

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21<sup>ST</sup> DAY OF FEBRUARY 2019

BEFORE

THE HON'BLE MR. JUSTICE ALOK ARADHE

WRIT PETITION NO.902 OF 2019(GM-TEN)

**BETWEEN:**

ONNYX ELECTRONICS  
A COMPANY REGISTERED UNDER THE COMPANIES ACT 1956  
HAVING ITS HEAD OFFICE AT NO 11,  
FIRST FLOOR,  
PLOT NO 13,  
COMMERCIAL CENTRE,  
KARKARDOOMA NEW DELHI - 110092  
REPRESENTED BY ITS AUTHORIZED SIGNATORY

... PETITIONER

(By Mr.M.NAGAPRASAINNA SR. ADV. FOR MS.SUVARNA, ADV.)

**AND:**

1. STATE OF KARNATAKA  
BY ITS PRINCIPAL SECRETARY TO GOVERNMENT  
DEPARTMENT OF PUBLIC WORKS,  
PORTS AND  
INLAND WATER SUPPLY VIKAS SOUDHA,  
BENGALURU - 560001
2. KARNATAKA ROAD DEVELOPMENT CORPORATION LIMITED  
SAMPARKA SOUDHA,  
DR PAJKUMAR ROAD,  
RAJAJINAGAR  
I BLOCK,  
BANGALORE- 560010  
REPRESENTED BY ITS CHIEF ENGINEER
3. BHARAT ELECTRONICS LIMITED  
CORPORATE OFFICE,  
OUTER RING ROAD, NAGAWARA,  
BANGALORE - 560045

REPRESENTED BY ITS CHAIRMAN AND MANAGING  
DIRECTOR

... RESPONDENTS

(By Mr.VIJAY KUMAR A.PATIL AGA FOR R1  
MR. AJAY.J.NANDALIKE ADV. FOR R2  
MR.A.G.HOLLA SR. ADV. FOR MR.M.SADANANDA, ADV.  
FOR R3)

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THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO CALL FOR THE ENTIRE RECORDS PURSUANT TO THE TENDER NOTIFICATION DATED 8.02.2018 AND DECLARE BID OF THE R-3 PURSUANT TO TENDER NOTIFICATION DATED .02.2018 (UNDER ANNEXURE-A TO THE WRIT PETITION) ISSUED BY THE R-2 TO BE NON-RESPONSIVE ON ACCOUNT OF VIOLATION OF KARNATAKA TRANSPARENCY IN PUBLIC PROCUREMENT RULES AND CLAUSE 29 OF THE TENDER CONDITIONS AND CONSEQUENTLY DIRECT THE R-2 TO AWARD THE WORK OF SHORT TERM TENDER IN TERMS OF ANNEXURE-A IN FAVOUR OF THE PETITIONER FORTHWITH.

THIS WRIT PETITION COMING ON FOR *PRELIMINARY HEARING IN 'B' GROUP* THIS DAY, THE COURT MADE THE FOLLOWING:-

**ORDER**

Sri.M.Nagaprasanna, senior counsel for the  
Ms.Suvarna, learned counsel for the petitioner.

Sri.Vijay Kumar A Patil, learned Advocate  
Government Advocate for respondent.No.1.

Sri.Ajay.J.Nandalike, learned counsel for the  
respondent.No.2.

Sri.A.G.Holla, Senior counsel for the  
Sri.M.Sadananda, learned counsel for the  
respondent.No.3.

2. The writ petition is admitted for hearing.  
With consent of the parties, the same is heard finally.

3. In this petition under Articles 226 & 227 of  
the Constitution of India, the petitioner inter alia seeks  
a writ of mandamus declaring the bid of respondent  
No.3 to be non responsive on account of violation of  
Clause 29 of the tender notification as well as Karnataka  
Transparency in Public Procurements Rules, 2000  
(herein after referred to as 'the Rules' for short) and a  
direction to respondent No.2 to award the work in  
question in favour of the petitioner forthwith. In order to  
appreciate the petitioner's grievance, few facts need  
mention, which are stated infra:

A tender notification dated 8.2.2018 was issued for  
up-gradation of 363 members of existing traffic signal

system to Adaptive Traffic Control System and its maintenance at 100 locations in Bangalore City Traffic Police. The petitioner as well as respondent No.3 and another bidder submitted their bids. On 26.02.2018, the bids were opened for technical evaluation but no action could be taken in view of the fact that the code of conduct was imposed in view of ensuing elections in the Karnataka State Legislative Assembly. On 30.10.2018, the tender of respondent No.3 was accepted and it was required to furnish security deposit in terms of clause 25.5 of ITT in the form detailed in Clause 29.1 of ITT for an amount of Rs.3,40,85,910/- within 20 days of the receipt of the Letter of Acceptance and additional security for unbalanced tender amount of Rs.17,16,81,750/- valid up to 30 days from the date of issue of the certificate of completion, failing which respondent No.3 was informed that action as stated in Clause 29.4 of ITT will be taken.

