing or the petitioner contended that the work executed by the petitioner in construction of STP at Nanjing,

Belgium has not been evaluated properly. In this regard, one factor which should be taken cognizance of is that in Section 2.2 of the Bid

Document, it is specifically stipulated that the tenderer should have carried out similar type of work in any State or Central Government

Departments/Boards/Undertakings/Corporations, Municipalities, Municipal Corporations and Urban Development Authorities. Moreover, a

cursory reading of the tender notification would make it clear that it is a National Competitive Bidding and not an international one. A relevant bone

of contention raised by the learned Standing Counsel for the respondent Corporation is that the qualification criteria have been framed taking note

of the environmental condition and as such, the environment prevailing in other countries may not be the same as the one prevailing in our country

and for this reason, the experience of the petitioner in foreign countries though in the required field, can hardly be of any assistance to it. I find a

certain force in this argument advanced by the learned Standing Counsel for the reason that only those national independent firms/Joint Venture and

the Lead Partners of consortiums, knowing the actuality of the local situation will be able to carry out the project of the respondent-Corporation.

Thus, admittedly, in the absence of any work executed by the petitioner in India in any of the State or Central Government Departments/Boards/

Undertakings/ Corporations/Municipalities, Municipal Corporations and Urban Development Authorities, it can safely be held that the respondent

has not done anything arbitrary in the process of rejecting the petitioner's Technical Bid. That apart, as against the requirement of having annual

turnover of Rs. 50 crores in any two years from April 2002, the petitioner's JV partner has shown turnover exceeding Rs. 50 crores only in one

year. Thus, in view of these reasons, it cannot at all be construed that the decision-making process of the tender inviting authority is faulty inasmuch

the respondent-Corporation has acted only in accordance with the Tamil Nadu Transparency in Tenders Act, 1998 and the Rules made

thereunder and the Tender Notification.

19. Needless to say, it is a settled principle that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of

contract. The Courts are always hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary,

discriminatory, mala fide or actuated by bias, the Courts can interfere or otherwise the Courts 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. In the decision in Tata

Cellular case, the Constitution Bench of the Supreme Court has authoritatively held that the principle of judicial review in the matter of contract

would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State and the power to refuse the lowest or any other tender is always available to the Government. 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. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision-making process, the Court has to necessarily 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 the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail upon the individual's interest.

11. Mr. A.R.L. Sundaresan, learned Senior Counsel appearing for the 4th respondent/successful bidder, would strenuously contend that the writ petition is not maintainable for non-joinder of necessary party, as only subsequent to the filing of the writ petition M/s. Herodex Power Systems Pvt. Ltd. Nashik, was impleaded as 4th respondent in this writ petition. He would also submit that the petitioner having not participated in the tender process has no locus standi to question the corrigendum. Learned Senior counsel further contended that the tender process has been statutorily followed and therefore, there is no question of exercising the judicial review available in this matter. The project is time bound and the 4th respondent had already been issued with the work order and they commenced preparatory works and it has to be completed within the given time frame and that any interference by the Court will cause serious prejudice to the 4th respondent and hence, he prayed for dismissal of the writ

petition. In support of his contentions, the learned Senior Counsel has relied on the following:

(i) Uflex Limited Vs. State of Tamil Nadu,

12. From the above rule, there cannot be any iota of doubt that after issuance of the tender documents and before the opening of the tender, the

Tender Inviting Authority may make any changes, modifications or amendments to the tender documents and shall send intimation of such change

to all those who have purchased the original tender documents and upload corrigendum for the information of those who have downloaded the

tender documents from the website.

13. Therefore, in this case, the Tender Inviting Authority, namely, the second respondent after the issue of the tender documents and before the

opening of the tender, is empowered to issue the corrigendum, amending or altering the experience clause, which is, accordingly, issued. Also, the

said corrigendum issued is communicated to all the prospective bidders, including the petitioner, who purchased the tender document from the

office of the second respondent and the same is uploaded in the website.

