(2013) 08 GAU CK 0011

In the Gauhati High Court

Case No : Writ Petition (C) No. 2928 of 2013

Ramen Deka APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 14-08-2013

Acts Referred:

Citation : (2014) 1 GLD 77 : (2013) 4 GLT 786

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : K.N. Choudhury and Mr. R. Dubey, for the Appellant; R. Sharma and Mr. B.N. Gogoi, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This writ petition is directed against the Annexure-4 series tender notices all dated 26.04.2013, by which sealed bids on single stage two packet systems were invited by the Chief Commercial Manager/PM & Catg, Northeast Frontier Railway, Maligaon, Guwahati, for providing On-Board Catering Services in various trains as indicated in the tender notices. According to the petitioner, the conditions specified in the tender notices are contrary to the Catering Policy, 2010, circulated by the Government of India in the Ministry of Railways, Railway Board, vide its circular letter No. 35/2010 dated 21.07.2010. As claimed in the writ petition, the petitioner has been running Food Plaza at New Jalpaiguri Railway Station under N.F. Railway and he has the experience of running On-Board Catering Services on trains under the Railways for more than last 15 years. Referring to the impugned tender notices, the petitioner has contended that the conditions stipulated therein being opposed to the aforesaid Catering Policy, 2010, are not sustainable in law. Be stated here that the petitioner has not responded to the impugned tender notices by submitting his tender. The basic grounds on which the tender notices have been enumerated in Paragraphs 5, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 25 and 26 of the writ petition, which are reproduced below.

5. That the present writ petition is being filed invoking the extra-ordinary jurisdiction of this Hon''ble Court under Article 226 of the Constitution of India challenging the legality and validity of the impugned Tender Notices issued by the Respondent No. 2 whereby the action taken by the Respondent No. 2 in fixing the Reserve Price/License Fee and formulating "Base Kitchen" norms is in clear violation to the Catering Policy 2010 and the Circular No. 82/2012 dated 31.12.2012 which is purely arbitrary and unreasonable. Moreover, the eligibility and the technical evaluation criterion as envisaged in Chapter 3 of Section A of the impugned Tender document is ambiguous and discriminatory opposed to the healthy competition since the tedious and complicated technical evaluation may disqualify a smaller layer/bidder with lower HTS even though the bidder fulfill the minimum eligibility criterion. The Petitioner prays before this Hon''ble Court to quash and set aside the Tender Notices and the Tender Document enumerating the arbitrary conditions which is in sheer violation of the Article 14 and 19(1)(g) of the Constitution of India and the principles of natural justice.

12. That it would be pertinent to note that Clause 3.3 of Chapter 3 of the Bid Document dealing with "Experience of Base Kitchen" is in complete violation to the Catering Policy 2010. Clause 6 of the Catering Policy states that the Zonal Railways will set up Base Kitchens and would be manages through departmental catering by zonal railways in phases. In case of non-availability, the Zonal Railways shall take immediate steps for construction of the same as required. But in the Bid Document, Clause 3.3 and 3.5 gives a new parameter of eligibility wherein the Bidder prior to its Bidding, has to own an operational Base Kitchen and in case the Bidder does not own a Base Kitchen, the Bidder would tie-up with the Base Kitchen and accordingly would set up the Base Kitchen. The Clause also contains setting up of the base kitchen on the non-railway area.

13. That it is humbly submitted that in accordance with the Clause 6 of the Catering Policy, the setting up of the ''Base Kitchens'' was the duty of the Zonal Railways but an arbitrary undertaking to be given by the Bidders that too for setting up of the Base Kitchen within the stipulated time, is nothing but an unreasonable and arbitrary act of the Respondents thereby violating the Catering Policy, 2010. The petitioner further humbly states and submits that the conditions regarding setting up of Base Kitchen has been incorporated with the sole intention of favouring the existing contractors and depriving new intending contractors, which is oppose to the policy of distribution of state largesse. On one hand the terms and conditions lay down for having base kitchen and on the other hand it requires an undertaking from the intending tenderer to set up a base kitchen within a stipulated period and also to have a memorandum of understanding with persons owning base kitchens. There is no rational of having base kitchen for on board catering more so when it has not been stipulated whether on board cooking on the trains would be allowed or not Furthermore, even the supply has to be made from the base kitchen, it is inconceivable as to how food would be supplied to the passengers in a long distance train relying only on a single base kitchen which can be located anywhere. Therefore, the

insistence on base kitchen is an onerous condition. It is also not practically feasible for the intending tenderer like the petitioner to set up a base kitchen in such a short notice and that too the same having no rational connection with the objective of the tender process. Therefore, on this ground alone, the impugned tender notices are liable to be interfered with.

