

(2004) 11 MAD CK 0095

In the Madras High Court

Case No : Writ Petition No. 14980 of 2004

URC Construction (P) Ltd.

APPELLANT

Vs

The Indian Institute of Technology, The Superintending
Engineer, Indian Institute of Technology and Larson and
Toubro Limited

RESPONDENT

Date of Decision : 09-11-2004

Acts Referred:

Constitution of India, 1950 — Article 136, 14, 226, 298, 299

Citation : (2005) 1 BC 573 : (2004) 5 CTC 631 : (2005) 2 CTLJ 264 : (2005) 1
MLJ 283 : (2005) WritLR 518

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : Sriram Panchu, for B. Harikrishnan, for the Appellant; Vijay Narayan,
for R. Parthiban and Narmatha Sampath for RR1 and 2 and R. Murari, for R3, for
the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—This matter has been specially ordered for hearing as directed by the Division Bench in W.A. No. 2920 and 2922 of 2004.

2. The first respondent called for a tender for construction of various works including construction of a new hostel block (ground + 6floors). Though the original pre-qualification notice included the criteria for other works, including a mega mess for boy's hostel, buildings and infrastructure for Bio-chemical Engineering and Bio-Technology Department at IITM, and a Sewerage treatment plant, this writ petition is only concerned with the construction of a new hostel block.

3. On 10-05-2003, the notification for pre-qualification of contractors was called for. The qualifications are as follows:

"Interested Contractors, who have executed three similar works costing not less

than 40% of the estimated cost put to tender (atleast one of them should be in Central Government/Central Autonomous Bodies like educational Institution / Central / Public Sector Undertakings during the last five years) out of which one work should cost not less than 80% of the estimated cost. The interested contractors should have completed at least two multistoried buildings. (Ground + 6 floors) for item (1) & (3) and at least one long span construction (minimum size 15m x 15m) for item (2)"

The numbers in brackets refer to the particular work for which the contractor is applying, item No. 1 being the contract in question. After the pre-qualification stage was crossed, a contractor would be informed of the date and time of sale of document. After the tender documents are submitted the tenderers would be called for a pre-bid meeting. The tender offers would be received on a subsequent date. Thereafter, the Technical Bid (Packet-A) and Financial Bid (Packet-B) would be opened. These were admittedly the different stages leading to the award of the contract.

4. The petitioner was found to have pre-qualified. He was informed by letter dated 25-03-2004, that the tender documents would be sold from 19-03-2004 to 29-03-2004, that the pre-bid meeting would be at 10:30 AM on 07-04-2004, that the tender offer would be received up to 3:00PM on 19-04-2004 and finally, that the technical Bid would be opened at 3:40 PM on 19-04-2004. The tender documents showed that there was an alteration in the qualification criteria from what was indicated in the pre-qualification notice and according to the petitioner this could be not done and it was to his disadvantage. The qualification criteria which was so altered is as follows:

"The applicant should have satisfactorily completely three works (atleast one of them in Central Government/ Central Autonomous Body/ Central Public Sector Undertakings) each costing not less than Rs. 12 crores or two works each costing not less than Rs. 15 crores or one work costing not less than Rs. 24 crores of similar multistoried buildings (Ground + six floors or more) during the last seven financial years 1997-98 to 2003-04"

Thereafter, it was awarded to the third respondent and the petitioner's bid was rejected by the impugned order dated 27-05-2004.

"We regret to inform you that, after evaluation of your technical bid, it is found that your bid does not meet tender requirements. Hence it has been decided by competent authority not to open your financial bid."

5. Therefore the writ petition has been filed challenging the rejection order. At the time of admission, only notice was ordered in the injunction application on 02-06-2004. When the matter came up again on 06-07-2004, the injunction application was dismissed. The interim prayer was principally to prevent the 3rd respondent the successful contractor from proceeding with the work. The respondents were served. The petitioner went in appeal against the dismissal of his injunction application. On 07-09-2004, the Division Bench in W.A. Nos. 2921

and 2922 of 2004, heard all the parties concerned, passed an order declining to interfere with the order of the Learned Single Judge and directed that the matter may be heard early since the interest of the third respondent is also involved.