14. Coming to the contention of the learned Senior Counsel for the petitioner that though the petitioner has made a representation on 17.03.2011

there is no reply from the respondents, it is to be stated that a reading of the said representation indicates that what is sought for is not a

clarification as per Rule 17 (2), but is an advice. Had any clarification been sought for by the petitioner in the tender document, the respondents

would have cleared the same. When the respondents discharge their duties as per the rules, the petitioner cannot dictate terms to the authorities to

do certain act to suit to his convenience. Hence, this contention fails.

(ii) Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others,

19. While considering the above submissions, the three-Judge Bench held as under: (Assn. of Registration Plates case 212, SCC pp. 698-701,

paras 38-40 & 43-44)

38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security

registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be

malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and the State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)

(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of

operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain

the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the

RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and

supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual

operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would

also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go

and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with

higher vehicular population.

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to

successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and

pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to

carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and

discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this

Court, cited at the Bar is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on

the Government in its dealings with tenderers and contractors.

21. In Jagdish Mandal v. State of Orissa¹⁴ the following conclusion is relevant: (SCC pp. 531-32, para 22)

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to

check whether choice or decision is made lawfully and not to check whether choice or decision is sound. When the power of judicial review is

invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial

transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a

distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review,

interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be

permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a

grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business

rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by

exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay

relief and succour to thousands and millions and may increase the project cost manifold. 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

blacklisting or imposition of penal consequences on a tenderer/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.

22. The same principles have been reiterated in a recent decision of this Court in Tejas Constructions & Infrastructure (P) Ltd. v. Municipal

Council, Sendhwa 15.

23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair

play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically

for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national

priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except

for striking down such action of the executive as is proved to be arbitrary or

unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

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

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

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions: (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached ? and (ii) Whether the public interest is affected? If the answers to the above questions are in the negative, then there should be no interference under Article 226.

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of

the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with 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. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.

12. I have heard the learned counsel for the parties and perused the records and also gone through the documents and pleadings.

13. A circumspection of the facts would reveal that petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in the

manufacture of automatic power factor correction panels being its main object. Since 2009, petitioner company is actively involved in system

integration of Reactive Power Compensation Systems such as Contactor/Thyristor Switched Automatic Power Factor Correction (APFC) Panels,

Contactor/Thyristor Switched Automatic Passive Harmonic Filter Systems, Electronic Energy Meters (MFM), Trivector Meters (TVM),

Availability based Tariff Meters (ABT for Power Plant Applications), TVM s/ABT Meters for Windmill Applications, Metering Panels, Energy

Management System, Medium Voltage Panels. The petitioner also supplies Capacitor Banks and Fixed Passive Harmonic Filter Banks with

Capacitors and Reactors for LV and HV applications and provides services which includes conducting Power quality Audits (Harmonics Study),

Installation, Erection and Commissioning of all types of electrical panels, etc. The 1st respondent floated a tender No: P & C 902 for Design,

Engineering, Manufacture, Supply, Installation, Testing, Commissioning, Operation and Maintenance of Automatic Power Factor Correction

Panels (APFC) and associated materials for Dynamic Reactive Power Compensation System. The concept of the project is to reduce the

quantified AT & C losses at Distribution Transformer level by designing, supplying

and installing APFC panels. The project is funded by the 3rd respondent namely M/s. Power Finance Corporation, New Delhi, under R-APDRP Part B Scheme (Promoted by Ministry of Power, Government of India) with appropriate project cost as Rs. 128 crores i.e. based on the Earnest Money Deposit (EMD) generally being 1% of the project cost.

