

Before Krishna Murari, CJ and Arun Palli, J.

**CEIGALL GAWAR (JV) A-898, TAGORE NAGAR,
LUDHIANA—Petitioner**

versus

STATE OF PUNJAB AND OTHERS—Respondents

CWP No. 6473 of 2019

May 22, 2019

***Constitution of India, 1950— Art.226—Contract—
Commercial functions—Courts ordinarily not to enter realm—
Technical bid rejected on technical grounds—Ineligible—Financial
bid not opened—No mandamus to Tendering Authority—Departure
from norms in bid document—impermissible.***

Held that, to issue mandamus requiring respondent No.4 to apply the terms and conditions which are not culled out or incorporated in the RFB issued for the tender in question would tantamount to a mandamus to the respondents' authorities to depart from the stated terms and conditions of the RFB it has issued. The same shall be in violation of the well settled principles that the Tendering Authority is bound to adhere to the norms, standards and procedures laid down in the bidding document and any arbitrary departure from such norms would not stand test of law.

(Para 25)

Further held that, Tendering Authority is enjoined to rigidly enforce essential conditions of a bid document put forth by it in public domain and in case of non compliance it is enjoined to reject such bid.

(Para 26)

Further held that, in the event, respondent No.4 was to adopt the criteria different from that stipulated in RFB issued for the project as is being suggested by the petitioner, it would lead to uncertainty and discrimination qua other bidders in the fray. Given that the bid capacity of all the bidders for the project in question has been computed in a uniform manner, strictly in accordance with the terms of the RFB issued for the project and thus, a fair, non-discriminatory and non-arbitrary approach has been adopted by respondent No.4 which cannot be faulted with.

(Para 28)

Further held that, it is well settled that award of contract is

essentially a commercial transaction and evaluation of the tenders are essentially commercial functions. Commercial consideration includes the ability of a tenderer to deliver goods or services or to do work of requisite standard. The financial computation involved in the process of finalizing the tender capacity and efficiency of the bidder and perception of feasibility of completion of the project have to be within the domain of the financial experts and consultants and the Courts ordinarily would not enter into the said realm in exercise of powers of judicial review.

(Para 29)

Puneet Bali, Senior Advocate with
Vibhav Jain, Advocate,
RP Saini, Advocate,
Satyam Aneja, Advocate,
for the petitioner.

Atul Nanda, A.G., Punjab with
Rameeza Hakeem, A.A.G., Punjab &
Amanat Chahal, A. A.G., Punjab.

Satish Singla, Government Senior Standing Counsel for
respondent No.2-Union of India.

Akshay Bhan, Senior Advocate with
Dr. Ashwinie Kumar Bansal, Advocate and
Alok Mittal, Advocate and
Baljinder Singh, Advocate, for respondent No.5.

KRISHNA MURARI, CHIEF JUSTICE

(1) Aggrieved by the rejection of its technical bid submitted in response to a notice dated 21.01.2019 issued by respondent No.4 calling for a bid for selection of a contractor for engineering, procurement, construction, testing, commissioning of approaches to Rail Over Bridge & Rail Under Bridge on Pakhowal Rail Road crossing and development of Rotary club as Smart street in Ludhiana City under Smart City Mission, the petitioner, a joint venture, has invoked the extra ordinary jurisdiction conferred upon this Court under Article 226 of the Constitution of India.

(2) Petitioner is a joint venture comprising of M/s Ceigall India Ltd. and M/s Gawar Construction Ltd. having a share holding of 74% and 26%, respectively. This joint venture was entered between the respective companies on 20.02.2019 for the purpose of bidding a tender

issued by respondent No.4-Ludhiana Smart City Ltd. (hereinafter referred to as 'LSCL'). It is a Special Purpose Vehicle (hereinafter referred to as 'SPV') established as a limited company under the Companies Act, 2013 incorporated as per the Mission Statement & Guidelines issued by the Ministry of Urban Development for the purpose of implementation of Smart City Mission. Under the Mission Statement & Guidelines issued by the Ministry of Urban Development, Government of India, the Smart City Mission has to be operated as Centrally Sponsored Scheme and the Central Government proposed financial support to the Mission to the extent of Rs.48,000/- crores over five years i.e. on an average of Rs.100/- crores per city per year for the cities selected as Smart Cities and equal amount on matching basis is required to be contributed by the State/Urban Local Bodies.

(3) The Scheme further provides that the implementation of the Mission at the city level will be done by a SPV, created for the purpose to plan, appraise, approve, release funds, implement, manage, operate, monitor and evaluate the smart city development project. Each smart city is proposed to have a SPV to be headed by a full time Chief Executive Officer (CEO) and to have nominees of Central Government, State Government and Urban Local Bodies on its board. The execution of the project may be done through joint venture subsidiaries, public private partnership (PPP), turnkey contracts, etc. suitably dovetailed with revenue streams. The SPV is a public limited company to be incorporated under the Companies Act, 2013 at the city-level in which the State/UT and Urban Local Bodies will be the promoters having 50-50 equity share holding.

(4) In accordance with the Mission Statement Guidelines, respondent No.4 was incorporated as the SPV for Ludhiana City situated in Punjab. A Request For Bid (hereinafter referred to as 'RFB') was issued vide notice dated 21.01.2019 for the selection of contractors for engineering, procurement, construction, testing, commissioning of approaches to Rail Over Bridge & Rail Under Bridge on Pakhowal Rail Road crossing and development of Rotary club as Smart street in Ludhiana City including two years defect liability period.