6. According to the learned Senior counsel, Mr. Sriram Panchu appearing for the petitioner, the petitioner had been found to have satisfied the pre-qualification conditions and had also participated in the pre-bid meeting which consisted of two bids, technical and financial. According to the learned Senior Counsel, the petitioner's bid was the lowest. In spite of that his bid was rejected. The grievance of the petitioner is that the amendment of the pre-qualification notification is arbitrary. It was made to exclude the petitioner and to award the contract to a chosen person. When tender is called for works involving public money there should be transparency and while there cannot be any doubt that the Court cannot enter into the realm of contract it has been held in various decisions that there must be a fair play and the decision must satisfy the principles of reasonableness. It must be free from arbitrariness and must not be tainted by bias or mala fides. After evaluation of the technical bid it was found that in the case of the petitioner the Methodology, Quality, Safety and Environmental aspects are not satisfactory and it was submitted that the conclusion was arrived at without giving an opportunity to the petitioner. The petitioner was not informed that the Technical Bids would be evaluated by a third party namely RITES. All these factors vitiated the respondent's decision. And even assuming without conceding that the amendment was fair, the petitioner satisfied the condition as amended. Further, if the respondent wanted to revise the conditions, there should have been fresh notice. The respondent cannot change the rules of the game mid-way. These in brief were the submissions made on behalf of the petitioner.

7. The learned Senior Counsel appearing for the first and second respondents, Mr. Vijay Narayan would submit that there are no merits in the writ petition. According to him, the narration of events would easily demonstrate this. The petitioner was asked to attend the pre-bid meeting by the letter dated 21-05-2003. The petitioner was informed by the letter dated 18-08-2003 that he was shortlisted for issue of tenders and he was called upon to produce the documents before 03-09-2003. On 05-09-2003, the petitioner was informed that the tender document of the above work was ready for issue and that he should purchase the tender documents between 15-03-2004 and 26-03-2004 enclosing a demand draft for the cost of the document and the pre-bid meeting with the tenderers was fixed on 31-03-2004. By letter dated 11-03-2004, the date of sale of the tender document and opening of tender were revised and the date of the pre-bid meeting remained the same, i.e., on 31-03-2004. This was confirmed by the letter dated 25-03-2004. By the letter dated 30-04-2004 the petitioner was informed that the submission of the tender for the abovesaid work was postponed to 19-05-2004. According to the learned Senior Counsel in the mean time what happened was that the petitioner was issued the tender document on 19-03-2004 and on 06-04-2004 the amendment of the eligibility criteria was

introduced. Yet, the petitioner participated in the process without challenging the amendment and therefore, now it is not open to him to complain of arbitrariness. The petitioner does not qualify if the amendment is properly understood, as understood by the respondent. The evaluation relating to Methodology etc., was the internal communication between the RITES and the respondent. The impugned order does not give reasons, and the respondent was entitled to reject the bid without assigning any reason. This Court cannot sit in appeal over the decision. In any event, the amendment and the evaluation by RITES were applicable to all the bidders and therefore, there was no unfairness. Other pre-qualifiers had not challenged the award in favour of 3rd respondent. There was no reason to interfere.

8. The learned counsel for the third respondent would submit that it may not be correct to say that there are no equities in favour of the petitioner because the Division Bench has specifically observed that this may also be considered at the time of final disposal.

9. In *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others*, the Supreme Court held,

"After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant's tender is vitiated by more than one illegality. Firstly, the tender notice did not specify the "viability range" nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/Government would first determine the "viability range" and would then call upon the lowest eligible tenderer to make a counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender. They did nothing of that sort."

