
(2016) 11 DEL CK 0050

In the Delhi High Court

Case No : Writ Petition (C) 4026 of 2016 & CM Nos. 16980 of 2016, 18565 of 2016, 18819/2016, 19827/2016 and 19828 of 2016

Texmaco Rail & Engineering Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-11-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 10 ADDelhi 377 : (2016) 235 DLT 118

Hon'ble Judges : Badar Durrez Ahmed and Ashutosh Kumar, JJ.

Bench : Division Bench

Advocate : Mr. Rajiv S. Bhatnagar with Mr. Aseem Chaturvedi and Mr. Vipul Joshi and Mr. K. Datta with Mr. Ashish Verma and Mr. Rahul Malhotra, Advocates, for the Intervener; Mr. Sanjay Jain, ASG with Ms Geetanjali Mohan, Ms. Pallavi Shali, Ms. Natasha Thakur and Ms.

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J. - In this writ petition cancellation of the notice inviting tender dated 02.05.2016 bearing No. 2016 RSI8TC for supply of BOXNS wagons has been sought. Primarily, the petitioner has sought a mandamus directing the respondents to award the NIT dated 04.12.2015 for procurement of 2000 BOXNS wagons in favour of the eligible bidders strictly in terms of the tender document without allowing any post tender modifications.

2. It is obvious that the prayer seeking cancellation of the NIT dated 02.05.2016 ("the second NIT") is predicated on the prayer with regard to award of the tender for BOXNS railway wagons, in respect of which the NIT was issued on 04.12.2015 ("the first NIT"). The grievance of the petitioner is that it was L-1 in respect of BOXNS railway wagons under the first NIT. Yet, no award of contract was made in respect thereof. The initial price offering of the petitioner for BOXNS wagon, in respect of which it was L-1, was Rs. 21,58,000/- per wagon. According to the petitioner, through several rounds of negotiations, this was reduced by the

petitioner to Rs. 14.50 lacs per wagon. Yet, the contract had not been awarded to the petitioner.

3. The respondents, however, contend that the final offer, after negotiations, which was made by the petitioner, was of Rs. 14.75 lacs and not Rs. 14.50 lacs, as alleged by the petitioner. It is the respondents' case that the Tender Committee, after considering all the pros and cons, was of the view that the cost of BOXNS wagons should be less than the cost of BOXNHL wagons. It is an admitted position that the negotiated price of BOXNHL wagons got firmed up at Rs. 14.50 lacs per wagon. Thus, according to the respondents, the price of BOXNS wagons, which had no earlier reference price, as it was a new type of wagon, ought to be less than Rs. 14.50 lacs per wagon. This conclusion of the respondents was based on the deliberations of the Tender Committee which opined that there were several factors which would lead to a price reduction insofar as BOXNS wagons are concerned compared to BOXNHL wagons with which it was similar. Consequently, the respondents contend that the final offer of the petitioner, being Rs. 14.75 lacs, was higher than the firmed up price of BOXNHL wagons and, therefore, this did not reflect the true market conditions. For this reason, it was decided to re-tender BOXNS wagons to discover the true price which, according to the respondents, would be less than the firmed up price for BOXNHL wagons. Consequently, the second NIT dated 02.05.2016 was issued.

4. As pointed out above, on 04.12.2015, the first NIT was issued. The said NIT was for supply of six categories of wagons. On 12.01.2016, inter alia, the petitioner submitted its electronic bids for the six categories of wagons, which included BOXNS wagons. The price bids were opened on the same day, that is, on 12.01.2016 and the price quoted by the petitioner was adjudged as L-1 for five out of six categories of wagons, including the BOXNS category. The Tender Committee deliberated on these rates in the course of a series of meetings held on 28.01.2016, 15.02.2016, 22.02.2016 and 23.02.2016.

5. From the minutes of the Tender Committee meetings held on 28.01.2016 and 15.02.2016, it appears that initially, it was recommended not to procure BOXNS wagons. Therefore, one round of price negotiations was recommended with the L-1 firms, that is, Cimmco Limited for BOXNHL and the petitioner (Texmaco Rail and Engineering Limited) for the other four types of wagons (viz., BOBRNHSM1, BRN22.9, BFNSM22.9 and BOBSN). No further negotiations were recommended insofar as BOXNS wagons were concerned as it had been recommended not to procure wagons of this type.