(5) Initially, the first notice of RFB was issued on 05.07.2018 prescribing 30th July as the last date for submission. However, since only a single bid was received in response to the notice in accordance with the Standard Operating Procedures of Department of Local Government, Punjab, providing that if there were less than three bids, the same were not to be opened in the first call of tender and

accordingly the said tender was cancelled.

(6) Another notice of RFB was issued on 07.08.2018. Till the last date of submission of bids, since only two bids were received, again in view of the Standard Operating Procedure, the same were not opened and the tender was cancelled.

(7) For the third time, fresh RFB was issued inviting tenders on 20.09.2018. However, only one bid was submitted by M/s S.P.Singla Construction Pvt. Ltd. The technical bid submitted by the bidder was opened on 08.10.2018. After approval of the evaluation report by the City Level Technical Sub-Committee, Ludhiana as well as State Level Technical Committee, an approval was accorded on 11.10.2018 to open the financial bid of the said bidder. On 12.10.2018, the financial bid was opened which was for a sum of Rs.132,77,00,000/- . Since the bid amount was found to be unusually high and completely unbalanced against the project costs of Rs.62,24,00,000/-, this tendering process was also annulled. However, in view of the unbalanced bid received and low participation of bidders, a decision was taken to rework the estimates according to Standard Data Book of Ministry of Road Transport & Highways (hereinafter referred to as 'MoRTH'). Accordingly, the revised cost estimates were worked out as per MoRTH to be Rs.73.57 crores by the office of the Chief Engineering, PWD (B&R), Patiala.

(8) After the revision of the costs, a fresh notice of RFB was issued on 22.01.2019 for a revised estimate of Rs.72.21 crores. The last date for submission of bids was prescribed as 22.02.2019. In response to this notice, two bids were received - one from M/s Ceigall India Ltd. and M/s Gawar Construction, a joint venture (the petitioner) and another from M/s Deepak Builder and Engineers India Pvt. Ltd. (respondent No.5).

(9) The technical bids submitted by the aforesaid two bidders were opened on 22.02.2019. Since the petitioner had not submitted the details of the value of works in Form T-8(b) for the projects detailed in the tender at Sr. Nos. 8, 9 and 10 which was a requirement in the respect of the lead member of the joint venture, the Project Management Committee (hereinafter referred to as the 'PMC') of the SPV sought clarification by way of two e-mails dated 25.02.2019 and 27.02.2019 in respect of value of works involved therein and whether agreements had been signed in relation thereto. The petitioner provided the requisite details while also making reference to the MoRTH RFP Amendment letter dated 07.06.2018 whereby an amendment was made

in the model RFP regarding bid capacity to be issued by MoRTH. The amendment suggested was that while calculating the bid capacity as per the formula given for assessment of Available Bid Capacity i.e. $(A * N * 2.5 - B)$ while determining the value of B the works for which the Letter of Award (LoA) has been issued but the Appointed Date/Commencement Date is not declared as on Bid Due Date, shall not be taken into account.

(10) PMC prepared a Technical Bid Evaluation Report which was placed before the City Level Technical Sub-Committee on 28.02.2019. The PMC made a presentation with regard to various aspects of qualification criteria and the Bid Evaluation Report. As per the formula set out in the RFB issued by respondent No.4, on evaluation of the technical bid, it was found that the petitioner had a negative bid capacity of Rs. - 470.40 crores and thus was ineligible for further participation in the tender process and financial bid submitted by it was not liable to be opened. However, the bid capacity of other bidder i.e. respondent No.5 was found to be Rs.739.59 crores. After due deliberations by City Level Technical Sub-Committee as well as State Level Technical Sub Committee, a decision was taken that the petitioner was disqualified to participate in the bid process any further as it did not qualify on technical grounds.

(11) It is the rejection of the technical bid submitted by the petitioner which is under challenge in this petition.

(12) Shri Puneet Bali, learned senior counsel appearing for the petitioner vehemently contended that the technical bid has wrongly been rejected and the petitioner has wrongly and illegally been disqualified from participating in the further tender process. It is further submitted that while calculating the assessed available bid capacity of the petitioner in accordance with Clause 4.4 of the RFB, respondent No.4 has wrongly and illegally included the value of work where LoA were received but the Appointed Date was not issued by the competent authority.

(13) In reply, learned Advocate General representing the State of Punjab and respondent No.4 submitted that MoRTH RFP Guidelines where upon the reliance is being placed by the petitioners to contend that the value of work for which appointed date was not issued ought not have been included, have no application whatsoever to the RFB issued by respondent No.4 for the project in question. It is further submitted that the circular dated 07.06.2018 which is being relied upon by the petitioner is a document incorporating certain amendments in

Model RFP issued by MoRTH/NHAI and is not applicable to the RFB in question.

(14) Much stress has been laid by the learned Advocate General on the contention that the circular dated 07.06.2018 being an amendment to Model RFP of MoRTH/NHAI would have no application to the present tender for which RFB has been issued under the Ministry of Urban Development, Government of India and is based on Standard Bidding Document issued by the Public Works Department of the State of Punjab.

(15) It is also submitted that the RFB issued for the present project is a complete and independent document in accordance with which the bids were to be invited and evaluated and accordingly the tender was to be awarded. No terms and conditions other than the one specified in project RFB would be attracted or said to be incorporated or made applicable to the invitation and evaluation of bids and/or of the project whether by way of reference or otherwise, expressly or by implication.