10. In *Tata Cellular Vs. Union of India*, , the Supreme Court held as follows:

"Administrative Law- Judicial review - Scope - Govt. contracts - Tenders - State decision/ action on must be in consonance with Art. 14 - Only the decision-making process and not the merits of the decision itself is reviewable as court does not sit as appellate court while exercising power of review - Decision / action when open to review - Test - While court cannot interfere with Govt.'s freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter, but whether the decision/ action is vitiated by arbitrariness, unfairness, illegality, irrationality or "Wednesbury unreasonableness" i.e. when decision is such as no reasonable person on proper application of mind could take or procedural impropriety, can be looked into by court - Test is whether wrong is of such a nature as to require intervention - If so court would set right

the decision-making process - But it would not substitute its own opinion for that of experts - Constitution of India, Arts. 226, 32, 136, 14, 298 and 299 - Govt. contracts.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides. .."

11. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , it was held as follows:

"Court's interference when called for - State can choose its own method - But it should comply with the norms, standard and procedure - Price need not always be the decisive factor - Decision has to be on the basis of overall view of the transaction after weighing various relevant factors and having regard to commercial viability."

12. In *Directorate of Education v. Educomp Datamatics Ltd.*, the Supreme Court held as follows:

"The view that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided is not acceptable. Because of the increase in the number of schools the hardware cost itself went up to Rs. 40/- crores. The total cost of the project was more than Rs. 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy the Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. ? ?

The terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. 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."

13. In *D. Anbalagan Vs. The Tamil Nadu Public Service Commission and The Treasury Officer Vellore, North Arcot District*, the Division Bench of this Court held thus:

"Merely because quashing of that order has not been prayed for specifically, that will not deprive the petitioner of that relief if he is otherwise entitled to it. We therefore, take the view that merely because there is no specific prayer for setting aside a consequential order, the relief which is otherwise due to the petitioner cannot be rejected."

14. The comparative table of the relevant qualification conditions:

S.No. Pre-qualification Tender dated 10-05-2003 Qualification criteria mentioned in Clause 1.3 in notice inviting tender and instructions to Tenderers Amended qualification criteria Clause 1.31 Interested Contractors, who have executed three similar works costing not less than 40% of the estimated cost put to tender (atleast one of them should be in Central Government/ Central Autonomous Bodies like educational Institution / Central / Public Sector Undertakings during the last five years) out of which one work should cost not less than 80% of the estimated cost.

The Applicant should have satisfactorily completed three similar multi-storied Building works (atleast one of them in Central Government/ Central Autonomous Body including Educational Institution/ Central Public Sector Undertaking) during the last five financial years 1998-99 to 2002-03, each costing not less than Rs. 12 crores out of which one work should have cost not less than Rs. 24 crores.

The applicant should have satisfactorily completely three works (atleast one of them in Central Government/ Central Autonomous Body/ Central Public Sector Undertakings) each costing not less than Rs. 12 crores or two works each costing not less than Rs. 15 crores or one work costing not less than Rs. 24 crores of similar multistoried buildings (Ground + six floors or more) during the last seven financial years 1997-98 to 2003-04 2 The interest contractors should have completed at least two multistoried buildings (Ground + 6 floors) for item (1) and (3) and atleast one long span construction (minimum size 15m c 15m) for item (2)

The Applicant should have completed at least two multistoried buildings (Ground + 6 floors or more) during the same five financial years.

15. The broad guidelines governing judicial review in cases of tenders have already been extracted. The extent to which the whole process lies purely within the realm of contract, has also been considered by the Supreme Court, as also the circumstances where interference in judicial review is permissible. But principles laid down in any decision or the ratio of the said case will apply to this case only if the facts and circumstances permit them. While there is no denying

the fact that public funds cannot be distributed arbitrarily, judicial quest in administrative matters must find the right balance between the exercise of discretion while arriving at the decision and the need to remedy any unfairness. The decision as such is basically not justiciable and judicial review in this regard is not an appeal from a decision but only a review of the manner in which the decision was made as observed by Chief Constable of the North Wales Police v. Evans 1982 3 All ER 140.