14. A tender specification along with the Bid Qualification Requirement (BQR) for the tender project was made available at the 1st respondent's website. The due date for the receipt of the tender and opening of the tender was 22.02.2012 at 2.00 p.m. The sealed tender was to be forwarded to the 2nd respondent and it was to be opened at the 2nd respondent's office. The tender system adopted was a two part open tender and the period of contract has been stated as 7 years from the date of commissioning of the last batch of the materials. The petitioner being a supplier of capacitor panels to various customers under the same concept and was in talks with one of the best manufacturers of capacitor panels to form a consortium to fulfill the BQR. There was a pre bid meeting held on 24.01.2012 which was initially fixed on 20.01.2012 and was subsequently altered by corrigendum 1. There were more than nine companies which attended the pre-bid meeting. The petitioner was one among them. In the said meeting the potential vendors had raised various queries towards technical specification for Remote Monitoring, Qualification criteria, Payment Clause, Capacitors, Control on the Project Cost, guarantee, etc. While so, the 1st respondent has issued Corrigendum 2 dated 18.02.2012 along with the clarification for queries raised in the pre-bid meeting. The corrigendum 2 and the clarifications which was issued along with it had completely deviated from the original BQR and had indicated substantial changes to the qualification for participation in the bid for the tender including removal of static VAR compensation panels, however, the due date remained unchanged as 27.02.2012. The specification in Corrigendum No: 2 were not a detailed one due to which certain clarifications were sought for from the 1st respondent by the vendors who were intending to bid for the tender. Thereby, the BQR was made very stringent vide corrigendum No: 2 and diluted in terms of certain terminologies on technical aspect to favour the bidders who have participated in the tender. The

clarifications provided by the 1st respondent on 22.02.2012 and 24.02.2012 contained certain essential requirements which were to be fulfilled by a qualified bidder to qualify for the bid and it would require substantial amount of time. Even though several requests were made to the 1st respondent by the petitioner vide letter dt. 25.02.2012 and other interested bidders, he refused to extend the due date which is unreasonable and unjustified.

15. It is the stand of the 1st and 2nd respondents that the work has been covered under Restructured Accelerated Power Development and

Reforms Programme (R-APDRP) Part B, promoted by Government of India. This is funded by Government of India (25%) and counter part

funding by Power Finance Corporation/REC (75%) as loan, with a view to reduce the Transmission & Distribution losses. If the Distribution

utilities achieve the target of 15% of AT & C losses on a sustained basis for a period of 5 years in the project area besides reduction of AT & C

losses @ 1.5% per year at the utility level, upto 50% loan against Part B projects will be convertible into grant in equal tranches, every year for 5

years @ 10% starting one year after the year in which the base line data system (Part-A) of the project area concerned is established and verified

by the independent agency appointed by MoP. The Part-B scheme covering various works including provision of APFC panels is to be completed

within 3 years from the date of sanction of DPR of the project area. The date of DPR sanction for the first phase of the project is 19.03.2010 and

the final phase is 22.02.2011. Accordingly, the completion date for the first phase is 18.03.2013 and the final phase of the project is 21.02.2014.

16. The Bid Qualification Requirement (BQR) conditions are as given below:

1. The Bidder shall have previous experience in Design, Engineering, Manufacture, Supply, installation, testing and commissioning of Static or

Dynamic VAR compensation panels of cumulative capacity of at least 240MVar in the past five years from the date of tender opening which

should have been supplied to power utilities/SEB's/Power distribution companies in India. Necessary testimonials in this regard should be

furnished, i.e., Proof of manufacture, Proof of purchase orders/contracts and supply confirmation by end user, commissioning reports/certificates.

In case the bidder outsources capacitor for the proposed APFC panels then the

bidder shall also furnish along with their bid an exclusive back up guarantee obtained from the principal manufacturer of capacitors.

2. The State or Dynamic VAR compensation panels of cumulative capacity of at least 100MVar supplied by the bidder to any of the power

utilities/SEB's/Power distribution companies in India should have been in satisfactory continuous service for at least one complete year during the

last three years from the date of tender opening. Necessary end user certificate should be furnished for this performance requirement.

3. Annual turnover of the bidder shall be minimum Rs. 33 Crores during any one of the last three years. The tenderer shall furnish either the Annual

Turnover Certificate by the Chartered Accountant or Audited Annual Statement of Accounts (or) the attested copy of Income tax return filed by

the bidder (or) the attested copy of sales tax clearance certificate (or) the attested copy of enlistment certificate issued by the NSIC certifying

turnover details of the bidder for the respective period as above said as proof for annual turnover.