(16) Learned Advocate General further submitted that by means of the instant petition, the petitioner seeks to call upon respondent No.4 to apply the terms and conditions of RFP of MoRTH which are ex-facie not applicable to the tender in question and issuing a mandamus to the respondents would tantamount to depart from the terms and conditions of RFB issued by respondent No.4, which would be against the well settled principle that the Tendering Authorities are bound to adhere to the norms and procedures laid down in the bidding document and any arbitrary departure from such norms would tantamount to a grave illegality.

(17) The argument on behalf of the petitioner revolves around the factum of application of MoRTH guidelines while computing the bid capacity of the petitioner. In order to appreciate the controversy it may be relevant to reproduce clause 4.4 of the RFB issued for the tender in question which prescribes the procedure for calculating the bid capacity of the tendere rs and the contents of the letter dated 07.06.2018 bringing about the amendment in the standard bidding document of MoRTH.

“4.4 The bid capacity of the prospective Bidders will be calculated as under:

Assessed Available Bid capacity = $(A * N * 2 - B)$ Where

A = Maximum value of Works executed in any year during the last three years (updated to the price level of year indicated in Appendix) taking into account the completed as well as works in progress.

N = Number of years prescribed for completion of the works for which bids are invited.

B = value (updated to the price level of the year indicated in Appendix) of existing commitments and on-going works to be completed during period of completion of the works for which bids are invited.

Note: The statement showing the value of existing commitments and on-going works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the officer, not below the rank of an Executive Engineer or equivalent.”

2.2.2.1 Bid Capacity

Bidders who inter alia meet the minimum qualification criteria will be qualified only if their available BID capacity is more than the total BID value (value as per Clause 1.1.1). The available BID capacity will be calculated as per following based on information mentioned at Annexure-VI of Appendix 1A.

Assessed Available BID Capacity :- $(A*N*2.5-B)$, where

N = Number of years prescribed for completion of work for which Bid is invited.

A = Maximum value of civil engineering works in respect of EPC projects executed in any one year during the last five years (updated to the price level of the year indicated in table below under note) taking into account the completed as well as works in progress. The EPC project includes turnkey project/item rate contract/Construction works.

B = Value (updated to the price level of the year indicated in table below under note) of existing commitments, works **for which Appointed**

Date/Commencement Date has been declared or on-going works to be completed during the period of completion of the works for which BID is invited. For the sake of clarification, it is mentioned that works for which LOA has been issued but Appointed Date/Commencement Date not declared as on Bid Due Date shall not be considered while calculating value of B.

Note: The Statement showing the value of all existing commitments, works for which **Appointed Date/Commencement Date has been declared** and ongoing works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the client or its Engineer-in-Charge not below the rank of Executive Engineer or equivalent in respect of EPC Projects or Concessionaire/Authorized Signatory of SPV in respect of BOT projects and verified by Statutory Auditor. The factors for updation of the value of Civil Engineering Works to the price level of the year are indicated as under:-

Year	Year-1	Year-2	Year-3	Year-4	Year-5
Updation Factor	1.00	1.05	1.10	1.15	1.20

2. Contents of this circular may be brought to the notice of all concerned for immediate compliance.

3. This issues with approval of Competent Authority.”

(18) Placing strong reliance upon clause 2.2.2.1 of the MoRTH guidelines, learned senior counsel for the petitioner has contended that the same ought to have been applied while computing the bid capacity of the petitioner.

(19) The dispute revolves around the method of determination of the bid capacity of the prospective tenderers. In accordance with the RFB of the tender in question, the assessed available bid capacity is to be calculated by applying the formula $A \cdot N^2 - B$ where ‘A’ is maximum value of works executed in any year during last three years. ‘N’ is number of year prescribed for completion of works for which bids are invited whereas ‘B’ is the value of existing commitments and

ongoing works to be completed during the period of completion of works for which bid is invited whereas according to the amended RFP of MoRTH while calculating the value of B for determination of the bid capacity, the work for which though LoA has been issued but appointed date/commencement date has not been declared as on bid due date shall not be taken into account while calculating the value of B.

(20) In the RFB for the tender in question, the current contract commitments/work in progress was required to be submitted in Form T-8(b) titled “Current Contract Commitments/Works in Progress”. The said format in the RFB stipulates that the bidders should provide information on their current commitments on all contracts that have been awarded, or for which a letter of intent or acceptance has been received or for contracts approaching completion but for which an unqualified, full completion certificate has yet to be issued. The format is an integral part of the RFB for the project in question and binding on the bidders which becomes apparent from a perusal of clause 3.2 of the RFB which provides as under:-

“3.2 All bidders shall provide the information in the form specified in Section 1, Forms of Bid and qualification Information.....”.

(21) A perusal of the clause 4.4 and particularly the words “value of existing commitments and ongoing works” used therein make it abundantly clear that for computation of the bid capacity the value of such commitments and ongoing works have to be taken into consideration. The meaning of existing works and ongoing contracts is explained in Form T-8(b) which stipulates that information is to be provided on all the contracts that have been awarded, or for which a letter of intent or acceptance has been received or for contracts approaching completion but for which completion certificate has not been issued.