6. However, the Member Technical (Railway Board), who was the Tender Accepting Authority, noted on 19.02.2016 that the technical issues regarding the BOXNS wagon design had been resolved and, therefore, this type of wagon too ought to be included in the procurement, subject to reasonability of rates and that the Tender Committee ought to deliberate on this too. It was also noted by the Tender Accepting Authority that the decision regarding BOXNS wagons could

be separately dealt with.

7. From the minutes of the supplementary Tender Committee meetings held on 22.02.2016 and 23.02.2016, it appears that the Technical Member had informed the Tender Committee that so far as the technical issues regarding the BOXNS wagon design are concerned, it had been confirmed that the entire design had been reviewed by the Research Designs and Standards Organization (RDSO) and it had been found that the recent design version could be considered optimal and did not require any significant changes to be made before introduction of the wagons in operation. Thus, the Technical Member confirmed that the technical issues regarding the BOXNS wagon design stood resolved. Paragraphs 2.5 and 2.6 of the minutes of the said supplementary meeting are as under:-

"2.5 So far as rates for BOXNS wagons are considered, Tender Committee notes from the briefing note (S. No.80, para 11.0) that no LPR is available, as this type of wagon is being procured for the first time. The Technical Member intimated the TC that this wagon is a variant of BOXNHL wagon, with less tare weight, albeit with high capacity of suspension springs and hence the rates should be comparable to that of BOXNHL wagons in the long run. Since, this wagon is being procured for the 1st time in this tender, cost of design and development of jigs & fixtures will have to be considered. Tender Committee notes that the lowest basic rate from regular sources for this wagon has been received as Rs. 21,58,000/- per wagon from M/s Texmaco Rail & Engg Limited (S.No.70, page 5) as against L-1 basic rate of Rs. 18,79, 000/- per wagon received from M/s Cimmco Ltd. for BOXNHL wagon (S. No.70, page 1). Rate quoted by M/s Texmaco for BOXNHL wagon is Rs. 19,06,000/- per wagon (basic rate) (S. No.70, page 3). 2.6. Since, the rate of BOXNHL wagon received in this tender are itself very much on higher side as already deliberated vide para 10.1 to 10.4 of the original TCP, in the opinion of the TC, rate of BOXNS wagon is also very much on the higher side. Tender Committee, accordingly, recommends that price negotiation may be done with M/s Texmaco Rail & Engg. Limited for BOXNS wagon also with a view to understand the pricing mechanism and to try and achieve reduction in the quoted rate to a reasonable level."

(underlining added)

Based upon this, it was, inter alia, recommended as under:-

"(b) One round of price negotiation may be done with the L-1 firms, viz., M/s Texmaco Rail & Engineering Limited for BOXNS wagon also with a view to understand the pricing mechanism of the tenderers and to try and achieve reduction in the quoted rates to bring it to a reasonable level. The firms will be intimated regarding the revised requirement when called upon for negotiation and during negotiation, they will be asked to submit break-up of their prices for respective types of wagons for which their offer is L-1."

Thus, price negotiation was to be done with the petitioner in respect of BOXNS wagon also.

8. On 09.03.2016, price negotiation with the petitioner took place. The petitioner reduced the price of BOXNS wagons to Rs. 16.60 lacs per wagon from its initial quoted figure of Rs. 21.58 lacs per wagon which was a reduction of 23.8%. This offer was communicated by the petitioner by its letter dated 15.03.2016 in the following manner:-

"We have considered all aspects, as highlighted above, realistically and have revisited the prices to find a meeting ground in our best mutual interests. Accordingly, we submit our revised prices in respect of the following types where we stand L1:

TYPES

Quoted Price

Revised Price

1.

BOXNS

Rs.21,58,000/-

Rs.16,60,000/-

2.

BOBRNS HSM1

Rs.16,72,000/-

Rs.13,30,000/-

3.

BFNS M22.9

Rs.18,70,000/-

Rs. 14,45,000/-

4.

BRN 22.9

Rs.17,99,500/-

Rs. 13,95,000/-

5.

BOBSN

Rs.17,71,000/-

Rs.13,76,000/-

*Other terms and conditions remaining same as in our original offer.

You will kindly appreciate that we have offered sharp downward revision of our quotes to facilitate resolution of the pricing issue amicably towards early placement of orders."