It is stated that the project is a time bound project and as per the PFC guidelines the first phase of the project shall be completed by 18.03.2013

and the entire project shall be completed on or before 21.02.2014, failing which the loan amount given by Govt. Of India and PFC to SEB will not

be converted as grant and the entire loan amount should be repaid and this will attribute loss to the TANGEDCO. Accounting 18 months time

from the date of issue of order for completion of the project the order has to be released by Aug. 2012.

17. It is seen that after following the tender process, the tender was finalized and Letter of Award dated 2.6.2012 was issued to 4th respondent

company in respect of 3 items namely, 18 KVAR APFC Panel, 27 KVAR APFC Pane, 72 KVAR APFC Panel and to another company by

name M/s. Shreem Electric Ltd. in respect of one item namely, 36 KVAR APFC Panel. The petitioner, without challenging either the tender

notification or the Letter of Award when there is a remedy available under the Act and the Rules, has come before this Court questioning the

Corrigendum 2 dated 18.02.2012. Though the petitioner has participated in the pre-bid meeting and raised queries, it has not chosen to participate

in the tender.

18. On the above background of circumstances what is required to be examined in this case is whether the impugned Corrigendum issued by the respondent is arbitrary, unjustifiable or unreasonable and is one made with a mala fide intention.

19. A tender specification along with the Bid Qualification Requirement (BQR) for the tender project was made available at the 1st respondent's website. The due date for the receipt of the tender and opening of the tender was 22.02.2012 at 2.00 p.m. The sealed tender was to be forwarded to the 2nd respondent and it was to be opened at the 2nd respondent's office. The tender system adopted was a two part open tender and the period of contract has been stated as 7 years from the date of commissioning of the last batch of the materials.

20. The Bid Qualification Requirement (BQR) conditions are as given below:

1. The Bidder shall have previous experience in Design, Engineering, Manufacture, Supply, installation, testing and commissioning of Static or

Dynamic VAR compensation panels of cumulative capacity of at least 240MVar in the past five years from the date of tender opening which

should have been supplied to power utilities/SEB's/Power distribution companies in India. Necessary testimonials in this regard should be

furnished, i.e., Proof of manufacture, Proof of purchase orders/contracts and supply confirmation by end user, commissioning reports/certificates.

In case the bidder outsources capacitor for the proposed APFC panels then the bidder shall also furnish along with their bid an exclusive back up guarantee obtained from the principal manufacturer of capacitors.

2. The Static or Dynamic VAR compensation panels of cumulative capacity of at least 100MVar supplied by the bidder to any of the power

utilities/SEB's/Power distribution companies in India should have been in satisfactory continuous service for at least one complete year during the

last three years from the date of tender opening. Necessary end user certificate should be furnished for this performance requirement.

3. Annual turnover of the bidder shall be minimum Rs. 33 Crores during any one of the last three years. The tenderer shall furnish either the Annual

Turnover Certificate by the Chartered Accountant or Audited Annual Statement of Accounts (or) the attested copy of Income tax return filed by

the bidder (or) the attested copy of sales tax clearance certificate (or) the

attested copy of enlistment certificate issued by the NSIC certifying

turnover details of the bidder for the respective period as above said as proof for annual turnover.

21. There was a pre bid meeting held on 24.01.2012 which was initially fixed on 20.01.2012 and was subsequently altered by corrigendum 1.

There were more than nine companies which attended the pre-bid meeting. The petitioner was one among them. In the said meeting the potential

vendors had raised various queries towards technical specification for Remote Monitoring, Qualification criteria, Payment Clause, Capacitors,

Control on the Project Cost, guarantee, etc. While so, the 1st respondent has issued Corrigendum 2 dated 18.02.2012 along with the clarification

for queries raised in the pre-bid meeting. The corrigendum 2 and the clarifications which was issued along with it had completely deviated from the

original BQR and had indicated substantial changes to the qualification for participation in the bid for the tender including removal of static VAR

compensation panels, however, the due date remained unchanged as 27.02.2012. The specification in Corrigendum No: 2 was not a detailed one

due to which certain clarifications were sought for from the 1st respondent by the vendors who were intending to bid for the tender. Thereby, the