(22) Conditions set out in Clause 4.4 do not carve out any exception of excluding any such existing commitment for which though LoA has been issued but the appointed date/commencement date has not been declared unlike the condition existing in the MoRTH RFP brought in by way of amendment carried out vide letter dated 07.06.2018.

(23) It is not in dispute that the project for which the RFB has been issued is being implemented under Smart City Mission under the Ministry of Urban Development, Government of India and not under

the Ministry of Road, Transport and Highways which brought an amendment in its RFP vide letter dated 07.06.2018, which is being strongly relied upon by the petitioner. How the conditions enumerated in RFP issued by one Department would stand attracted and can be made applicable in the RFB issued by Special Purpose Vehicle which has been incorporated under the Companies Act for the purpose of Smart City Mission Project under the aegis of completely different departments, namely, the Ministry of Urban Development has not been answered by the petitioner.

(24) Further more, the RFB for the project in question is based on standard bidding document issued by the Public Works Department of the State of Punjab. A perusal thereof would go to show that definition of bid capacity and the information in relation to existing commitments and ongoing contracts to be provided by prospective bidders is *para materia* with the provisions contained in RFB issued for the project in question. On the other hand, a perusal of clause 2.2.2.1 of the MoRTH Model RFP (as amended by MoRTH Guidelines) and that of clause 4.4 of present RFB would yield the following distinctive features:-

- i) Two documents contain a different method for determining the value of B. In case of RFB for the project in question, the value of B is to be determined on the basis of existing commitments and ongoing works whereas in the MoRTH RFP guidelines, while determining the value of B, the works for which the appointed date/commencement date has not been declared are to be excluded.
- ii) The formula for bid capacity in two documents is entirely different. In the MoRTH Model RFP the bid capacity is computed by applying multiple of 2.5 to the project of $A*N$ while under RFB in respect of the project in question only multiple of 2 is to be applied.
- iii) In case of joint venture under the RFB issued for the project in question the lead member has to meet at least 51% of the requirement of the bid capacity and financial capacity whereas under the MoRTH Model RFP the lead member has to meet at least 60% of the requirement of the bid capacity, technical and financial capacity.
- iv) Another important aspect worth noting is that under the MoRTH Model RFP, the joint venture is not even

permissible for the projects having value of less than 100 crores whereas there is no such restriction in the RFB issued for the project in question.

(25) There is yet another aspect of the matter. To issue mandamus requiring respondent No.4 to apply the terms and conditions which are not culled out or incorporated in the RFB issued for the tender in question would tantamount to a mandamus to the respondents' authorities to depart from the stated terms and conditions of the RFB it has issued. The same shall be in violation of the well settled principles that the Tendering Authority is bound to adhere to the norms, standards and procedures laid down in the bidding document and any arbitrary departure from such norms would not stand test of law. Reference may be made to the decision of the Hon'ble Apex Court in the case of *West Bengal State Electricity Board versus Patel Engineering Co. Ltd. and others*¹ wherein it has been observed as under:-

“24.It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided.”

¹ (2001) 2 SCC 451

(26) Rather a Tendering Authority is enjoined to rigidly enforce essential conditions of a bid document put forth by it in public domain and in case of non compliance it is enjoined to reject such bid. In case of *B.S.N. Joshi & Sons* versus *Nair Coal Services and others*², it has been held as under:-

“ 66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) xxxxx

(v) xxxxx

(vi) xxxxx

(vii) xxxxx”

(27) In the case of *Air India Limited* versus *Cochin International Airport Limited*³, the Apex Court has clearly laid down that while State is at liberty to choose its own method to arrive at a decision, there is an obligation cast upon them by which they are bound to adhere to the norms, standards and procedures laid down in the tender documents and there cannot be any arbitrary departure from the same.

(28) In the event, respondent No.4 was to adopt the criteria different from that stipulated in RFB issued for the project as is being

² (2006) 11 SCC 548

³ 2000(2) SCC 617

suggested by the petitioner, it would lead to uncertainty and discrimination qua other bidders in the fray. Given that the bid capacity of all the bidders for the project in question has been computed in a uniform manner, strictly in accordance with the terms of the RFB issued for the project and thus, a fair, non-discriminatory and non-arbitrary approach has been adopted by respondent No.4 which cannot be faulted with.

(29) It is well settled that award of contract is essentially a commercial transaction and evaluation of the tenders are essentially commercial functions. Commercial consideration includes the ability of a tenderer to deliver goods or services or to do work of requisite standard. The financial computation involved in the process of finalizing the tender capacity and efficiency of the bidder and perception of feasibility of completion of the project have to be within the domain of the financial experts and consultants and the Courts ordinarily would not enter into the said realm in exercise of powers of judicial review.

(30) In the case of *Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) and another* versus *CSEPDITRISEH Consortium and another*⁴, the Apex Court has observed as under:-

36.At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd.....”