14. That it is stated that the paragraph 18 of the Catering Policy, 2010 provides that the minimum license fee/minimum reserve price shall be fixed realistically, equitably in order to have a fair, just and equitable fixation of license fees without adversely affecting the quality of service and further provides that factor to be considered as basis for arriving at such realistic and equitable minimum license fee/minimum reserve price. Paragraph 18.2 indicates at what percentage of the estimated Annual Sales Turnover license fee shall be fixed.

15. That it is humbly submitted that the respondents have fixed the minimum license fees at a very exorbitant price in all its tender documents in violation of the Catering Policy 2010, whereas the other zone of the Indian Railways namely South western zone and Western zone have fixed the minimum license by following the Railways Catering policy 2010 with regard to the assessment of license fees on sales turnover method for Mail/express trains. The minimum license fee has been fixed without considering the sale figure of a particular train as a result the minimum license fee has been fixed unreasonably higher and about three times higher than the actual Minimum Reserve Price if calculated as per the parameters set out in the Catering Policy. Moreover, it is pertinent to note that the Respondent No. I in its minutes of meeting dated 13.03.2013 have reiterated the Policy of fixing the minimum license fees as per the assessment of sales turnover method.

16. That it is pertinent to note that the present tender process is totally opposed to the known rules of tendering process where, if the bidder is technically qualified based on the minimum eligibility criterion, his financial bid will be opened and considered. However in the instant tender, a tedious, complicated and arbitrary mechanism is envisaged to find out the technical eligibility of a bidder after submission of all the bids. As per Form Tech-3, firstly, a Total Quality score (QS) of each bidder is to be calculated by giving marks based on the ISO and other certifications obtained by the various outlets of bidder. Thereafter, a Relative Score (RQS) of each bidder is to be determined by dividing their respective total Quality Score (QS) with the highest quality score (HQS).

18. It is humbly submitted that the aforesaid arbitrary method leads to wholly absurd situation. Firstly, even after satisfying the minimum technical eligibility criteria, it is not clear whether a prospective bidder will finally technically qualify in the tender or not. Rather his technical qualification in the tender is dependent upon participation of some other bidder who gets the highest Techno-commercial Score (HTS). A bidder gets technically qualified for opening of the financial bids, if another bidder with low highest Techno-commercial score (HTS) participates in the bid and he may get technically disqualified if another bidder of high HTS

participates in the same bid. Thus in a same bid, a bidder gets technically qualified for opening of financial bid depending upon who are the bidders and their highest Techno-Commercial score (HTS) as per bids in para 3.5 of chapter 3 of section B. This clause is ex facie illogical and irrational. Therefore, the Tender Document enumerating such condition/criterion which leads to an anomalous situation, deserves to be quashed at the outset otherwise it will create problems for respondents in view of its patent flaws and un-workability.

19. It is submitted that this illogical and unduly complicated mechanism leads to a technical evaluation criterion which is unclear, unspecified, vague and wholly precarious and variable as opposed to a clear, specific and unambiguous tender criterion which is a paramount requirement of government tender. It is an admitted issue that in any Government contract being awarded through open tender system, it is absolute necessary that the tender document must explicitly spell out the eligibility criteria for technical qualification so that the perspective bidders my decide whether they are technically qualified to participate in that tender and offer competitive rates thereon or not. The perspective bidders, who intend to participate in the bid after examining their eligibility as per tender documents are also required to tender requisite earnest money so as to reflect their sincerity and earnestness towards the tender and for the performance of the tender. Since participation in a tender entails monetary consequences for a bidder in as much as huge amounts of earnest money are to be deposited with the government department and these monies remain blocked for a considerable period of time, the bid document should clearly and unambiguously indicate the qualification for becoming eligible to participate in the tender process and for offering the financial bid. This element is totally missing in the impugned tender bid document since even after satisfying the minimum technical qualify in the tender or not. This clause in utterly illogical, unreasonable and discriminatory in nature and clearly violative of Article 14 of the constitution of India.