9. The second supplementary Tender Committee meetings were held on 16.03.2016 and 29.03.2016. In the minutes of the said meetings, the revised offer made by the petitioner in respect of the five types of wagons, in which it was L-1 as indicated above, was noted. It may be pointed out that insofar as BOXNHL wagon was concerned, the revised rate of Rs. 14.50 lacs per wagon offered by Cimmco Limited was considered reasonable and the Tender Committee recommended the same to be adopted for placing orders for BOXNHL wagons. Insofar as BOXNS wagon was concerned, the Tender Committee deliberated as under:-

"7.3 BOXNS Wagon:

7.3.1 This wagon is being procured for the first time and no LPR is available. L-1 rate received for this tender was Rs. 21,58,000/- per wagon from M/s Texmaco Rail & Engineering Limited, which has been revised to Rs. 16,60,000/- per wagon, during negotiation, i.e., reduction of Rs. 4,98,000/- per wagon. The revised rate is 23.08% lower than the original price quoted by the firm.

7.3.2 The Technical member informed the Tender Committee that BOXNS wagon is a variant of BOXNHL wagon only and hence, for the purpose of ascertaining the reasonableness of rate, the same can be compared with the rate of BOXNHL wagon. Tender Committee observes the following:

(i) Tare weight of BOXNS wagon is less than BOXNHL wagon, because of reduction in the weight of bogie.

(ii) Quantity of free supply steel being provided for BOXNS wagon (6.3773 MT) is more than the quantity of free supply steel for BOXNHL wagon (5.67352 MT). [Annexure V of the bid document, page 54 at S. No.24 refers].

(iii) CRF Section is a bought out component for wagon manufacturing. It has been intimated by RDSO that requirement of CRF for BOXNHL wagon is 252.85 MT per hundred wagon (S. No.7/2), whereas for BOXNS wagon, it is only 132.03 MT per hundred wagon (S. No.8/3).

Thus, the requirement of CRF Section for BOXNS wagon is less by 1.2082 MT per wagon.

(iv) There is no Bogie Mounted Brake System (BMBS) in BOXNS wagon as compared to BOXNHL wagon.

(v) BOXNHL wagon is a Stainless Steel wagon whereas BOXNS wagon is manufactured by using both Stainless Steel as well as Mild Steel. For the purpose of welding, cost of welding in case of Stainless Steel is more as compared to the

cost of welding in case of Mills Steel.

(vi) Since, BOXNS wagon is being procured/manufactured for the first time, aspects of cost of development of jigs and fixtures as well as the uncertainties involved in trying out a new design will also have to be considered.

(vii) BOXNS wagon is of integrated design with a fish bone structure. As a result, complete wagon will have to be manufactured in one fixture resulting in lower productivity as compared to BOXNHL wagons.

7.3.3. Tender Committee notes that the revised rate of BOXNS wagon (Rs. 16,60,000/- per wagon) is 14.48% higher than the revised rate of BOXNHL wagon (Rs. 14,50,000/- per wagon) and the same is still considered to be on higher side."

(underlining added)

Therefore, through the second supplementary meeting of the Tender Committee, it was recommended that one more round of price negotiation may be held with the petitioner for, inter alia, 2000 BOXNS wagons with a view to explore further possibility of reduction in rates.

10. On 31.03.2016, the Tender Committee accepted the revised price for BRN22.9 category of wagons, but required the petitioner to revise its price for the other four categories, including BOXNS wagons. The second round of negotiation with the petitioner took place on 07.04.2016. Initially, the petitioner offered a revised price of Rs. 15 lacs per wagon for BOXNS wagons. At the end of the negotiations, the petitioner made a further revised offer of Rs. 14.75 lacs per wagon, which was a 31.65% reduction from the initial price offer for BOXNS wagons. According to the respondents, this was the last offer that the petitioner made. However, according to the petitioner, a further reduction in price was offered after "informal discussions" with the respondent No.3 and the offer was revised to Rs. 14.50 lacs per wagon.

11. The minutes of the third supplementary Tender Committee meetings held on 07.04.2016, 13.04.2016 and 26.04.2016 indicate that after negotiations, the petitioner submitted another letter further revising the rate for BOXNS wagon to Rs. 15 lacs and further to Rs. 14.75 lacs per wagon. There is no mention or reference to any offer of the petitioner to further reduce the price of BOXNS wagons to Rs. 14.50 lacs per wagon. Paragraph 7.0 of the said minutes indicates the revised offer from the petitioner for the four types of wagons as under:-

"7.0 Thus, the revised offer from M/s Texmaco Rail & Engineering Limited for the four types of wagons are as detailed in Table ?1 below TABLE-1

Wagon

Quoted Basic Price per wagon (Rs.)