(31) In *Montecarlo Limited* versus *National Thermal Power*

⁴ (2017) 4 SCC 318

*Corporation Ltd.*⁵, it has been held that when a decision is taken which is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court would follow the principle of restraint. It may be relevant to extract the following observations from the said judgment:-

“**25.** Recently in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.* [*Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818 : (2016) 8 Scale 765] a two-Judge Bench eloquently expounded the test which is to the following effect:

“We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third-party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial

⁵ (2016) 15 SCC 272

feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

(32) Referring to note in Clause 4.4, learned senior counsel for the petitioner submitted that in view of the requirement in the note for the details to be supplied by the tenderer in Form T-8(b) to be counter signed by the officer of the authority for whom the bidder is undertaking the said works is itself indicative of the fact that such work for which the appointed date has not been specified, it cannot be considered for calculating the value of the ‘B’ for the purpose of bid capacity for the simple reason that the authority signing the document itself does not consider the said works within the category of the existing commitments. For a ready reference the provision of the note is being reproduced hereunder:-

“Note: The statement showing the value of the existing commitments and ongoing works as well as the

stipulated period of completion remaining for each of the works listed should be counter signed by the officer, not below the rank of an Executive Engineer or equivalent.”

(33) In our considered opinion the provisions extracted above are only meant for certifying the veracity of the details to be submitted by the tenderer of the existing commitments of ongoing works and the stipulated period of completion remaining for each of the works so disclosed by him. The provisions of the said note cannot be taken for importing the provisions of MoRTH RFP guidelines into the RFB issued for the project in question as has been suggested by learned senior counsel for the petitioner.

(34) In the light of the aforesaid discussion, it is evident that MoRTH RFP guidelines cannot be referred to or relied upon for the purpose of ascertaining the rights and obligations of the bidders for the project by deviating from the conditions enumerated and set out in the RFB for the project in question. It is, therefore, only the terms of the RFB for the project in question that needs to be strictly applied. The MoRTH RFP guidelines thus will have no applicability to the case at hand.

(35) Thus, the first argument advanced by learned counsel for the petitioner has no force and is not liable to be accepted.

(36) The next submission advanced by the learned senior counsel for the petitioner is that no reason has been disclosed either in the decision rejecting the technical bid of the petitioner or during the process of evaluation of the technical proposals carried out by various committees. It is also contended that no formal communication was made to the petitioner with respect to the decision of rejection of its technical bid. Learned senior counsel also submitted that the absence of reasons in the deliberations for the conclusion of rejecting the technical bid shows a complete absence of application of mind by the committees and thus the decision stands vitiated.

(37) Learned Advocate General, Punjab in reply contends that there has been adequate consideration of the petitioner’s contention with respect to the application of MoRTH guidelines before the final decision in the matter. The deliberations were made by the City Level Technical Sub Committee (CLTSC), Ludhiana, in its meeting held on 28.02.2019 and MoRTH guidelines were found to be inapplicable to the project in hand. The Technical Bid Evaluation Report (TBER) was thus approved and was forwarded with recommendation for approval by the

State Level Technical Committee (SLTC). The SLTC in its meeting held on 06.03.2019 deliberated upon the recommendations received and unanimously accorded that MoRTH guidelines were not in line with the RFB issued for the project. Accordingly, SLTC was also of the opinion that the bid of the petitioner stood technically disqualified. The contention that no reasons were accorded by various committees is misconceived in facts as well as in law.

(38) To support the facts, learned Advocate General has drawn the attention of the Court to the TBER filed as Annexure R-1, the minutes of the meeting of the CLTSC dated 28.02.2019 filed as Annexure R-2 as well as SLTC filed as Annexure R-3 to the counter affidavit. A perusal of the aforesaid documents lends credence to the contention of the learned Advocate General inasmuch as the issue of applicability of the MoRTH guidelines put forward by the petitioner has been considered and deliberated before taking a conscious decision that the same would not apply to the RFB issued for the project in question and the petitioner has a negative bid capacity.

(39) The first aspect in this regard to be delved is the legal necessity for recording reasons while rejecting the technical bid. At the outset it may be pointed out that clause 30 of the instructions to the bidders in the tender in question empowers the authority to reject any bid without assigning any reasons. Clause 30 reads as under:-

“30. Employer’s Right to accept any Bid and reject any or all bids:-

The Employer reserves the right to accept or reject any bid and to cancel the bidding process and reject all bids, at any time prior to the award of contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the employer’s action.”

(40) Such clauses have been the subject matter of consideration and interpretation before the Hon’ble Apex Court and the power granted upon the Tender Issuing Authority the right to reject a bid without assigning reasons have been upheld. Reference may be made to the pronouncement of the Hon’ble Apex Court in the case of *State of Orrisa versus Harinarayan Jaiswal and others*⁶, wherein the Apex Court was considering challenge to Clause 6 of the Government Order

⁶ (1972) 2 SCC 36

which read “no sale shall be deemed to be final unless confirmed by the State Government who shall be at liberty to accept or reject any bid without assigning any reason therefor”. Such power conferred was upheld by making the following observations:-

“Even apart from the power conferred on the Government under ss. 22 and 29, we fail to see how the power retained by the Government under cl. (6) of its order dated January 6, 1971 can be considered as unconstitutional..... The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the legislature has empowered the Government to see that there is no leakage in its revenueWhile accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Art. 19(1)(g) or Art. 14 can arise in these cases.....There is no concluded contract till the bid is accepted..... By merely giving bids, the bidders had not acquired any vested rights.....Such a power cannot be considered as an arbitrary power.....”.

