
(2007) 04 DEL CK 0183

In the Delhi High Court

Case No : Writ Petition (C) No. 848 of 2007 and CM No. 1498 of 2007

Schmid Telecom India Pvt. Ltd.

APPELLANT

Vs

Airport Authority of India and Another

RESPONDENT

Date of Decision : 24-04-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226

Citation : (2007) 2 BC 307

Hon'ble Judges : Mukul Mudgal, J;Aruna Suresh, J

Bench : Division Bench

Advocate : Rajiv Nayyar and Jayant K. Mehta, for the Appellant; V.P. Singh and Anjana Gosain, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—The petitioner, Schmid Telecom India Pvt. Ltd. is a company incorporated under the provisions of the Companies Act, 1956, was a tenderer for a notice of tender issued by the Airport Authority of India, the respondent No. 1 in March-April, 2006 being tender No. CNS(P)-02/2006-07 for supply installation, testing and commissioning of Voice Communication System for installation in Airports under it.

2. The facts as averred by the petitioner are as follows:

(a) In April/May, 2006, the petitioner submitted its bid. On 16th May, 2006, the respondent No. 1 sought certain documents from the petitioner in support of its bid which documents were supplied by the petitioner on 17th May, 2006. Further clarification was sought from the petitioner by the respondent No. 1 by letter dated 18th July, 2006, which reads as follows:

AAI/Proc/VCCS/2005-CNS(P) Dated:18/07/06

To,

M/s Schmid Telecom India Pvt. Ltd. Schmid Telecom AG Binzstrasse 35 CH-8045

Zurich Switzerland SUB : Tender No. CNS(P)-11/2006-07 for VCS System.

Kind Attention: Mr. Rajan Mehra, Managing Director.

Sir,

Kindly refer to the bid documents submitted to AAI in response to the above tender on 08/05/06. AAI is in process of evaluating the technical bid. Following points need to be clarified.

1. Para No. 3.4(I), 3.5 (c), 4.1, 4.2.4(d), 5.8, 6.5.6 (Flashing indicating within 50 ms), 6.5.7, 7.1 : Relevant information regarding the above points is not provided in the technical description of validate the points. It is requested to provide detailed information so that the compliance of the points may be verified.
2. Para No. 4.2.2 (c) : Provision of wireless instructor/ supervisor headset is not indicated. Relevant information in this regard may be provided.
3. Para No. 4.3.7: System capability of recording directly from switch and recording all records irrespective of volume level at the touch screen of operator position could not be ascertained. Clarification may be provided.
4. Para No. 6.2.3: Interface cards for interfacing 5 MFC circuits have been quoted against requirement of 8, the same may be clarified. Also clarify that the interface cards being supplied will be compatible for MFC-5 signaling format also.
5. Para No. 8.1, 10.1 and 10.2 : Amendments for these points were issued by us. The compliance statements do not reflect the amendment and compliance of these points. Necessary documentation supporting the compliance may also be provided.

Relevant information in respect of the points mentioned above may be submitted latest by 26.07.06. It may be noted that in accordance with Para 9.2 of Section-A of tender document if sufficient and relevant information is not submitted the tender will be considered not responsive. No further correspondence will be made thereafter.

Thanking you,

Yours faithfully

Sd/-

A.K. Kapur

Asstt. G.M.(CNS-P)

(b) The said letter dated 18th July, 2006 was responded to by the petitioner on 26th July, 2006.

(c) On 8th January, 2007, the petitioner came to know that the respondent No. 1 had allowed respondent No. 2, M/s Frequents GmbH, to submit another revised

bid in August, 2006, without notice or knowledge of the petitioner or other bidders. Since the original bid of the respondent No. 2 was not in conformity with the terms of the tender document and this was done illegally and arbitrarily, to resurrect the bid of the respondent No. 2, the respondent No. 1 permitted rebidding from all the bidders including the respondent No. 2. The petitioner had submitted its original and one revised bid in November-December, 2006 whereas the respondent No. 2 was given opportunity to submit two revised bids one in August, 2006 and another in November, 2006. The price bids were opened by the respondent No. 1 on 12th December, 2006. However, the original bids of the petitioner and respondent No. 2 were not opened.