Revised rate obtained after 1st round of Price Negotiation (Rs per wagon)

Reduction from original(%)

Revised rate obtained after 2nd round of Price Negotiation(Rs per wagon)

Reduction from Original (%)

BOXNS

21,58,000/-

16,60,000/-

23.08

14,75,000/-

31.65

BOBRNHSM1

16,72,000/-

13,30,000/-

20.45

12,00,000/-

28.23

BFNSM22.9

18,70,000/-

14,45,000/-

22.73

13,95,000/-

25.40

BOBSN

17,71,000/-

13,70,000/-

22.64

11,50,000/-

35.06"

12. With regard to BOXNS wagon, the specific discussion in the minutes is to be found in paragraph 8.2 and the same is as under:-

"8.2 BOXNS Wagon:

8.2.1 As against the original quoted rate of Rs. 21,58,000/- per wagon, the revised rate after first round of price negotiation was Rs. 16,60,000/- per wagon and now after second round of price negotiation, it has further come down to Rs. 14,75,000/- per wagon. Thus, there is a reduction by 31.65% over the original L-1 rate of M/s Texmaco Rail & Engineering Limited. However, Tender Committee is of the considered opinion that this rate is still on higher side.

8.2.2 TC has deliberated in Para 7.3.2 of its 2nd Supplementary Tender Committee Proceedings (pages 41/n-42/n) that cost of material input to be arranged by the wagon manufacturers will be less in the case of BOXNS wagon as compared to BOXNHL wagon.

8.2.3 However, this being a new design wagon involving a manufacturing process that entails lower productivity in comparison to BOXNHL, development of jigs and fixtures for the new type and the uncertainties involved in trying out a new design, there is likelihood of increase in cost. This has also been deliberated by the TC in Para 7.3.2 of its 2nd Supplementary Tender Committee Proceedings (pages 41/n ? 42/n). These aspects will definitely add to the cost, but to what extent, is not known to the TC, being a case of first procurement.

8.2.4 Therefore, TC is of the view that any saving on account of lower material inputs" cost should at best cancel out the additional costs likely to be incurred in manufacturing this new type of wagon [as brought out in para 8.2.3]. Therefore, BOXNS wagon should cost less than that of BOXNHL. TC, thus, considers the revised rate of Rs. 14,75,000.00 per wagon received from M/s Texmaco Rail & Engineering Limited to be on higher side and, therefore, recommends to invite fresh bids for this wagon."

From the above discussion, it is evident that the final offer that was considered by the Tender Committee was of Rs. 14.75 lacs per wagon for BOXNS wagons. This represented a reduction of 31.65% over the original L-1 rate quoted by the petitioner. The Tender Committee was of the view that the BOXNS wagon should cost less than the BOXNHL wagon and, therefore, the revised price of Rs. 14.75 lacs per wagon received from the petitioner, when compared to the firmed up price of Rs. 14.50 lacs per wagon for BOXNHL wagon, was on the higher side.

13. Consequently, the Tender Committee recommended the invitation of fresh bids for BOXNS wagons. It may also be noted that the minutes clearly record in paragraph 8.6 thereof that as a result of the second round of price negotiation held with the petitioner, reasonable rates had been obtained for two types of wagons ? BOBRNHSM1 and BOBSN. For the other two types of wagons ? BOXNS and BFNS wagons ? the Tender Committee had recommended invitation of fresh bids. The actual recommendation in respect of BOXNS and BFNS wagons was as under:-

"(b) To invite fresh bids through open tender with 21 days opening date for 2,000 BOXNS & 500 BFNS wagon. Since the purpose of re-tendering is to invite most competitive rates for these two types of wagons, TC recommends that the

quantity distribution criteria in the bid document may be incorporated as per Railway Board's Circular No.99/RS(G)/779/2 Pt. Dated 11.02.2016 (S.No.130). It may also be spelt out in the bid document that splitting of quantity will be done among the three lowest bidders only, as quantity being procured is small (2,500 wagons only vs. 14,777 wagons, initial tender quantity)."

The recommendation of the Tender Committee was accepted by the Tender Accepting Authority on 28.04.2016.

14. On 29.04.2016, the petitioner issued a letter to the Tender Accepting Authority suggesting that the petitioner had offered to reduce the price to Rs. 14.50 lacs per wagon for BOXNS wagons. The contents of the said letter, to the extent relevant, are set out below:-

"As L1 bidder, we were invited for price negotiation which took place with the Tender Committee on 7th April, 16. The Committee Members were visibly happy about our giving a substantial reduction and submitting an offer of Rs. 14.75 lacs on the table. Our understanding was that this was acceptable to the Tender Committee. Later, however, we were contacted to enquire if we could, as a gesture of good will, further bring down the price to Rs. 14.50 lacs. In response, we conveyed that for a relatively minor difference, we would not like to delay the entire process of Tender finalization.