20. That is contended that the impugned tender evaluation criterion does not serve any public interest and it is opposed to any kind of logic and reason. The impugned tender condition has no nexus to any public interest sought to be achieved and on the contrary, the impugned tender criterion will be opposed to healthy competition in as much as the smaller player with lowers HTS will be disqualified even though they may fulfill minimum eligible criterion. It is pertinent to mention herein that tender conditions have been framed in such a manner that it would suit the existing contractors who have been operating the on board catering services and discourage new tenders. The petitioner desires to participate in the impugned tender process but because of the onerous conditions, has no option but to approach this Hon''ble court.

21. That the arbitrariness and vagueness in the evaluation is also apparent from the foot note at Annexure A/5 to Section B which provides as follows:

Tender committee would make efforts that only workable bids are accepted i.e. too high bids which unworkable need to be deliberated by the Tender committee.

Tender Committee may convene a meeting prior opening of financial bid so as to estimate the workable rates mathematically on the basis of input cost of material, labour, service, mechanized working and profit margin levels.

23. That the petitioner also assails the criterion of fixation of the exorbitant minimum license fees/reserve license fee and the setting up of the Base Kitchen by the Respondent in gross violation of the Catering policy 2010 and Circular No. 82 dated 31.12.2012 issued by the Respondent No. 2.

25. That it is humble submitted that the Respondents have fixed the minimum license fees at very exorbitant price in all its tender documents in violation of the Catering policy 2010, whereas the other zone of the Indian Railways namely South western zone and Western zone have fixed the minimum license by following the Railways Catering policy 2010 with regard to the assessment of license fees on sales turnover method of Mail/express trains. The minimum license fee has been fixed without considering the sale figure of a particular train as a result the minimum license fee has been fixed unreasonably higher and about three times higher than the actual Minimum Reserve price if calculated as per the parameters set out in the Catering Policy. Moreover, it is pertinent to note that the Respondent No. 1 in its minutes of meeting dated 13.03.2013 have reiterated the policy of fixing the minimum license fees as per the assessment of sales turnover method.

26. That being highly aggrieved by the action of the Respondent authorities in fixing the exorbitant rate of Minimum License Fee/Reserve Price, dragging tie petitioner into setting up of Base Kitchen, in complete violation to the catering policy 2010 and in preparing a tedious and complicated technical evaluation criterion for the bidders, thereby violating Article 14 and 19(g) of the Constitution of India, the petitioner has no other efficacious remedy but to invoke this instant Write Petition before the Hon''ble High Court.

In support of the aforesaid grounds urged in the writ petition against the tender notices, the petitioner in the writ petition has referred to the following clauses of the tender policy.

Modified para 18.2: Minimum license fee will be fixed as 12% of the estimated annual sales turnover for static units, 10% of the annual sales turnover for mobile units of ordinary Mail/Express trains and premium super-fast trains and for Rajdhani/Shatabdi/Duronto trains, 10% of the annual sales turnover based on actual occupancy figures certified by the Trains Superintendent.

3.2 Experience of Catering Business

3.2.1 The bidder should have a minimum of five (5) years of relevant experience as defined in Techno commercial bid- (packet A). The Bidder shall submit a copy of Articles of Association/partnership Deed certified by Chartered Accountant where......................

3.3. Experience of Base kitchen

3.3.1 Prior to bidding for the award of License, the bidder should own at least one (1) operational kitchen, anywhere in India (preferable at the originating or terminating station). Relevant documentary proof of ownership of such Base Kitchen MUST be submitted along-with the Bid.

3.3.2 in case of bidder does not own a base kitchen, either at the originating, en-route station or terminating station of the Train, the bidder shall have a tie-up with a Base Kitchen as specified vide Clause

3.3.3 At the originating or terminating station or en-route station of the Train, prior to making this Bid. The bidder shall submit a Memorandum of Understanding with such Base Kitchen along-with details of address and 5 photographers as documentary proof. For the purpose of this Para, the Base Kitchen shall include a Cell Kitchen or any other major static unit viz. Refreshment Room/Jan Ahaar (in absence of a Mega/Medium Base Kitchen) capable to supply of cooked meal on the pantry car.

3.3.3 The Base kitchen should have modern equipments/gadgets as per industrial practices. The Base kitchen should be able to prepare a minimum of 1000 meals per day.

3.4 Minimum Annual Turnover

3.4.1 The bidder must have minimum annual turnover of Rs. 3 crore during each of the preceding five years reckoned from the date of bid opening i.e. if date tender opening is 15.10.2010. The 2005-06, 2006-07, 2007-08, and 2009-10 shall be considered. The bidder would submit audited balance sheet and profit and loss account or Income Tax returns of last five (5) years.