"Judicial review, as the words, imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

.....

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretion properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p.1160)."

16. In Tata Cellular Vs. Union of India, the principles were deduced as follows:

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

an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

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

The hidden criteria in this case cannot be said to have been evolved as tailor-made to suit some other bidders and knock off others. In a technical matter like this where the Government of India is embarking upon new communication scheme with advance technology all the criteria cannot be postulated in the beginning itself. Where the Committee of Experts thought certain criteria have to be evolved in order to subserve the interest of the scheme it is not necessary to have all of them set out in the beginning itself."

17. Let us examine whether the objections are sustainable. First it appears that the petitioner has accepted the amendment. When the petitioner paid the fees for receiving the tender documents they were handed over to him, the correction note was given on 6-4-2004, it is only thereafter that the petitioner made bid for the tender and found that the bid was rejected. It was open to the petitioner to challenge the amendment even before he bid for it. But having accepted the variation in the contract, it is now not open to him to cry "Foul". The Learned Senior Counsel appearing for the petitioner cited D. Anbalagan Vs. The Tamil Nadu Public Service Commission and The Treasury Officer Vellore, North Arcot District, for the proposition that it is not necessary that there should be a special prayer for quashing of a consequential order and that if the decision is found illegal and if the petitioner is entitled to the relief even if specific prayer for setting aside a consequential order is not asked for, the relief can be granted. But in this case, the amendment of the condition is not a consequential order. It was the condition subject to which the tender was opened for bidding. The petitioner accepted the amendment which is why he made his bid. On this ground therefore, even at the threshold the petitioner's prayer has to be rejected.

18. Secondly, we will also examine if the petitioner has a case on merits. It was submitted by the learned Senior Counsel for the petitioner that on a proper construction of the amended condition, the petitioner actually qualifies and therefore, his tender ought not to have been rejected. These are the buildings that the petitioner had shown to prove his pre-qualification. The projects completed by the petitioner are given as under:

S. No.	Name of Work	Cost of Work (Rs. In Crores)	Whether for Works
1	Multistoried Central & No. of floors Govt./Body	20.75	Basement + G+3
2	Central Body of New Hostel Complex ..	18.13	(G+3) No Building ..
3	BGS ..	13.25	(G+4) NO International School

19. According to the petitioner as per the amended qualification criteria the applicant should have satisfactorily completed three works each costing not less

than Rs. 12 crores or 2 works each costing less than Rs. 15 crores or one work of similar multistoried building costing not less than Rs. 24 crores. According to the petitioner the words "similar multi-storied building" is applicable only in the case where the applicant has completed one work of Rs. 24 crores. Therefore, since the petitioner has completed three works each costing not less than Rs. 12 crores, his tender ought not to have been rejected.

20. The learned Senior Counsel referred to Backbone Tarmat-NG JV v. National Highways Authority of India & Anr. 2003 (3) RAJ 273 wherein it was held as follows:

"It may be true the Court while deciding a case of this nature must have public interest in mind. But would public interest be a bar to exercise power of judicial review whence on a misconstruction and misinterpretation of essential conditions of the tender, the respondent No. 1 awarded the contract in favour of respondent No. 7 which it was not entitled to do? Would public interest mean that such acts are the part of the 1st respondent should be glossed over only because the offer of respondent No. 2 is the lowest? Answers to the said question must be rendered in negative."

21. But in M/s. G. J. Fernandez Vs. State of Karnataka and others, , the Supreme Court observed that "Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed the applications for contracts all along."