We understand that accordingly, the Tender Committee, after due deliberation, decided to make a counter offer to us at Rs. 14.50 lacs for which we had already conveyed our concurrence.

In this backdrop, we are absolutely in a state of shock to learn that the Tender for BOXNS is proposed to be discharged which defies all logic and facts on record.

We urge you, Sir, for your kind personal review in the matter in the interest of complete transparency, equity and fair play. Needless to say, the discharge of BOXNS tender at this stage would severely prejudice and jeopardise our interest and create serious commercial and legal complications. We earnestly believe that we would not be discriminated against in the matter of the distribution of orders for RSP 16-17 with due regard to the fact that we have always been the recipient of highest orders and turning out the best performance."

15. But, the decision to re-tender BOXNS wagons had already been taken on 28.04.2016 and consequently, on 02.05.2016, the second NIT was issued. Immediately thereafter, on 04.05.2016, the present writ petition was filed. When this matter was taken up for hearing on 23.05.2016, we had, while passing an interim order, observed as under:-

"Be that as it may, the view of the respondents, as disclosed in their counter-affidavit, is that the Tender Committee observed that the cost of "BOXNS" wagons should be less than the cost of "BOXNHL" wagons. It is further stated in the counteraffidavit that since the negotiated price of "BOXNHL" got firmed up at Rs. 14.5 lacs per wagon, the final revised rate of the petitioner at Rs. 14.75 lacs

per wagon for "BOXNS" was considered to be on the higher side and it is for this reason that the offer of the petitioner was not accepted and a fresh tender was floated on 02.05.2016 only in respect of "BOXNS" wagons and that the date of final submission of bids is 24.05.2016 (i.e., tomorrow).

The learned counsel for the petitioner, however, pointed out that the initial offers made by the bidders clearly indicated the basic rate of "BOXNS" to be higher than that of "BOXNHL". The lowest difference was that of the petitioner at Rs. 2.52 lacs and the highest difference was of a public sector corporation (Bridge and Roof Company India Limited) and that was at Rs. 3.95 lacs.

It was, therefore, submitted that the contention of the respondents that the price of "BOXNS" wagons should be lower than that of the "BOXNHL" is belied by the evaluation of the whole industry itself. The learned counsel for the respondents informed us that the price of "BOXNHL" wagons got firmed up at Rs. 14.5 lacs per wagon on 15.03.2016. However, it is submitted by the learned counsel for the petitioner that it was not put to the petitioner during negotiations that it had to offer a price of "BOXNS" wagons at less than Rs. 14.5 lacs per wagon inasmuch as that was the firmed up price for "BOXNHL" wagons. Therefore, according to the petitioner, the submission of the respondents that because the "BOXNS" negotiated price was higher than the "BOXNHL" firmed up price of Rs. 14.5 lacs per wagon, the order was not placed on the petitioner and a fresh tender was invited in respect of "BOXNS" wagons, would not stand to reason.

In these circumstances, prima facie, we are in agreement with the submissions made by the learned counsel for the petitioner that the action taken by the respondents is arbitrary and although they have the right to accept or reject any offer, that right must be exercised in a fair and reasonable manner. Prima facie, we feel that the action taken by the respondents in not accepting the offer made by the petitioner is arbitrary. It is in these circumstances that we are directing that the date of final submission of bids shall be extended by the respondents to one week after the next date of hearing. This is in respect of tender No. 2016/RS(1)/954/8(TC) dated 02.05.2016.

Renotify for final arguments on 04.08.2016."

This order has continued till date. It was contended on the part of the petitioner that there is nothing on record to indicate that the price of BOXNS wagons should be less than BOXNHL wagons. In fact, it was contended that the initial price offered by each of the bidders in the industry for BOXNS wagons was higher than what they had offered for BOXNHL wagons. Even the public sector undertaking ? Bridge and Roof Company India Limited ? had made a price offer for BOXNS wagons higher than that of BOXNHL wagons. Thus, it was submitted that the understanding of the industry itself was that BOXNS wagons were to cost more than BOXNHL wagons.