3.5. Additional Mandatory Requirements

3.5.1 All other mandatory requirements have been enlisted at Annexure A/2, chapter 1 of section B of the Bid document. This includes Permanent Account Number, Vat/Service Tax Registration, ESIC and PF Registration, Commercial Gas Cylinder License, Fire Training Certificate etc.

(a) To setup base kitchens within one year in case the railway provides land and six months when basic six months when basic structure is provided by the Railway on Railway premises or within 6 months in case base kitchen is set up on non-railway area approved by the railway administration at or around stations as per Annexure A/1 (a) as per the service requirement for the train.

(b) To obtain required ISO certification for the base kitchen within 6 months from the date of commencement of contract....

3.5 Selection Process

3.5.1 The responsive bids shall be evaluated in the following manner:

a. Scrutiny of bids Minimum Eligibility as per Chapter 3 of Section A. Such bids that meet with the eligibility criteria will be called "eligible bids."

b. The eligible bidders will be evaluated techno-commercially and awarded a Techno-commercial Score to assess the capability of the eligible bidders) on basis of scrutiny of information provided in Annexure-A/4 (Tech Form I to Tech Form 6) and the scoring scale at Annexure-A/5.

c. The highest Techno-commercial score (HTS) secured by any of the bids will be the base Techno-Commercial index.

d. All bids whose techno-commercial score is more than or equal to 60% of highest Techno-Commercial score (HTS) will be "techno-commercially qualified" for consideration of Railway Administration.

e. Price Bids will be opened for "techno-commercially qualified" bids only. The date, time and venue of opening of price bid will be intimated only to the "techno-commercially qualified bidders"

f. Highest priced bid will be selected for award of contract

g. In the event of highest price being the same for more than one bid, bid with higher techno-commercial score should be considered by award of contract.

2. While referring to the Catering Policy, 2010 as circulated by the circular letter dated 21.07.2010, the petitioner has also referred to the Annexure-3 circular letter dated 02.01.2013, by which the Zonal Railways were advised to implement the tendering process with the enclosed revised SBD''s. However, except enclosing the said letter dated 02.01.2013, the revised SBD as was circulated by the said letter has not been enclosed to the writ petition. Thus the writ petition is confined to the challenge made in respect of the Annexure-4 series tender notices all dated 26.04.2013 in reference to the Catering Policy 2010 without referring to the revised SBD''s circulated by the said letter dated 02.01.2013. As per the own admission of the petitioner, the Catering Policy, 2010 was followed by SBD prepared in June, 2012, but the same was kept in abeyance till December, 2012. It was only thereafter the revised SBD was issued on 02.01.2013. The impugned tender notices are in tenure of the said SBD.

3. In the counter affidavit filed by the respondent railways, it has been denied that the terms and conditions stipulated in the tender notices are in violation of the Catering policy. Referring to the revised SBD as circulated by the aforesaid letter dated 02.01.2013, it has been stated that the tender process has been initiated as per the guidelines of the Railway Board. It has also been stated that contrary to the stand of the petitioner, the fixed reserved price based on the actual assessment of sales in all the trains against which tenders have been quoted is even lower than the earlier price. In this connection, the respondents have annexed to the counter affidavit the Annexure-E document to show that the existing license fee is higher than the reserved price quoted. For a ready reference, the said chart is re-produced below:-

4. The railways in their counter affidavit have denied that there is any discrimination to any individual bidder. It has been stated that the tender process

has been undertaken with certain parameters fixed by the Railway Board and that in the SBD every aspects like scope of work, general conditions of bidding, bidding process, eligibility criteria of bidding etc., have been duly taken care of. It is the stand of the Railways that the writ petition has been filed with the sole purpose of escaping the participation in the tender process apprehending shortcoming of lacking requisite eligibility. It has been stated that all over the Indian Railways tenders floated like that of the impugned tender notices are in process with the same terms and conditions and the bidders have participated in large numbers. It has also been stated that in the instant case also large number of bidders have participated, except the petitioner.

5. The affidavit further states that the reserved price and license fee has been fixed in accordance with the catering policy of 2010 and that sales assessment by joint team of Commercial and Accounts was conducted against each train to ascertain the actual sales of individual pantry car.

6. In the reply affidavit filed by the petitioner, while reiterating the stand in the writ petition, it has been stated that the changes brought about in the Catering Policy, 2010 are not tenable in law. The petitioner has also filed an additional affidavit so as to state that even the Zonal Railway are confused in the matter and accordingly clarification were sought for which have been provided by the circular letter dated 09.07.2013.