BQR was made very stringent vide corrigendum No: 2 and diluted in terms of certain terminologies on technical aspect to favour the bidders who

have participated in the tender. The clarifications provided by the 1st respondent on 22.02.2012 and 24.02.2012 contained certain essential

requirements which were to be fulfilled by a qualified bidder to qualify for the bid and it would require substantial amount of time. Even though

several requests were made to the 1st respondent by the petitioner vide letter dt. 25.02.2012 and other interested bidders, he refused to extend

the due date. Therefore, sufficient time was not given to the interested participants to enable them to submit their quotations.

22. To examine the aspect as to whether the clarification issued by the 1st respondent by way of Corrigendum 2 on 18.02.2012 is arbitrary and

with a malafide intention to deny the participants their right to quote the tender within the time frame, we will have to examine the relevant Rules

namely the Tamil Nadu Transparency in Tenders Rules, 2000, hereinafter referred to as the Rules. Rule 17 of the said Rule reads as under :

17. Clarification to tender documents :

(1) At any time after the issue of the tender documents and before the opening of the tender, the Tender Inviting Authority may make any changes, modifications or amendments to the tender documents and shall send intimation of such change to all those who have purchased the original tender documents.

(2) In case any one tenderer asks for a clarification to the tender document before 48 hours of the opening of the Tender, the Tender Inviting Authority shall ensure that a reply is sent and copies of the reply to clarification sought will be communicated to all those who have purchased the tender documents without identifying the source of the query.

23. As per the above Rule, the power of the Tender Inviting Authority in making the changes, modifications and amendments to the tender

documents is available. In this case, the tender was floated by the 1st respondent and a pre-bid meeting was held on 24.01.2012. Interested

participants, including this petitioner, took part in the pre-bid meeting and raised various queries. By way of reply to the queries raised during the

pre-bid meeting, the Chief Engineer, P & C, Chennai, of the 1st respondent issued Corrigendum 2 on 18.02.2012 and the same was provided to

the petitioner as well as to the other interested persons. The clarifications issued contained certain essential requirements which were to be fulfilled

by the intending bidder to qualify for the bid. The only aspect raised by the petitioner is that there was no sufficient time to submit the tender after

incorporating the changes made to the tender specifications vide Corrigendum 2 dt. 18.2.2012 and clarifications issued on 22.02.2012 and

24.02.2012 and the act of the 1st respondent in not extending the time to submit the tender documents is per se illegal and it was done with a

malafide intention. It is clear from the pleadings of the parties that the impugned corrigendum was issued on 18.02.2012 and it has been

communicated to all the interested persons including this petitioner. The fact that the said clarification was communicated to the petitioner is not in

dispute. The only concern of the petitioner is that the due date for submission of the tender document was not extended, even though several

requests were made to the 1st respondent by the petitioner and other interested bidders. Thereby, there was no sufficient time to the interested

persons to submit their quotations.

24. Even as per the admitted facts, the pre-bid meeting was held on 24.01.2012 and by way of clarifying the queries raised in that meeting, the

respondents have issued corrigenda 1 and 2 and subsequent clarifications on 22.02.2012 and 24.02.2012. The last date for receipt of tender

documents was 27.02.2012. Rule 17 (1) empowers the Tender Inviting Authority to make changes, modifications and amendments to the tender

documents. In fact, Rule 17 (2) empowers the Tender Inviting Authority to ensure that any clarification sought for by any one tenderer before 48

hours of the opening of the tender document is issued not only to the person who sought for the clarification but also to all those who have

purchased the tender documents without identifying the source of the query. As is clear from the facts pleaded, the official respondents have only

clarified the queries raised by the interested persons in the pre-bid meeting held on 24.01.2012 by issuing the corrigendum 2 dated 18.02.2012.