(d) On 2nd January, 2007, a letter was sent by respondent No. 1 to the petitioner which reads as follows:

Date: 02/01/07

To,

M/s Schmid Telecom India Pvt. Ltd. Schmid Telecom AG Binzstrasse 35 CH-8045 Zurich Switzerland

SUB : Tender No. CNS(P)-11/2006-07 for VCS System. Kind Attention: Mr. Rajan Mehra, Managing Director.

Sub: Tender No. CNS(P)-11/2006-07 for VCS System - price bid. Sir,

Kindly refer above mentioned subject regarding opening of price bid in respect of Tender No. CNS(P)-11/2006-07 for VCS System.

Price bid for the above tender were opened on 12th December, 2006. Revised price bids were invited from all bidders allowing them to reduce price as compared to their original offer.

As the original price in respect of M/s Frequentis and M/s Schmid were not opened at that time, competent authority has desired to open the original bids also to ascertain that the revised price bids submitted by the bidders are lower than their original price bids.

The original price bids in respect of M/s Frequentis and M/s Schmid Telecomm will be opened on the 08/01/2007 in the office of ED(CNS-P) at 1500 hrs. You are requested to make it convenient to attend the opening of the above price bids.

Yours faithfully

Sd/-

A.K. Kapur

Asstt. G.M.(CNS-P)

(e) Consequent to the above letter, the original bids were opened on 8th January,

2007.

(f) The main plea on which the petitioner has preferred the present writ petition is that the respondent No. 1 had acted arbitrarily and unreasonably and has favored the respondent No. 2 and the respondent No. 1 authorised the respondent No. 2 to submit a revised price bid suo motu contrary to the terms of the tender. It has also been submitted that the price bid of respondent No. 2 had been opened on 8th January 2007 contrary to the tender condition 8.6 so as to favor it by permitting it to alter its price bid to grant an unfair advantage to the respondent No. 2. This was clearly contrary to para 8.5, Section A, of the tender document which prohibits the submission of revised bid save and except upon a query by the respondent No. 1 AAI. Thus since this revision of the price bid was done without a query by the respondent No. 1, the revised bid of the respondent No. 2 ought not to have been accepted. The relevant provisions of the tender extracted by the petitioner read as follows:

5.1 Tenders once submitted shall be final and no amendment shall be permitted. A bidder shall submit only one bid.

5.2 The tender will be in three parts, Part-I (Eligibility Requirements), Part-II(Technical Bid) and Part-III (Financial Bid).

...

5.9. Tenders, in which any of the particulars and prescribed information are missing or are incomplete, in any respect and/or prescribed conditions are not fulfilled ,shall be considered non-responsive and are liable to be rejected.

...

8.3 The Part-I of the tender will be first evaluated for confirming the eligibility of bidders to participate in the tender process. The bidders meeting the eligibility criteria will be short listed and Part-II of the bid, that is, technical bid will be processed only for bidders short listed on the basis of Part-I.

8.4 Part-II of the tenders shall be scrutinized and processed by the AAI to ensure whether the same are in conformity with the technical requirements of the specifications or any other information shall be replied positively within the time specified, failing which tenders shall be finalised on the basis of the information available. It shall, Therefore, be in the bidders" interest to give complete and comprehensive technical particulars, description and details.

8.5 The bidder shall not make any "suo-motu" changes in the drawings/specifications/designs etc. However, in case it becomes necessary for the bidder to make any changes in their original price as listed in Part II of the tender on account of technical clarification, deviations etc. against the queries by AAI to bring the equipment in line with the requirement of the specification, such price adjustment/revision should be sent in a separate sealed cover duly super-scribed as:

PRICE ADJUSTMENT TO PART-III. REVISED PRICE AGAINST TENDER No. AND RELEVANT TO THE TECHNICAL PARTICULARS AS CONTAINED IN THE LETTER No. DATED....

8.6 Part III containing Financial Bid will be opened at a latter date, only for the tenderers found technically qualified by the tender evaluation committee.

9.2 Tenderer, in which any of the particulars and prescribed information are vague, missing or are incomplete, in any respect and/or prescribed conditions are not fulfilled ,shall be considered non-responsive and are liable to be rejected. If the tenderer gives wrong information in his Tender. If the tenderer gives wrong information in his Tender AAI reserves the right to reject such tender at any stage or to cancel the Contract, if awarded and forfeit the Earnest Money Deposit.