7. I have heard Mr. K.N. Choudhury, learned senior counsel, assisted by Mr. R. Dubey, learned counsel for the petitioner. I have also heard Mr. R. Sharma and Mr. B.N. Gogoi, learned counsel representing the Railways. I have also gone through the entire materials on record. Considering the matter in its entirety, my findings and conclusions are as follows.

8. As noted above, although in the writ petition, while referring to the Catering Policy 2010, the petitioner has also referred to the Annexure-3 circular letter dated 02.01.2013, enclosing there with the revised SBD''s, but the petitioner has not enclosed the said revised SBD. Thus while moving the writ petition; the Court did not have the said revised SBD''s before it. However, what has been enclosed is the Annexure-5 bid documents forming part of the impugned tender notices so as to give the impression that the same is contrary to the Catering Policy 2010. It gives the impression that along with the tender notices the N.F. Railway authority furnished the bid documents independent of the Catering Policy 2010.

9. In the counter affidavit filed by the Railways, the revised SBD''s as circulated by the Railway Board by the aforementioned letter dated 02.01.2013 has been enclosed. While comparing the said bid documents circulated vide the said letter dated 02.01.2013 along with the bid documents enclosed to the impugned notices, it is absolutely clear that the impugned bid documents are the replica of the revised SBD as circulated by the said letter dated 02.01.2013. But while read independent of the SBD enclosed along with the letter dated 02.01.2013 and along with the impugned notices, it gives the impression that in some areas the

NF Railway authority deviated from the Catering Policy 2010.

10. The Catering Policy 2010 was introduced pursuant to a Cabinet decision with the objectives of providing hygienic, good quality, affording food to the travelling public by adopting best Cater and Hospitality Industry Practices. As per the said Policy, the Railways would progressively take over management of all Mobile Catering Services including base kitchens and Mobil Catering through departmental catering in a phased manner. Dealing with the "Quality Assurance Programme", the said Catering Policy provides under Clause-4 that SBD''s shall be drafted by the Railway Board by engaging suitable professional agency to be supervised by a cross functional team comprising of Executive Directors, TC, Finance, Source, Health and Mechanical Directors of Railway Board. Special tender conditions, whenever required may be framed by Zonal Railways or IRCTC, as the case may be. With a view of ensuring High Quality Hygienic, cleanliness and use of standard ingredients for food served on trains, the Mobile Catering Units will pick up bills from nominated base kitchens which would be managed and controlled by zonal railways progressively in phases to ensure quality of the food served on trains.

11. The said Catering Policy also deals with infrastructure at statics units, base kitchen disposal of garbage, catering by mobile units etc. As per Clause 14 of the said Policy, the Zonal Railways shall have an effective and transparent contract awarding, management and monitoring steps. Allotments of all major units and all general minor units at A, B and C category stations shall be done through open, competitive, two packet tendering system following all the procedures/ instructions issued by Government of India/Railway Board from time to time. Special tender condition, whenever required, is to be framed by Zonal Railways or IRCTC. Suitable clause to deal with default and failures in the performance of contractors like penalty/fines, termination, risk and cost actions, existing clause etc. are to be dealt in the SBD''s and contract documents.

12. From the above what is seen is that the Railway Board is to translate the said Catering Policy chalking out the required modalities. It is in this connection Annexure-B circular letter dated 31.12.2013 was issued modifying clause 18.2 in respect of fixation of license fee followed by the Annexure-C circular letter dated 02.01.2013 enclosing therewith the revised SBD. The impugned tender notices and the SBD''s are absolutely in line with the revised SBD''s circulated by the Railway Board vide their aforesaid letter dated 02.01.2013. It will be pertinent to mention here that the said Circular letter dated 02.01.2013 and the revised SBD''s are not under challenge. Rather, the writ petition has been structured projecting that the impugned tender notices with the SBD''s is in deviation of the Catering Policy, 2010.

13. The clauses in the Catering Policy vis-a-vis the revised SBD''s in reference to which the petitioner has challenged the tender notices and the SBD''s enclosed therewith are already there in the SBD''s circulated vide the aforesaid letter dated 02.01.2013, to which there is no challenge.