22. Now let us examine the amended qualification criteria to see if the respondent's construction of the condition can be accepted or if it is misconstruction or misinterpretation. At the first stage when the pre-qualification tender was published it was a notice for four different works. At the time the words "3 similar works" applied to four different kinds of buildings, (1) hostel block, (2) mega mess for boy's hostel, (3) construction of buildings and infrastructure for bio-chemical Engineering and Bio-Technology Department at IITM and (4) the proposed Sewerage treatment plant of about 14 lakh liters per day capacity. But, when tender documents were supplied, the criteria laid down therein was applicable to that particular work only. They amended the qualification criteria in the notice inviting tender where they used the words "three similar multistoried building works" and finally, came the correction note. This takes in 3 different cases, a contractor, who has completed 3 works, or one who has completed 2 works or one who has completed only one. The only way in which this condition could be read, is to add the words "of similar multistoried buildings" to each of the three different cases.

23. To explain, it would mean three works of similar multistoried building each costing not less than Rs. 12 crores or 2 works of similar multi-storied buildings each costing not less than Rs. 15 crores or one work of similar multistoried building costing not less than Rs. 24 crores. Right from the beginning it was clear that they wanted the contractors who had expertise in similar works. "Similar

works" would only mean similar buildings. Actually the petitioner's construction is clearly wrong because then persons who have not completed even one multistoried building could have participated. Therefore, the petitioner's claim that even if the amended qualification is applied, their bid should have been accepted or atleast not rejected, is not sustainable.

24. Thirdly, it was contended that the bid at the original pre-qualification notice had two criteria, one being the value criterion and the other the height criterion while in the counter there is an explanation as to why there is an upward revision in the value criterion there is no explanation why the respondent had telescoped the two criteria into one. We have already seen that the first pre-qualification notice invited applications for four different kinds of works. You may say that the pre-qualification notification is a common or composite notice. It has been extracted above and will show that the first paragraph deals with value alone and the second paragraph relates to work (1) and work (3) and also work (2). Because it was a composite notice and the buildings belonging to different categories the value criterion and the height criterion had been given in two paragraphs. When the tender documents were given to the applicants for each specific work then the qualification criteria could be set out separately for each nature of work. So it was done. The respondent has admitted the reason for revising the qualification criteria. They have stated in their counter that at the time of the preparation of the tender documents a re-assessment of the cost of work was done. The cost was assessed at Rs. 30 crores as against the earlier estimate of Rs. 20 crores, 40% of the estimated cost, which is what is stated in pre-qualification notice, equals to Rs. 12 crores, of present estimated cost, so also 80% mentioned in the pre-qualification notice, would now equal to Rs. 24 crores. The value was shown as a percentage of estimated cost in pre-qualification notice and in figure in the amendment note. So there is no difference. Instead of going in for new tenders they restricted the tender to the 18 contractors who had been pre-qualified on the basis of the earlier notification. It is specifically stated in the notification that the tenderers were advised to furnish information on Qualification Criterion relating to Experience on similar works only.

25. The qualification criteria originally, upwardly revised the value of the three similar multi-storied buildings which should have been completed by the contractor, to cost not less than Rs. 12 crores each, out of which one should be Rs. 24 crores. If this condition stood, then for a bid to be accepted atleast one work of each contractor should have cost not less than Rs. 24 crores. Perhaps, this was felt to be too stringent and unrealistic. Thereafter they revised it again as extracted above. Tested against the condition as it now stands the petitioner has not completed even one similar multi-storied building. But the condition cannot be said to be arbitrary or mala fide. The respondents appear to have weighed the various relevant factors and arrived at the conclusion.

26. This is also what the Supreme Court refers to as "pragmatic adjustment" in

Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, . The Supreme Court held in that case that Government must have "reasonable play" in its joints as a necessary concomitant for an administrative body in an administrative sphere and that it is entitled to pragmatic adjustments depending on circumstances and Courts cannot strike down terms of a tender because the Court feels other terms would have been wiser or logical. In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, the Supreme Court observed that the State can choose its own method to arrive at a decision, that it can fix its own terms of invitation to tender and that is not open to judicial scrutiny and that, it can enter into negotiations before finally deciding to accept one offer and that, price need not always be the sole criterion for awarding a contract and for bona fide reasons, tender conditions may be relaxed. The Supreme Court also observed in the same decision that even if 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 and that though Court should always keep the larger public interest in mind and should intervene only when it comes to a conclusion that overwhelming public interest requires interference. No such public interest is present in this case.