16. Consequently, it was submitted that the understanding of the Tender Committee that BOXNS wagons should cost less than BOXNHL wagons was

without any substance or basis. It was contended that the discharge and re-tendering of BOXNS wagons would be prejudicial to public interest apart from the conduct of the respondents being arbitrary. It was also contended that the second NIT did not contemplate award of any part of the tender quantity on the basis of performance index of bidders which was the regular feature of Railway tenders, including the first NIT. In this context, it was submitted that the mechanism for award of quantities under the first NIT and prior tenders was that the total quantity of allotment for any tender was based on performance index and competitive bidding amongst the bidders. 40% of the total quantity was allotted on the basis of performance index and 60% was allotted on the basis of competitive bidding amongst the bidders in such a manner that L-1 to L-6 bidders received orders in the ratio of 22:20:18:16:13:11.

17. It was also contended that the discharge and re-tendering of BOXNS wagons was non-transparent, arbitrary and mala fide. It was submitted that the petitioner would be gravely prejudiced due to the discharge/re-tendering of the BOXNS category of wagons. The learned counsel for the petitioner placed reliance on the following decisions:-

(i) Union of India and Others v. Dinesh Engineering Corporation and Another: (2001) 8 SCC 491;

(ii) Inderjit Mehta v. Union of India and Others: WP(C) 5685/2015 decided on 01.09.2016; and

18. On the other hand, the learned counsel for the respondents submitted that the first NIT with regard to BOXNS wagons was discharged after considering all the aspects by the Tender Committee consisting of Additional Secretary level officers of the Ministry of Railways, who had experience and expertise in the field. It was argued that the Tender Committee felt that BOXNS wagons were comparable with BOXNHL wagons and there were many factors which would lead to lowering of the price of BOXNS wagon, while there were some which would also raise the price of BOXNS wagon when compared to BOXNHL wagon. However, the overall view taken by the Tender Committee was that the price reducing components would, in all probability, outweigh the price increasing components and, therefore, they came to the conclusion that BOXNS wagons ought to be priced lower than BOXNHL wagons. It was also pointed out by the learned counsel for the respondents that since BOXNS wagons were introduced for the first time, there was no earlier price with which a comparison could be made. Therefore, the price that would be discovered in the first instance would also form the basis for all future tenders of BOXNS wagons. Considering this, it became important that the price mechanism was understood clearly and that the true price of BOXNS wagon was discovered. It was, therefore, contended that there were adequate reasons for the Tender Committee to have come to the conclusion that BOXNS wagons ought to be re-tendered. Several decisions were cited by the learned counsel for the respondents on the scope of judicial review, particularly, in connection with tender matters. Reliance was placed on the

following decisions:-

- (i) Jagdish Mandal v. State of Orissa and Others, (2007) 14 SCC 517;
- (ii) Meerut Development Authority v. Association of Management Studies and Another, (2009) 6 SCC 171
- (iii) Michigan Rubber (India) Limited v. State of Karnataka and Others, (2012) 8 SCC 216; and
- (iv) State of Jharkhand and Others v. CWE-Soma Consortium, Civil Appeal No. 6125/2016 decided on 12.07.2016;

19. Let us now examine the decisions relied upon by the learned counsel for the parties. The learned counsel for the petitioner had, first of all, placed reliance on the decision of the Supreme Court in the case of Dinesh Engineering Corporation (supra). Specific reliance was placed on paragraphs 15 and 16 of the said decisions. They read as under:-

"15. Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellant that the Railways under clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer.

We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the Railway to rely upon this clause in the Guidelines to reject any or every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, learned senior counsel appearing for the EDC, drew out attention to a judgment of this Court in *Sterling Computers Ltd. etc. v. M/s. M & N Publications Ltd. & Ors.*, (1993) 1 SCC 445 which has held:

"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."

16. But then as has been held by this Court in the very same judgment that a

public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while we are told the Railways are making purchase without any tender on a proprietary basis only from the EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of nonapplication of mind, hence, it has to be quashed as has been done by the High Court."

20. From the above extract, it is evident that an argument had been raised on behalf of the Railways, in that case, that under Clause 16 of the Guidelines, it was entitled to reject any tender without assigning any reasons and also had the power to accept or not to accept the lowest offer. The Supreme Court acknowledged this power being vested in the Railways. But, at the same time, it indicated that this did not give an arbitrary power to the Railways to reject the bid offered by a party "merely" because it had the power. The Supreme Court observed that the power could be exercised on the existence of certain conditions which in the opinion of the Railways were not in its interest to accept the offer. In that case, the Supreme Court noted that no such ground had been taken when the tender was rejected. It is in this backdrop that the Supreme Court agreed with the High Court that it was not open to the Railways to rely upon the said Clause 16 of the Guidelines to reject any or every offer that may be made by a tenderer.