4. The petitioner on 24.11.2018 filed an appeal under Section 16 of the Karnataka Transparency in Public Procurements Act, 1999 (herein after referred to as 'the Act' for short). It is the case of the petitioner that the period of 20 days stipulated in tender document for furnishing security deposit expired on 20.11.2018. However, the period for extension of the security deposit was extended and the respondent No.3 furnished the bank guarantee on 01.01.2019, which was sent for validation. It is the case of the petitioner that the bid of the respondent No.3 was accepted in violation of the terms and conditions of the NIT as well as the provisions of the Act framed thereunder. In the aforesaid factual background, the petitioner has approached this court.

5. Learned Senior counsel for the petitioner has invited the attention of this Court to clauses 28 and 29 of the tender notification as well as Rule 26(3) & (4) of the Rules and has submitted that no extensions could

have been granted to respondent No.3 for furnishing the security deposit. It is pointed out that the respondent No.3 ought to have furnished the security deposit on or before 20.11.2018. However, the security deposit was furnished on 01.01.2019, which could not have been accepted by respondent No.2. It is further submitted that under clause 29(4) of the tender notification, the contract awarded to the respondent No.3 was liable to be cancelled and his Earnest Money Deposit ought to have been forfeited. It is urged that action of respondent No.2 in accepting the bid of respondent no.3 is arbitrary and unreasonable. In support of aforesaid submissions, reliance has been placed on decision of the Supreme Court in **'MONARCH INFRASTRUCTURE (P) LTD. VS. COMMISSIONER, ULHASNAGAR MUNICIPAL CORPORATION AND OTHERS', (2000) 5 SCC 287** and **'W.B.STATE ELECTRICITY BOARD VS. PATEL ENGINEERING CO. LTD. AND OTHERS', (2001) 2 SCC 451.**

6. On the other hand, learned counsel for the respondent No.2 submitted that three bidders had submitted their bid and respondent No.3's bid was lowest, whereas, the petitioner was the second lowest bidder. It is further submitted that all the three bidders were qualified. It is also submitted that the bid of respondent No.3, which is a public sector undertaking is lower than the bid submitted by the petitioner by approximately Rs.6.3 Crores. It is also urged that the writ petition is premature and as and when the contract is awarded to respondent No.3, the petitioner has a remedy by filing an appeal.

7. Learned Senior Counsel for respondent No.3 submitted that on issuance of Letter of Acceptance on 30.10.2018 the contract was complete in view of Section 7 of the Contract Act, 1872 and the acceptance of the offer of respondent No.3 was unconditional. Attention of this Court has been invited to Clauses 25.2, 26.1, 28 as well as 29 of the tender notification. It is

also urged that in view of Clause 2.2 of the tender notification, the petitioner is not eligible as the petitioner is a Joint Venture Company. It is urged that the petitioner should be relegated to the remedy of an appeal under Section 16 of the Act. In support of aforesaid submissions, reliance has been placed on decision of the Supreme Court in '**JAWAHAR LAL BARMAN VS. UNION OF INDIA**', AIR 1962 SC 378 and a decision of this Court in '**M/S KIRLOSKAR BROTHERS LTD. VS. KARNATAKA NIRAVARI NIGAM LIMITED AND OTHERS**', W.P.NO.13514/2008. By way of rejoinder reply, learned counsel for the respondent No.2 submitted that later on a corrigendum was issued and even the Joint Venture Company was made eligible to submit the bid.