9.3 The information contained in the tender should be comprehensive and to the point. The tenders containing more information than sought, with a motive to confuse or delay the finalization process are likely to be rejected.

9.4 Canvassing in any form in connection with the tenders is strictly prohibited and the tenders submitted by the Contractors who resort to canvassing are liable for rejection.

(g) The petitioner has laid great stress on the fact that the favoritism shown to the respondent No. 2 was demonstrated by the fact that while other bidders were permitted only one revised bid in November, 2006, the respondent No. 2 was permitted to file two revised bids one in August, 2006 and another November, 2006, thus giving them favorable treatment. This was contrary to the terms contained in the tender document. It is contended that the petitioner being ready and willing to match the revised price bid of the respondent No. 2, was entitled to assert this right as the conduct of the respondent No. 1 violated Articles 14 and 16 of the Constitution of India.

3. The respondent No. 1 averred as follows:

(a) That the petitioner, respondent No. 2 and three other bidders submitted their bids out of which four bids were found technically acceptable by the Technical Evaluation Committee (in short "TEC") of respondent No. 1. During the technical evaluation of the bids, it was observed by the TEC that the respondent No. 2 had included 8 MFC terminals in the scope of delivery which was not as per the NIT conditions.

(b) Accordingly, a clarification was sought by the respondent No. 1 vide letter dated 18th July, 2006 from respondent No. 2 so as to make clear their stand on the question of supply of MFC terminals as such terminals were not required by the terms of the tender. A reply was received to the said query dated 18th July, 2006 from the respondent No. 2 on 26th July, 2006. This was done strictly in conformity with para 8.5 Section A of the tender conditions and consequently the price adjustment bid was received from the respondent No. 2 by letter dated 2nd August, 2006. Since the respondent No. 2 was given this opportunity, in line with

the instructions of the Government of India, Central Vigilance Commission and to maintain parity, this opportunity was also granted to all the three bidders which were found technically qualified by TEC. Consequently, both the petitioner and the respondent No. 2 submitted their revised bids which were opened on 12th December, 2006. The learned Counsel for the respondent has highlighted the fact that the price quoted by the respondent No. 2 was lowest amongst all the bidders both in the original and the revised bids submitted. The original price bids in respect of the respondent No. 2 and the petitioner who were the surviving bidders were opened on 8th January, 2007 only to establish the fact that the price quoted in the revised bid by bidders were lower than the price offered in the original bid strictly in accordance with the Clause 8.5.

4. This Court had directed the respondent No. 1 to file an additional affidavit in terms of the order dated 26th February, 2007 which reads as follows:

The plea of the learned Counsel for the petitioner is that the stand taken by the respondent that the revised bid was open on 12th December, 2006 and original bid was open on 8th January, 2007, is falsified by averments made in paragraph (7) of the counter affidavit. The learned Counsel for respondent No. 1 is directed to file additional affidavit indicating and explaining the following statement made in paragraph (7) of the counter affidavit which reads as under:

7. ... It is also pertinent to mention that price adjustments bid in respect of respondent No. 2 was opened along with their original bid and it was found that the offer price quoted by the respondent No. 2 in the price adjustment bid allowed earlier (but not considered as all bidders were allowed to submit revised price bid to give equal opportunity) and the revised price bid submitted subsequently are exactly same.

Additional affidavit shall also annex the relevant documents supporting the plea of the respondent. The additional affidavit so filed shall also explain the number of bidders who have originally been found to be technically accepted out of the four bidders. Let the additional affidavit be filed within one week from today.

List on 13th March, 2007.

5. Consequent to this order such an affidavit was sworn on 3rd March, 2007 was filed in this Court on 5th March, 2007. This affidavit emphasized that different queries were addressed to all 4 bidders on 18th July, 2006 and all such letters were annexed. The relevant portion of the above affidavit read as follows:

In this respect, it is submitted that respondent No. 2 while giving clarification to the letter of respondent No. 1 dated 18.7.2006 had stated as under:

7.2 Clarification Para 5.14

Since our initial interpretation of the tender specification was that we also have to offer MFC terminals as such your clarification has an impact on our Scope of Delivery (SOD) and our price. We kindly ask for your permission to make the

necessary adjustments to our SOD and to our pricing schedule. Kindly indicate if, according to the tender procedure, we are allowed to counter a revised SOD and a revised pricing Schedule in sealed envelopes to your kind attention.