27. Further the respondent has given reasons for increasing the value criterion, the petitioner appears to have no objection to this. As regards the changes in the "height criterion" it cannot be said that there has been a major deviation. What was referred to as "similar works" in the common or composite pre-qualification notice is specified as similar multi-storied building in the tender document for the contract for construction of multi-storied building.

28. The objection to the evaluation by RITES on the ground it was not informed to the petitioner cannot be sustained. This only makes the decision-making process more fair since it is an independent body which is assessing the competing bids.

29. In M/s. G. J. Fernandez Vs. State of Karnataka and others, , the Supreme Court held that the conditions in stipulation in a tender notice have two types of consequences, the first is that the party issuing the tender has the right to enforce them strictly and the second consequence is not that the party issuing a tender cannot deviate from the guidelines and if any such deviations are made, it should not result in arbitrariness or discrimination. In that case the Karnataka Power Corporation "made some changes in the time frame originally prescribed. These changes affected all the applicants alike and were not objectionable." It was held that in the same way, the changes or relaxation in other directions would be unobjectionable, unless the benefit of those changes or relaxation were extended to some but denied to others. But in this case there is no such discrimination between the tenderers.

30. The learned Senior Counsel also referred to the following paragraph from "Facets of Vigilance - Prevention to Prosecution" by K.L. Malhotra and at page

352 while dealing with common irregularities in execution of works, tenders and contracts, the following paragraph is found:

"3. Prequalification of contractors:

Very often it is seen that only Contractors known to the officials of the Organisation and to the architect are place on the select list. This system gives considerable scope for malpractices, favouritism and corruption. It is therefore necessary to fix in advance the minimum qualifications, experience and number of works of a minimum magnitude satisfactorily executed in terms of quality and period of execution. After fixing the basic criteria to be fulfilled, applications should be invited by advertisements in the Press supported by certificates of satisfactory completion in respect of quality and time. It has to be ensured that all firms satisfying completion in respect of quality and time. It has to be ensured that all firms satisfying the minimum criteria are placed on the select list and also that no firm which does not satisfy the minimum criteria is placed on the select list."

31. The conditions referred to above do not seem to have been violated. M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, was referred to by the learned Senior Counsel appearing for the petitioner where the Supreme Court observed that the whole structure was built in contravention to the provisions of law and must be dismantled and the construction of the underground shopping complex would perpetuate an illegality. So it was submitted that when the third respondent knew that the proceedings were pending and still ventured to begin the works, he cannot take advantage of an illegality and plead equity. To this, the learned counsel for the third respondent would submit that, that ratio will not apply to the present case. In that case the structure was built in contravention of all the statutes, but that is not so with regard to the construction begun by the third respondent. A tender had been legally awarded to the third respondent and he had proceeded to construct. I am inclined to accept this submission of the third respondent.

23. For the following reasons, viz.,

- (1) the petitioner having received the amended tender with the correction note on 06-04-2004, had made his bid one month later without objecting to the amendment and therefore, cannot challenge it later after his tender was rejected;
- (2) on a proper construction of the amended condition the petitioner's bid does not qualify;
- (3) the amendment is not a mala fide amendment nor a serious deviation warranting interference. It is more an amendment which is explainable and in any event, the respondent is entitled to a "a little play in its joints";
- (4) the change affected all applicants equally, there is no discrimination;
- (5) the assessment by RITES, an independent body cannot vitiate the process

merely because that was not intimated to the petitioner and

(6) even assuming that the petitioner is the lowest bidder, that is not the only criterion nor the decisive factor and; finally, since the discretionary power cannot be lightly exercised in this case and since no gravely tainting factor is found, the writ petition fails and the same is dismissed. No costs.