21. But, the facts in the present case are entirely different. The respondents have not exercised the power to reject the bid of the petitioner insofar as the BOXNS wagons were concerned merely because of whim. There were good reasons which have been set out in the minutes of various meetings where these deliberations took place. We may also note that the Supreme Court decision in *Dinesh Engineering Corporation (supra)* referred to the earlier judgment of the Supreme Court in *Sterling Computers Ltd. etc. v. M/s. M & N Publications Ltd. & Others : (1993) 1 SCC 445*, where it is specifically recorded that under special circumstances a discretion has to be conceded to the authorities who have to enter into contracts giving them liberty to assess the overall situation for the purpose of taking a decision as to whom a contract may be awarded and on what terms. It is further outlined that if the decisions have been taken in a bona fide

manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle that the courts, while judging the constitutional validity of executive decisions, must grant a certain measure of freedom of "play in the joints" to the executive. The decision of the Supreme Court in *Dinesh Engineering Corporation (supra)*, however, cautioned that "merely" because an authority has certain elbow room available for exercise of discretion in accepting offers in contracts did not mean that the discretion could be exercised in ignorance of the provisions of law and especially Article 14 of the Constitution.

22. The said decision in *Dinesh Engineering Corporation (supra)* has clearly set down the principle that "merely" because an authority has the power to reject any tender without assigning reasons, it did not mean that the said authority could reject tenders arbitrarily or unreasonably. But, this principle is not applicable in the facts of the present case. First of all, the entire exercise undertaken by the Tender Committee and the Tender Accepting Authority is not tainted with any mala fides. Secondly, there are reasons as to why the BOXNS wagons have been subjected to retender. The reasons being to discover the real market price of the product which was the subject matter of tender for the first time. It was also the opinion of the Tender Committee, right or wrong, but a bona fide opinion that the BOXNS wagons must be priced lower than the BOXNHL wagons. It would also be in aid of public interest if the price of BOXNS wagons is discovered at a rate lower than Rs. 14.5 lacs per wagon which was the firmed up price for the BOXNHL wagon. Therefore, the decision of the Supreme Court in *Dinesh Engineering Corporation (supra)* does not in any way advance the case of the petitioner.

23. The next decision referred to by the learned counsel for the petitioner was a Division Bench judgment of this Court in *Inderjit Mehta (supra)*. That case is clearly distinguishable from the facts obtaining in the present petition. There re-tendering had been directed by a notice dated 17.03.2015 for the third time when, on the second occasion, the petitioner therein was the L-1 bidder. Paragraphs 20 and 21 of the said decision are relevant and they are set out herein below:-

"20. The mere plea of the respondent no. 2 that that the Accepting Authority is of the view that lower rates may be possible on re-tender, does not stand to reason. The lower rates, if any, would not enure to the benefit of the respondent no. 2 but would enure, if at all, to the benefit of the earlier contractor as the subject tender is at the risk and costs of the earlier contractor. There is no cogent material placed on record to show as to how the accepting authority has formed such an opinion. The only reason that appears from the record is that the petitioner had, in the first call, quoted higher rates of approximately Rs. 172 crores and in the second call has quoted rates of approximately Rs. 162 crores. This cannot be a ground to form an opinion that in the third call the rates are further likely to go down. It is not the case of the respondent no. 2 that there are

only two bidders. The rates quoted by the other bidders apparently were higher than the petitioner and that is why the petitioner is now Rs. -1.

21. We are thus of the view that the decision taken by the respondent no. 2 in cancelling the subject tender and resorting to re-tender cannot be sustained. Accordingly, the tender notice dated 17.03.2015 is quashed. The respondent is directed to declare the petitioner as L-1. In view of the substantial delay already having been caused, we direct the respondents no. 1 and 2 to award the contract to the petitioner subject to the petitioner satisfying the other conditions of the tender. The petition is accordingly allowed in the above terms leaving the parties to bear their own costs."

24. In that case, as would be evident from the paragraphs quoted above, there was no cogent material placed on record to show as to how the Accepting Authority had formed an opinion that lower rates may be possible on re-tender. It is because there were no reasons whatsoever that this Court took the view that the decision taken by the respondent No. 2 in that case in cancelling the tender and resorting to re-tender could not be sustained. The facts in the present case are entirely different. We have already set out in detail the deliberations of the Tender Committee and the reasons given by them for arriving at the conclusion that the BOXNS wagons ought to be priced lower than the BOXNHL wagons. It is clear that this Court in judicial review does not sit in appeal over the decision of the Tender Committee. We only have to search for sustainable reasons and if found, even if the Court has a contrary view, the same cannot be substituted in place of that of the Tender Committee. Of course, the Court can strike down any decision which is clearly arbitrary because that is anathema to the provisions of Article 14 of the Constitution.