6. That the respondent No. 1 vide their letter dated 1.8.2006 allowed the respondent No. 2 to submit a price adjustment bid. Copy of the letter dated 1.8.2006 is annexed herewith as Annexure R-6.

7. That when the matter was processed at various levels in the office of respondent No. 1, it was decided that such an opportunity should be given to all the bidders and Therefore letter dated 28th/29th November, 2006 (Annexure P-7) was addressed to all the four bidders. The petitioner and respondent No. 2 submitted their revised price bid. In this matter, as far as the respondent No. 2 is concerned, he submitted the original bid on 8.5.2006 at the time of submission of tender documents, price adjustment bid on 2.8.2006 and again submitted revised price bid in response to a letter dated 28th/29th November, 2006 (Annexure P-7). The petitioner also submitted a revised price bid in response to Annexure P-7.

6. The respondent No. 1 in order to demonstrate their contention have relied upon the following price comparative statement in respect of the relevant bidders:

ORIGINAL PRICE BID	S. No.	Description	Qty	M/s Schmid	Switzerland	M/s Frequentis, Austria	M/s Redflex, Austria	Unit Cost (US\$)	Total Cost (US\$)	Unit Cost (US\$)	Total Cost (US\$)
1. Cost of Equipment & accessories	3	180548.00	541644.00	146891.00	440891.00	356708.00	1070124.00				
2. Cost of Service	3	166504.00	14172.00	42516.00	63174.00						
3. Cost of Manuals & Documentation inclusive	3	13930.00	1946.00	5838.00							
4. Cost of Training	3	9607.00	5366.00	5366.00	6006.00						
5. Freight & insurance charges	3	9213.00	1495.00	4485.00	4620.00						
6. Taxes & Duties	3	N/A	N/A	N/A	N/A						
Total		740898.00	498878.00	1143924.00							
REVISED PRICE BID	S. No.	Description	Qty	M/s Schmid <td>Switzerland</td> <td>M/s Frequentis, Austria</td> <td>M/s Redflex, Austria</td> <td>Unit Cost (US\$)</td> <td>Total Cost (US\$)</td> <td>Unit Cost (US\$)</td> <td>Total Cost (US\$)</td>	Switzerland	M/s Frequentis, Austria	M/s Redflex, Austria	Unit Cost (US\$)	Total Cost (US\$)	Unit Cost (US\$)	Total Cost (US\$)
1. Cost of Equipment & accessories	3	161468.00	484404.00	140220.00	420660.00	356708.00	1070124.00				
2. Cost of Service	3	84247.00	14172.00	42516.00	63174.00						
3. Cost of Manuals & Documentation inclusive	3	6070.00	1946.00	5838.00							
4. Cost of Training	3	9607.00	5366.00	5366.00	6006.00						
5. Freight & insurance charges	3	9213.00	1495.00	4485.00	4620.00						
3. N/A	N/A	N/A	N/A	N/A	N/A						
Total		593541.00	478865.00	1143924.00							

7. In this chart certain corrections were made at the behest of the learned Counsel for the respondent No. 1 with the consent of the learned Counsel for the petitioner during the hearing of the writ petition and the above chart incorporates such corrections. It was also submitted that the respondent No. 2 while giving response by letter dated 26th July, 2006 to the letter dated 18th July, 2006 of the respondent No. 1, had stated as follows:

7.2 Clarification Para 5.14

Since our initial interpretation of the tender specification was that we also have to offer MFC terminals as such your clarification has an impact on our Scope of Delivery (SOD) and our price. We kindly ask for your permission to make the necessary adjustments to our SOD and to our pricing schedule. Kindly indicate if, according to the tender procedure, we are allowed to counter a revised SOD and a revised pricing schedule in sealed envelopes to your kind attention.