(41) It would be imperative to note the distinction in law between the existence of reasons and communication of reasons. While a party may not be necessarily communicated the reasons, it would be necessary for the reasons and the material on which the decision is based to exist in the record and which can be put forth before a Court of law while justifying such action. This view being propounded by us finds support from the judgment of the Allahabad High Court in the case of *City Infrastructure (India) Pvt. Ltd. versus New Okhla Industrial Development Authority, Civil Misc. Writ Petition No. 31442 of 2006* decided on 08.05.2007. The said judgment deals with the specific issue of communication of reasons for rejection of the technical bid *vis a vis* the existence of reasons for such rejection. Aggrieved petitioner therein relied upon the judgment of the Hon'ble Supreme Court in *Star Enterprises versus CIDCO Maharashtra*⁷, to contend that non-communication of the reasons for rejection of the

⁷ 1990(3) SCC 280

technical bid was fatal. Rejecting this contention, the Division Bench of the Allahabad High Court held that the law on the point as also laid down in *Star Enterprises v. CIDCO* (supra) was that although the action must be based on reasons i.e. reasons must exist and must be demonstrable to the Court and there is no such absolute proposition in law for such reasons to be communicated to the bidder. It may be relevant to extract the following observations from the said judgment:-

“35. Now comes the second ground of attack of Sri Vaidyanathan to the decision of respondent No. 1. At the very outset learned Counsel for the petitioner contended that the respondents have not disclosed or communicated any reason to the petitioner for rejection of the technical bid, hence the decision is liable to be set-aside on this ground alone. Reliance was placed upon the judgment of the Apex Court in *Star Enterprises'* case (supra). The Apex Court in the said judgment observed that availability of reasons for actions on the record assures credibility to the action. The reasons in support of such action provides an opportunity for an objective review. The Apex Court in the said judgment observed that the stand of the authority should be made available and ordinarily the same should be communicated to the concerned department. Following was laid down in paragraph 10 of the said judgment-

10. In recent times, judicial review of administrative action has become expansive and is becoming, wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including case of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in

support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The submission of Mr. Dwivedi, therefore, commends itself to our acceptance, namely that when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so.

36. There cannot be any denial that there cannot be any exclusion of a tenderer in the process without there being any valid reason. There has to be valid reason for exclusion of a tenderer from the process. In the present case only communication to the petitioner as disclosed on the record is a letter dated 25th May, 2006 sent by NOIDA to the petitioner that his bid failed to fulfil the eligibility criteria of technical bid. The said is not a communication of any reason but only informing the decision. The reasons have been brought on the record along with the counter affidavit, along with which the report of the Technical Foundation Committee dated 22nd May, 2006 has been filed. Thus when called upon, the respondent have disclosed the reasons on the basis of which the bid of the petitioner was rejected. Although Clause 7.8.2 reserves the right of Chief Executive Officer to reject any tender including the highest tender without assigning any reason but the valid reason has to be there for any action of the authority. The reasons having come on the record, we are not inclined to quash the decision of the respondents only on the ground that reason was not communicated. The judgment of the Apex Court in *Star Enterprises'* case (*supra*) laid down that reasons has to be there and they should be ordinarily communicated but from the above no such proposition can be carved out that non communication of the reason is always fatal.”

(42) The action of respondent No.4 for not communicating the reasons to the petitioner can only be faulted if there is any mandate in law for communicating such reasons, and no such requirement in law

could be demonstrated by learned senior counsel for the petitioner.

(43) In the case of *Jagdish Mandal* versus *State of Orissa and others*⁸ while dealing with the specific case of rejection of a tender, the Apex Court held that there is no necessity to give an opportunity to show cause or pass a speaking order and it was observed that so long as the decision relating to award of contract was in public interest and *bona fide*, the same cannot be interfered with and in such cases the principle of natural justice would stay at a distance. It may be relevant to extract the following from the said judgment:-

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

⁸ 2007(14) SCC 517

power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

27. The learned counsel for the fifth respondent submitted that the Department ought not to have acted on a complaint received against him, without giving him an opportunity to show cause. This contention has no merit. Whether any complaint is received or not, the Department is entitled to verify the authenticity of the document pledged as earnest money deposit. Such verification is routinely done. The Committee was neither blacklisting the tenderer nor visiting any penal consequences on the tenderer. It was merely treating the tender as defective. There was, therefore, no need to give an opportunity to the tenderer to show cause at that stage. We no doubt agree that the Committee could have granted an opportunity to the tenderer to explain the position. But failure to do so cannot render the action of the Committee treating the EMD as defective, illegal or arbitrary.”

(44) This issue has further been emphasized by the Hon’ble Apex Court in a recent decision rendered in the case of *Haryana Urban Development Authority and others* versus *Orchid Infrastructure*

Developers Pvt. Ltd.⁹. It was the contention of the respondent-bidder in the said case that the bid has been rejected by unreasoned order and the same is arbitrary. The facts were that a communication dated 24.09.2004 was sent to the bidder by the Estate Office where it was mentioned that the bid has not been accepted; and hence the earnest money was being returned. The Court observed that the communication of the decision reflects only return of the cheque pursuant to the decision of the Administrator. The decision of the Administrator which was communicated to the Estate Office on 21.09.2004 stated that on consideration of the relevant aspects and the report submitted seven bids are being rejected. The Court after looking into the communication and the report held that there was sufficient reason for rejection of the bid.