The Rule contemplates that such changes should be intimated to all those who have purchased the tender documents. It is petitioner's own case

that he has not purchased the document from the Tender Inviting Authority, but had downloaded the said document from the concern website.

Though the petitioner claims that he had taken part in the pre-bid meeting, nothing is stated as to why it has not proceeded further to participate in

the tender by submitting the tender documents. From the facts pleaded and dates furnished by the parties, there was no ambiguity that the

petitioner had sufficient time to submit his tender document on or before 27.02.2012. Therefore, the contention of the writ petitioner that the act of

the 1st respondent in not extending the time for submission of the tender document is unsustainable.

25. The next allegation of the petitioner is about the changes made to the Bid Qualification Requirement (BQR) by way of Corrigendum 2. From a

perusal of the relevant documents annexed in the typed set of papers it is seen that the term used in the tender and the Corrigendum were Static

VAR Compensation or Dynamic VAR Compensation Panels and not Static Capacitor or Dynamic Capacitor as alleged by the petitioner. The

Controller is an integral part of VAR Compensation Panel in both Static VAR Compensation Panel and Dynamic VAR Compensation Panel. The

respondents have stated the same in a simple way in the Corrigendum and in the Clarifications to avoid any confusion among the interested

persons. It is the stand of the 1st and 2nd respondents that the original BQR Clause (1) and (2) also calls for experience in VAR compensating

panels and not capacitors alone. For Static or Dynamic VAR compensation panels Capacitors are the same and only the control elements differ. In

the static VAR compensation panels under voltage/ over voltage/ earth fault/ current sensing elements are employed. In dynamic VAR

compensation panels Power Factor Controllers are employed.

26. As per the corrigendum-2 and clarification dated 18.02.2012 experience in static or dynamic VAR compensation panels have been maintained

as per the original BQR Cl.(1) & (2). The petitioner has stated in the affidavit filed along with this writ petition that most of the capacitors are used

for improvement of power factor through some sensing relay and this sensing relay along with other control elements only has been given in the

clarification. Thus, from a comprehensive reading of the original BQR and the Corrigendum and the clarifications, it is clear that the corrigendum

and the clarifications are only continuance of the original BQR and they do not alter the original Bid Qualification Requirement in any way. One

more contention of the writ petitioner before this Court is that the specification for 9 KVAR was provided only by a clarification on 24.02.2012

and as such only two days were left with to meet the specifications required. But according to the respondents 1 and 2, in the MPP capacitor

specification furnished on 22.02.2012, it has already been stated that series reactor of 1% of the rating of capacitor step shall be used. Moreover,

in technical specification cl. 5.2, it has been stated that the capacitor rating table provides a conceptual design of the KVar assigned for the

capacitors within each stage for the application, however the bidder may propose alternate Configuration of KVar assigned to various stages but

the total KVar capacity should be the same as in the table and therefore, 5 days time is available for participating in the tender.

27. Analysing every factor pleaded, it can be seen that the impugned corrigendum is only a clarification issued to the petitioner and other

companies as they required certain clarifications and it does not otherwise alter any of the specifications or criteria or terms and conditions

stipulated in the tender notification. Though it is contended by the petitioner that only to favour some particular companies this has been done, it is

conspicuously absent in the entire material documents as to how the petitioner can plead that the respondents had any intention to favour any

particular company. In other words, except pleading that the respondents had acted with a malafide intention to favour some particular companies,

the petitioner has not brought to surface any concrete material to prove such an allegation. Therefore, the manner in which the power has been

exercised by the Tender Inviting Authority is very much in accordance with law and it does not, in any way, require an interference from this Court

by way of judicial review.

28. In matters of tenders, the duty of the court is to confine itself to the question of legality. Its concern should be :

Whether the Tender Inviting Authority -

1. exceeded its powers,
2. committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers ?

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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 are : (i) Illegality; (ii) Irrationality; and (iii) Procedural

impropriety. Further, The principles deducible relating to scope of judicial review of administrative decisions and exercise of contractual powers by

government bodies are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be

fallible.