8. This permission sought by the respondent No. 2 was allowed by the respondent No. 1 by letter dated 1st August, 2006, which reads as follows:

AAI/Proc/VCCS/2005-CNS(P) Date: 01/08/06

To,

M/s Frequentis

Sub : Tender No. CNS(P)-02/2006-07 for VCS System Kind Attention: Mr. Ashok Kumar Sir,

Kindly refer to the bid documents and your response to the clarifications sought by AAI in respect of the above tender.

Your request for submission of Price adjustment/ revision in compliance to Para 6.2.3/8.1 regarding MFC terminals has been considered.

You may submit price adjustment/revision as per Para 8.5, Section-A of tender document, Para is produced below:

QUOTE-The bidder shall not make any "suo-motu" changes in the drawings/ specifications /designs etc. However, in case it becomes necessary for the bidder to make any changes in their original price as listed in Part II of the tender on account of technical clarification, deviations etc. against the queries by AAI to bring the equipment in line with the requirement of the specification, such price adjustment/revision should be sent in a separate sealed cover duly super-scribed as:

PRICE ADJUSTMENT TO PART-III. REVISED PRICE AGAINST TENDER No. AND RELEVANT TO THE TECHNICAL PARTICULARS AS CONTAINED IN THE LETTER No. DATED.... UNQUOTE

The price adjustment should reach us latest by 07/08/06.

Thanking you,

Yours faithfully

Sd/-

A.K. Kapur

Asstt. G.M.(CNS-P)

1/8/06

9. The respondent No. 1 after processing the matter on various levels came to a conclusion that such an opportunity granted to respondent No. 2 should be given to all the bidders. Therefore, to maintain the fairness and parity inter-se all the bidders the letter dated 28/29th November, 2006 was issued addressed to all the four bidders. Not only the respondent No. 2 but the petitioner also submitted revised price bids and the respondent No. 2 submitted the original bid on 8th May, 2006 and the price adjustment bid on 2nd August, 2006 and resubmitted the revised price bid in response to the letter dated 28/29th November, 2006. The revised price bids in response to the said letter dated 28/29th November, 2006 issued to the petitioner, respondent No. 2 and the Redflex Communications Systems Pvt. Ltd. were opened by the Price Bid Opening Committee in the presence of the representatives of all the bidders on 12th December, 2006. Since the fourth bidder did not extend the validity of their offer the said bidder was not considered at the time of the opening of the price bid. On 12th December, 2006, only the original and the revised bids of Redflex Communications System Pvt. Ltd were opened. In order to ensure fairness and to ensure that the original bids were not higher than from the original bid both the bids of the original bids of the petitioner and the respondent No. 2 were opened on 8th January, 2007 after advance intimation to the petitioner and the respondent No. 2, whose representatives were present even on 8th January, 2007. Bids of the petitioner and the respondent No. 2 were only opened on 12th December, 2006 and 8th January, 2007 by the price bid opening committee only in the presence of the representatives of the bidders.

10. The respondent No. 1 has submitted that the petitioner has sought to make much of the phrase "price bid" written inadvertently in paragraph 7 of its letter dated 18th July, 2006 to respondent No. 2, which paragraph reads as follows:

7. Para No. 6.2.3/8.1 : In case of MFC circuits only MFC capability and interface cards were required to be quoted. Price "bid" shows that you have quoted for MFC terminals also. Clarification in this regard may be given MFC terminals are not required by us. Relevant information in respect of the points mentioned above may be submitted latest by 26.07.2006. It may be noted that in accordance with Para 9.2 of Section-A of tender documents if sufficient and relevant information is not submitted the tender will be considered not responsive. No further correspondence will be made thereafter.

11. It is submitted that the petitioner has sought to seize on one inadvertent error in the said letter where the "price bid" has been erroneously written in respect of "pricing schedule" and this evident from the letter dated 2nd January, 2007 extracted above where it was clearly stated that the original price bid in respect of the petitioner and the respondent No. 2 were not opened on 12th December, 2006.