“25. Coming to the question whether the Administrator had rejected the bid in an illegal or arbitrary manner, the learned counsel for the plaintiff has submitted that the bid had been rejected by an unreasoned order, as such it was an arbitrary rejection. The learned counsel has drawn our attention to the communication dated 24-9-2004 which has been communicated by the Estate Officer to the plaintiff in which it has been mentioned that the bid has not been accepted, hence earnest money had been refunded. However, this communication of the decision reflects only the return of the cheque pursuant to the decision of the Administrator. The order passed by the Administrator is apparent from the communication of the Administrator made to the Estate Officer, HUDA on 21-9- 2004 which has been extracted above. It is apparent from the rejection order that the reports submitted were considered and decision was taken not to accept the bids with respect to auction of seven properties. It was not a case of singular rejection of the bid made by the plaintiff alone. Six other bids were also not accepted. The reason for rejection has been made clear in Para 15 of the written statement filed by HUDA.....”

26. Thus, it is apparent that the report and recommendations of the Auction Committee consisting of 5 members, was not to accept the bids of big commercial

⁹ (2017) 4 SCC 243

sites as the prices fetched were on lower side which was examined by the Government at the Headquarters level. Considering the auction trends and also taking into consideration the higher prices fetched at Panipat, Panchkula and Faridabad, it was decided to reject the seven bids. Thus, there was due application of mind.

27. In our opinion, when it is apparent from the communication that the reports were considered and what was contained in the report was very much pleaded in the written statement, mere non-production of report was not of any significance in the instant case. We are satisfied that the rejection of the bid by the Administrator was absolutely proper and justified and was beyond the pale of judicial scrutiny. The Administrator had the right to reject the bids and he had rejected it on sufficient ground, duly considering the materials on record as is apparent from the communication dated 21-9-2004. In the interest of the public, revenue of the State and in the interest of HUDA the huge property was saved from being plundered.

31. Reliance has been placed on behalf of the respondent on a decision of this Court in *Star Enterprises v. City and Industrial Development Corpn. of Maharashtra Ltd.* [*Star Enterprises v. City and Industrial Development Corpn. of Maharashtra Ltd.*, (1990) 3 SCC 280] The relied upon portion is extracted hereunder: (SCC pp. 284-85, para 10)

“10. In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and

improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The submission of Mr Dwivedi, therefore, commends itself to our acceptance, namely, that when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the parties concerned unless there be any specific justification not to do so.”

32. No doubt about it that there have to be some reasons for rejection of the bid which are adequately present in the instant case as discussed hereinabove. The decision is of no help to espouse the cause of the plaintiff.”

(45) In the case at hands, admittedly, petitioner was provided with an opportunity to clarify its bid to the extent that the details of the existing commitments and ongoing works submitted by the lead members were not in conformity with the RFB for the project in question.

(46) The minutes of the meeting of the CLTSC and SLTC alongwith the TBER demonstrate due deliberation and consideration of all the relevant issues including non-applicability of MoRTH RFP guidelines. The petitioner’s contention that no reasons have been accorded by various committees is misconceived in facts as well as in law. The duty enjoined upon the respondents’ authorities is to deliberate, apply its mind to the case of the petitioner and that the reasons must exist and be assigned for the rejection of the technical bid and not necessarily to be communicated to the petitioner. In the case at hands the reasons for rejection of the technical bid were non-fulfillment of the bid capacity criteria as computed in terms of the formula contained in Clause 4.4 of the RFB for the tender in question coupled with the non-applicability of MoRTH RFP guidelines which were being relied upon by the petitioner. Seeking communication of the reasons for rejection of its technical bid on the aforesaid ground is not mandated by law.

(47) From the above it is clear that the presence of detailed reasons in the body of an order of rejection is not *sine qua non* so long as the decision is based on reasons/material which could be demonstrated to a Court to record its satisfaction that the order of

rejection is not *ex-facie* arbitrary or irrational.

(48) In view of the legal position discussed hereinabove and there being no mandate in law, in the case at hands, non-communication of a speaking order with reasons to the petitioner cannot be held to be fatal for rejection of its technical bid. Thus the second argument advanced by learned counsel for the petitioner also has no legs to stand.

(49) Last submission canvassed by learned senior counsel for the petitioner is that there were only two bidders for the tender in question. However, the bid of the petitioner having been rejected as technically non-responsive in utter disregard of the MoRTH RFP guidelines automatically left respondent No.5 as the sole bidder. The bid submitted by the petitioner, it is stated, is 7.11 crores less than the bids submitted by respondent No.5 which comes out to be almost 10% of the contract value and thus clearly there is a loss to the State exchequer on account of the arbitrary action on behalf of the respondents' authorities.

(50) The State respondents have responded to the said contention of the petitioner by urging that the scope of scrutiny of commercial matters under judicial review on the touchstone of the public interest is well settled and it has been held that contours of judicial review in such matters are very limited in nature. Learned Advocate General vehemently contended that the award of the contract is essentially a commercial transaction and evaluation of the tenders are essentially purely commercial functions and one of them very important consideration to be taken into account is the ability of the tenderer to deliver goods or services or to do the work of requisite standard and quality. Reliance in support of the contention has placed on the decision of the Hon'ble Apex Court in case of *Jagdish Mandal* versus *State of Orissa* (supra) and *TANGEDCO* versus *CSEPD* (supra).

(51) The very purpose of defining the bid capacity and evaluating the bids offered in response to the RFB on that basis is to ascertain if the bidder has the ability and bandwidth to execute the project within the stipulated completion period. Without there being sufficient bid capacity in all the likelihood, the contractor would not be able to complete the project within the timeline which would be detrimental to public interest and may lead to escalation in the project costs. It is to be noted that the invitation of the bids by way of RFB for the project in question was issued for the 4th time. It is trite law that in the absence of overwhelming public interest or the *malafide*, the Courts should not interfere in award of contracts and sufficient play in the joints should be

afforded to the State authorities in commercial matters.