14. Clause 1.2.5 in Chapter 1 (scope of work) in the revised SBD, the time limit for completion of setting up of the base kitchen by the licensee, after award of contract, will be one year in case the Railways provide land on rend/license and six months when basic structure on rent/license is provided by the Railways and within six months in case base kitchen is set up on non-Railway authorized/ approved area. In case of failure of the licensee to comply with the prescribed time limit, the contract can be terminated as per the SBD prior to bidding in the award of license, the bidder should owned at least one operational base kitchen, anywhere in India, preferably at-the originating or terminating station. In case the bidder does not own a base kitchen either at the originating enrooted station or terminating station of the train, the bidder shall have a tie-up with a base kitchen as specified in the SBD (Clause 3.3.3) at the originating or terminating station or enrooted station of the train, prior to making the bid. MoU will have to be submitted by the tenderer.

15. The SBD also provides the terms like minimum annual turnover as the eligibility criteria, the SBD is of exhaustive dealing with evaluation criteria, techno-commercial bid, (Packet-A), Price Bid (Packet B) detailing the conditions thereof. Having regard to the objective sought to be achieved by the Catering Policy of 2010 and stipulations made in the revised SBD circulated by the Railway Board, itself in reference to which only the SBD has been incorporated in the impugned tender notices, it cannot be stated that the Railways have deviated from the Catering Policy. It is for the respondents to decide as to what terms and conditions would meet the objective sought to be achieved by the aforesaid Catering Policy of 2010 and not for the petitioner. Merely because some of the terms and conditions of the SBD''s are inconvenient for the petitioner, the tender process that has been initiated by the Railways cannot be stalled.

16. As regards the plea raised in the additional affidavit that even the Zonal Railway was confused in the matter and accordingly sought for clarification, which was provided by the Railway Board vide its letter dated 09.07.2013. Suffice is to say that merely because the Zonal Railways sought for certain clarification in respect of the SBD dated 02.01.2013 and which were provided by the said letter dated 09.07.2013, it cannot be the case of the petitioner that the tender notices are not sustainable in law because of the particular stipulations made in the SBD.

17. As to what is the projection of the case of the petitioner in the writ petition has been noted above. By enclosing the SBD''s along with the impugned tender notices, the projection is sought to be made that the same is independent of the Catering Policy although the fact of the matter is that the SBD''s enclosed to the impugned tender notices are in fact the SBD circulated by the Railway Board vide its letter dated 02.01.2013. As has been held by the Apex Court in Meerut Development Authority Vs. Association of Management Studies and Another, by way of judicial review, the Court cannot examine the details of the terms of the contracts which have been entered into by the public bodies or the States. The

Courts have inherent limitations on the scope of any such enquiry. The Courts can only examine whether the decision making process was reasonable, rational, not arbitrary and violative of Article 14. In Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, the Apex Court observed that:-

18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the "decision making process.".. By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry. But at the same time... the Courts can certainly examine whether "decision making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three Judge Bench in Tata Cellular Vs. Union of India, It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However, 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.

18. Coming to the case in hand, it cannot be stated to be a case of any arbitrary exercise of power by the respondents. The terms and conditions of the SBD stipulated in the impugned tender notices, are already there in the SBD circulated by the aforesaid letter dated 02.01.2013. A part from the fact that the said circular letter dated 02.01.2013 incorporating the SBD is not under challenge, the terms and conditions stipulated therein cannot be said to be arbitrary and in violation of the Catering Policy, 2010.

19. In Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, the Apex Court referring to its earlier decisions held thus:-

It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. 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 Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

20. In Tata Cellular (supra), the Apex Court after examining its earlier decisions, laid down the following principles as to the extent of judicial review permissible in contractual matters involving invitation of bids-

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

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

(iii) 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.

(iv) 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.

(v) 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 reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

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

21. In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, the Apex Court observed thus:-

The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. 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 that overwhelming public interest requires interference, the court should intervene.

22. In the instant case, the tender notices are in respect of establishing good governance standard and improving the quality of the Catering Service for providing food and beverage service to passengers travelling on trains through mobile catering service and operation and management of the static catering contracts dealing with provisions of food and beverage to passengers travelling on trains. Keeping in mind the objective sought to be achieved, it cannot be held that the process adopted or decision made is so arbitrary or irrational that no respondents'' authority acting reasonably or in accordance with the relevant law could not have taken such decision.

23. Above being the position, the inevitable conclusion is that the writ petition is devoid of merit and deserves dismissal, which I accordingly do.

24. The writ petition is dismissed leaving the parties to bear their own cost. The interim order stands vacated.