8. I have considered the submissions made by learned counsel for the parties and have perused the record. Before proceeding further, *I may advert to the well settled legal principles delineated by catena of*



decisions of the supreme court. **'IN RAUNAQ INTERNATIONAL LTD., VS. IVR CONSTRUCTION LTD.'**, (1999) 1 SCC 492: (AIR 1999 SC 393), it has been held that Court should not interfere in exercise of power of judicial review in dispute between the two rival tenderers in the absence of public interest. Similarly view was taken in **'SANJAY KUMAR SHUKLA VS. BHARAT PETROLEUM CORPN. LTD.'**, (2014) 3 SCC 493: (AIR 2014 SC 3778) and it has been held that the Court should be vigilant against agitation of private disputes under the writ jurisdiction when there is no improper exercise of power on the part of public authority. It has further been held that power of judicial review has to be exercised only when justified by public interest having due regard to the fact situation of the case. In **'BAKSHI SECURITY AND PERSONNEL SERVICES (P) LTD. VS. DEV KISHAN COMPUTED (P) LTD.'**, (2016) 8 SCC 446: (AIR 2016 SC 3585), the Supreme Court summarized the principles with regard to interference in contractual matters and it was

*held that power of judicial review cannot be invoked to protect the private interest over the public interest or to decide contractual disputes. It has been further held that before exercising the power of judicial review, the Court must pose to itself the questions, namely, whether process adopted or decision made is mala fide or intended to favour someone, whether process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably in accordance with law could have reached such a decision and whether public interest is affected.*

9. In the backdrop of aforesaid well settled legal position, facts of the case on hand may be adverted to Section 13 and Section 16(1) of the Act read as under:

*13. Acceptance of Tender.- The Tender Accepting Authority shall, after following such procedure as may be prescribed pass order accepting the tender and shall communicate the information relating to acceptance of tender together with a comparative analysis and reasons*

*for accepting of tender to the procurement entity and the Tender Bulletin Officer: Provided that where the Tender Accepting Authority consists of single officer who is due to retire within the next six months, from the date fixed for the acceptance for tender, he shall not act to accept the tender without obtaining prior approval of the Procurement Entity: Provided further that subject to such general or special order as may be issued by the Government from time to time, the Tender Accepting Authority may before passing order accepting a tender negotiate with lowest tenderer.*

*16. Appeal.- (1) Any tenderer aggrieved by an order passed by the Tender Accepting Authority other than the Government under section 13 may appeal to the prescribed authority within thirty days from the date of receipt of the order: Provided that the prescribed authority may, in its discretion allow further time not exceeding thirty days for preferring any such appeal, if it is satisfied that the*

*appellant had sufficient cause for not preferring the appeal in time. (2) The prescribed authority may after giving opportunity of being heard to both the parties pass such order thereon as it deems fit and such order shall be final. (3) The prescribed authority shall as far as possible dispose of the appeal within thirty days from the date of filing thereof.*

10. Thus, from perusal of aforesaid provisions conjointly it is axiomatic that if an order is passed by the Tender Accepting Authority accepting the tender, an appeal shall lie under Section 16(1) of the Act against an order which may be passed under Section 13 of the Act.

11. In the instant case, admittedly, the contract has been awarded to respondent No.3 on 31.10.2018. Thus, the remedy of appeal is available to the petitioner in the fact situation of the case and the petitioner admittedly has availed of the remedy by filing an appeal under Section 16 of the Act. It is well settled in law that

when a statute creates the rights and liabilities and provides for a mechanism for redressal of grievance, ordinarily a party should take recourse to the remedy provided under the statute. It is trite law that jurisdiction of this court under Article 226 of the Constitution of India is discretionary in nature and is normally not exercised where a statutory alternative remedy is available. [See: '**MODERN INDUSTRIES VS. SAIL**', (2010) 5 SCC 44, '**UNITED BANK OF INDIA VS. SATYAWATI TONDON**', (2010) 8 SCC 110 and '**UNION OF INDIA AND OTHERS VS. MAJOR GENERAL SHRI KANT SHARMA AND ANOTHER**', (2015) 6 SCC 773.] Undoubtedly, in exceptional cases, the Court can permit by passing of a statutory remedy and permit a party to avail of the remedy under Article 226 of the Constitution of India. However, in the instant case, the dispute *prima facie* appears to be between the rival tenderers, in which no element of public interest is involved and therefore, at this stage, I am not inclined to permit the petitioner to

invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, which otherwise is discretionary in nature. The petitioner has already availed of the alternative remedy. Therefore, I deem it appropriate to dispose of the writ petition with a direction to decide the appeal preferred by the petitioner by a speaking order after affording an opportunity of hearing to the parties preferably within 45 days from the date of receipt of copy of this order. It is made clear that this court has not expressed any opinion on the merits of the claim of the petitioner.

With the aforesaid directions, the petition is disposed of.

**Sd/-  
JUDGE**

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