(52) In the case of *Tata Cellular* versus *Union of India*¹⁰ while considering the question of the scope of judicial review in the case of award of a tender by a public authority, it was held that the principles of judicial review are applicable to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However, the Court went to observe that there are inherent limitations in exercise of that power of judicial review and the right to choose cannot be considered as an arbitrary power. It is only where the power is exercised for any collateral purpose, the exercise of that power can be struck down by a Court of law. It may be relevant to quote the following observations from the said judgment:-

"Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters and the need to remedy any unfairness. Such an unfairness is set right by judicial review." After examining a number of authorities, the Court concluded (at page 687) 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.
- (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 or quasi-administrative sphere.

¹⁰ (1994) 6 SCC 651

However, the decision can be tested by the application of the "*Wednesbury* principle" of reasonableness and the decision should 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 arid unbudgeted expenditure.”

(53) The same view has been reiterated by the Hon'ble Apex Court in the case of *Asia Foundation and Construction Ltd. versus Trafalgar House Construction (I) Limited and others*¹¹. In *New Horizons Limited and another versus Union of India and others*¹², the Apex Court has emphasized the need to allow for certain flexibility in the administrative decision making process while observing that the decision can be challenged only on the *wednesbury* principle of reasonableness i.e. unless the decision is so unreasonable that no sensible person would have arrived at that decision, it should not be interfered with.

(54) Again in the case of *Delhi Science Forum versus Union of India*¹³ while reaffirming the principle, it has been held that if a reasonable procedure has been followed, the decision is not open to challenge except on the *Wednesbury* principle of unreasonableness.

(55) While affirming the aforesaid principle once again, in the case of *Raunaq International Ltd. versus IVR Construction Ltd.*¹⁴, the Hon'ble Apex Court has observed as under:-

“When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in

¹¹ 1997(1) SCC 738

¹² 1995(1) SCC 478

¹³ (1996) 2 SCC 405

¹⁴ (1999) 1 SCC 492

such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.”

(56) Once again reference may be made to the decision of the Hon’ble Apex Court rendered in the case of **TANGEDCO v. CSEPDITrishe Consortium** (supra) wherein it has been held that financial computation, capacity and efficiency of the bidder, perception of feasibility of completion of the project lies within the domain of experts and consultants and Courts ordinarily would not enter into the said realm in exercise of powers of judicial review. It may be relevant to extract the following observations from the said judgment:-

“36..... At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd.”

(57) The view taken by the Apex Court in the case of *Tata Cellular v. Union of India* (supra) and *Jagdish Mandal v. State of Orissa and others* (supra) stand reiterated by the Apex Court in **JSW Infrastructure Ltd. and another** versus **Kakinda Seaports Ltd. and others**¹⁵. Thus it stands well settled that mere offer of a lesser bid by a tenderer is itself not a sole criteria for accepting the bid particularly

¹⁵ (2017) 4 SCC 170.

when the said bidder is not found to be technically qualified and its technical bid is held to be non-responsive and rejected.

(58) It may be pertinent to notice at this stage that Mr. Akshay Bhan, learned senior counsel for respondent No.5 adopted the arguments advanced by learned Advocate General, Punjab. He further submitted that once the petitioner was found to be technically disqualified, his financial bid was never opened and thus there was no occasion for the authorities to have any comparative assessment of the financial bid offered by the petitioner and respondent No.5. After disqualification of the technical bid offered by the petitioner, it was only respondent No.5 who was left alone in the fray and only his financial bid was left before the authorities which was opened and the authorities had no occasion to even know about the quantum of the financial bid offered by the petitioner and thus it does not lie in the mouth of the petitioner to say that he being the L-1, his bid was liable to be accepted.

(59) There appears to be force in this argument as well. The respondents' authorities had no knowledge about the quantum of the bid offered by the petitioner as his financial bid was never opened and thus there was no reason or occasion before the authorities to make a comparative assessment of two bids. Thus the decision taken by respondent No.4 to accept the bid offered by respondent No.5 cannot be faulted on the ground that the bid offered by the petitioner was lower than the one offered by respondent No.5.

(60) The legal proposition which emerges from the aforesaid discussion is that the prescription of the conditions in a tender document is within the domain of the employer and cannot be objected to unless the tender conditions are arbitrary or perverse. The decision making process cannot be challenged, except, where it is shown to be *mala fide* or for collateral reasons. It is not at all necessary that only the L1 bidder ought to be selected for the work. The eligibility criteria to be fulfilled by a bidder is one of the essential requirements and in such a situation it is not necessary to accept the lowest financial bid for the reason that the said bidder may not be having the capacity or experience or may not be found to be technically qualified to provide quality work.

(61) In view of the facts and circumstances of the present case, enumerated hereinabove, neither the tender conditions nor the procedure followed for finalizing the bid can be held to be arbitrary, irrational or against the public interest. Furthermore, once the petitioner

participated in the tender process without objecting to the tender conditions, he cannot be permitted to take u-turn and challenge the tender.

(62) The irresistible conclusion is that petition must fail and accordingly stands dismissed.

(63) However, in the facts and circumstances, we do not make any order as to costs.

Shubhreet Kaur