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

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not,

such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body

functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of

Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or

actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

29. The above are the principles laid down by a Three Judge Bench of the Supreme Court in Tata Cellular's case, referred to above. In the very

same judgment, the power of Judicial Review has been examined by the Supreme Court, wherein it has been held that 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 of 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. Therefore, restraint under judicial review is always limited to

this Court and it has to be invoked rarely and hesitantly under Article 226 of the Constitution of India.

30. Added to the above, the terms of the contract are not open to judicial scrutiny, the same being in the realm of contract. The Courts are always

hesitant to interfere with the administrative policy decision and in rarest of rare occasions, if it is arbitrary, discriminatory, mala fide or actuated by

bias, the Courts can interfere or otherwise the Courts 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 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. In a commercial transaction, the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, provided the tender conditions permit such a relaxation. Even when some defect is found in the decision making process, the Court has to necessarily 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 the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion and is satisfied that overwhelming public interest requires interference, the Court should interfere. Otherwise, the larger public interest will prevail over the individual's interest. This is the law laid down by this Court in the case of *Ion Exchange Waterleau Ltd. v. The Commissioner, Madurai Municipal Corporation*, 2008 (3) CTC 675, cited *supra*, which is also considered in the case of *Uflex Limited*, referred to above.

31. On an analysis of the entire factors, it could be seen that the manner in which the decision making process undergone by the respondents by inviting tender and thereafter issuing corrigendum/clarification for the purpose of achieving the technical specification from well experienced persons, taking into account the public interest and invoking Rule 17 (1), by making proper changes, modifications or amendments to the tender document, is in a transparent manner and after following the procedure contemplated. In other words, the respondents have scrupulously followed the provisions, rules and jurisdictional limit, while processing the tender and issuing corrigendum/clarification. At this stage, the petitioner has challenged the said corrigendum/clarification, on the ground that the action of the respondents is arbitrary and actuated with malice. In the given situation, in the absence of any arbitrary or colourable exercise of power or the action of the respondents being tainted with mala fides, this Court is not inclined to exercise the power of judicial review under Article 226 of the Constitution to interfere with the tender making process undertaken by the respondents, as the same is done in a transparent mode and keeping in view the object of the Act.

32. It is true, as contended by the learned counsel for the petitioner, that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism and that the judicial power of review is exercised to rein in any unbridled executive functioning. In this case, as already stated above, as the respondents have exercised their power only in accordance with the rules and, at the same time, there is no illegality, irrationality and procedural impropriety in their action in issuing the impugned Corrigendum, this Court is restrained to interfere with the same.

33. Also, in the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring design, engineering, manufacture, supply, installation, testing, commissioning, operation and maintenance of Automatic Power Factor Correction Panels and associated materials for Dynamic Reactive Power Cocmpensation System, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, I do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19(1)(g) of the Constitution.

34. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Selecting one manufacturer through a process of open competition is not creation of any monopoly, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said Article.

35. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position

which has been firmly established is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

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

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

37. If the answers to the above are in the negative, there should be no

interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/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. This is the law in a recent decision in the case of Michigan Rubber (India) Ltd., which has been laid down by the Supreme Court after referring to a catena of decisions of the very same Supreme Court, and relied upon by the fourth respondent.

38. Keeping the above guidelines in mind, if we consider the present case, it is to be stated that the power of judicial review is available only on the ground of arbitrariness and violation of principles of natural justice in the decision making process of the authorities. It is also equally important that the Court has to consider the viability of the project concerned and the public interest involved. It is stated by the learned counsel for the respondents 1 and 2 that the project involved in this tender is time bound, to be completed on or before March, 2013, and is worth about Rs. 125 crores. Therefore, such a huge project formulated for the benefit of the people of this Country cannot be interfered with by this Court on a challenge made by a person, who has not even participated in the tender, that too on a mere clarification issued in the form of a corrigendum. In the light of what is discussed above, this Writ Petition has to be only dismissed and, accordingly, it is dismissed. The first respondent is at liberty to go ahead with the tender process. Consequently, the connected miscellaneous petitions are closed. There shall be no orders as to costs.