25. We now come to the decisions cited on behalf of the respondents. The first decision being that of Jagdish Mandal (supra). Paragraph 22 of the said decision reads as under:-

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make

mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and 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 black-listing or imposition of penal consequences on a tendered/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

26. The said decision reiterates the well established principle that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The purpose of judicial review of administrative action is to check as to whether a choice or decision was made "lawfully" and not to check whether the choice or decision was "sound". In point of fact, judicial review of administrative action is for the purpose of verifying as to whether the decision arrived at was a lawful decision and not whether the decision was right or wrong. It was specifically stressed by the Supreme Court in Jagdish Mandal (supra) that the decision relating to award of a contract, if made bona fide and in public interest ought not to be interfered with by the Courts in exercise of the power of judicial review even if there were a procedural aberration or error in assessment or some prejudice being cause to a tenderer. In the present case, we find that the decision making process was bona fide and not tainted by any mala fides. Further, we are of the view that the decision to re-tender the BOXNS wagons was in public interest as the objective was to discover the lowest price for the BOXNS wagons which was being subject to tender for the first time and there was no last known price which could be used as a reference point. In fact, the Tender Committee was of the view that the only reference point that could be taken was perhaps the price of the BOXNHL wagons and in their opinion, the price of the BOXNS wagons ought to be lower than the BOXNHL wagons. It is for this reason that the decision to re-tender the BOXNS wagons was taken. In such an eventuality, in view of the principles set down in Jagdish Mandal (supra), it is clear that no interference by this Court is warranted in the

present case.

27. In Meerut Development Authority (supra), it was observed that bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from any hidden agenda. The Court further observed that no bidder was entitled, as a matter of right, to insist upon an authority inviting tenders to enter into further negotiations unless the terms and conditions of the notice so provided for such negotiations. The Supreme Court also held that the authority issuing the notice inviting tenders had the right not to accept the highest bid and even to prefer a tender other than the highest bidder (or the lowest bidder, as the case may be), if there existed good and sufficient reasons, such as the bid not representing the market price. The Court, however, cautioned that the decision of the authority inviting tenders in accepting or refusing a particular bid must, of course, be free from arbitrariness or favouritism. In the present case, we do not find any act of arbitrariness or favouritism on the part of the respondents. It must also be remembered that in respect of various other wagons referred to above, the petitioner's bids have been accepted. Thus, it cannot even be argued that the respondents bear any malice towards the petitioner.

28. The next decision referred to by the learned counsel for the respondents was that of the Supreme Court in Michigan Rubber (India) Limited (supra). In that decision, the earlier case law of the Supreme Court on the matter of tenders was reviewed. In particular, the principles laid down in Jagdish Mandal (supra) were specifically endorsed and reiterated. Paragraphs 23 and 24 of the decision in Michigan Rubber (India) Limited (supra) read as under:-

"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 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 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 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 negative, then there should be no interference under Article 226."

29. We may note that when the two questions are posed in the context of the present case, the answers are that the process adopted and the decision taken by the respondents was bona fide and was not intended to favour anybody. The decision taken to re-tender the BOXNS wagons cannot be said to be so arbitrary or irrational that this Court can say that the decision was such that no responsible authority, acting reasonably and in accordance with the relevant law, could have reached. Furthermore, it cannot be said that the decision taken by the respondents was not in public interest as discussed by us above. Since the answers to the two questions are in the negative, there is no question of there being any interference by this Court in the present matter under Article 226 of the Constitution.

30. We may also mention the decision in the case of CWE-Soma Consortium (supra) which essentially reiterates the views of the Supreme Court referred to in the cases mentioned above. In particular, it holds that the decision of the State issuing a notice to cancel an earlier tender and to invite fresh tenders cannot be interfered with by the Court unless it is found to be mala fide or arbitrary. The Supreme Court also observed that while exercising judicial review in the matter of Government contracts, the primary concern of the Court is to see whether there is any infirmity in the decision making process and as to whether the decision is vitiated by any mala fides, unreasonableness or arbitrariness. Clearly, in the present case, we do not find any infirmity in the decision making process nor is the decision to re-tender the BOXNS wagons vitiated by any mala fides or tainted by any unreasonableness or arbitrariness.

31. In view of the foregoing discussion, no interference is called for by this Court

and consequently, the writ petition is liable to be dismissed. It is ordered accordingly. However, the parties shall bear their own costs.