12. The Hon'ble Supreme Court in the cases of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , and Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , held that the courts should not interfere in

matters of the technical and commercial terms stipulated by the purchaser and that if the tender permits the purchaser to accept deviations in the technical terms, the purchaser would be free to accept such variation/deviation, without any interference from the courts. The relevant paragraphs of the said judgments read as follows:

i) Air India Limited's case (supra)

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India*, *Fertilizer Corporation, Kamgar Union (Regd.) v. Union of India*, *CCE v. Dunlop Indian Ltd.*, *Tata Cellular v. Union of India*, *Ramniklal N. Bhutta v. State of Maharashtra and Raunaq International Ltd. v. IVR Construction Ltd.* The award of a contract 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 reason, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. 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.

ii) Raunaq International's case (supra)

15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of offers, the court should hesitate to intervene.

27. In the present case, however, the relaxation was permissible under the terms

of the tender. The relaxation which the Board has granted to M/s Raunaq International Ltd. is on valid principles looking at the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s IVR Construction Ltd. who have challenged this award of tender themselves do not fulfill the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfill the requisite criteria seems to be misplaced. Even if the criteria can be relaxed both for M/s Raunaq International Ltd. and M/s IVR Construction Ltd., it is clear that the offer of M/s Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfill the requisite criteria itself and whose offer is higher than the offer which has been accepted. It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210MW, is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people. In the present case, there is no overwhelming public interest in collateral reasons for granting the contract to M/s Raunaq International Ltd.

13. In *G.B. Mahajan and Ors. v. Jalgaon Municipal Council and Ors.* (1991) 2 SCC 91, it was held:

37. It was urged that the basic concept of the manner of the development of the real estate and disposal of occupancy rights were vitiated by unreasonableness. It is truism, doctrinally, that powers must be exercised reasonably. But as Prof. Wade points out:

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. "With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority"....

14. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, it was held:

12. At times it is said that public authorities must have the same liberty as they

have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts in such matters they have to follow the norms recognized by courts while adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

14. In *Tata Cellular Vs. Union of India*, it was held:

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers of Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

...

80. At this stage, *The Supreme Court Practice*, 1993, Vol. 1, pp. 849, 850, may be quoted:

4. *Wednesbury principle*.-- A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have

reached it. (Associated with Provincial Picture Houses Ltd. v. Wednesbury Corporation, per Lord Greene, M.R.)

...

88. ... While, as mentioned hereinbefore, fair play in action in matters like the present one is an essential requirement, similarly, however, "free play in the joints" is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere as the present one. Judged from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will.

...

94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be rested 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.

15. We are of the view that the respondent No. 1 has acted in line with the Clause 8.5 and the petitioner's case is largely based upon the word "bid" used in paragraph 7 of the letter dated 18th July, 2006 which has been satisfactorily explained in reference to the letter dated 26th July, 2006 and in the context of the other circumstances. The edifice of the petitioner's case is founded on the use of the word price bid in para 7 of the letter dated 18th July, 2006. The invitation of the revised bid was only on account of the technical clarification on

account of the query raised by AAI in terms of Clause 8.5 so as to bring the tender of respondent No. 2 in line with the requirements of the tender specification. Such revised bid was sent separately not only by the respondent No. 2 but also by the petitioner. We are also satisfied that the error in the letter of 18th July, 2006 using the phrase "price bid" is inadvertent and has been explained to our entire satisfaction. Though we have found that there is no violation of the tender condition and the inadvertence in using the phrase "price bid" does not vitiate the grant of the tender to the respondent No. 2. Even if we assume that there is some irregularity, it falls within the scope of the phrase "fair play in the joints" as per the law laid down in *Sterling Computer's case* (supra). In *Air India Limited's case* (supra) it has been held by the Hon'ble Supreme Court that the court must exercise its discretionary power under Article 226 with caution and should exercise it only in furtherance of public interest. In the instant case there is nothing to show that acceptance of the respondent No. 2's tender by the respondent No. 1 will be detrimental to the public interest.

16. The respondent No. 1 having fully followed the requirements of the tender conditions for invitation and opening of revised financial bid, no cause for interference is called for under Article 226 as the respondent No. 2 always was the lowest bidder both in the original bid and the revised bid. Even otherwise, a perusal of the chart submitted by the respondent as extracted above, the respondent No. 2 was always the lowest bidder both in the original and the revised price bid and no prejudice whatsoever is caused to the petitioner or to the public interest. On the contrary the acceptance of the lowest bid in absence of any flaw would subserve public interest. Accordingly, there is no merit in the writ petition. The writ petition and the application for stay are dismissed.