

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 3rd/4th DAY OF DECEMBER 2009

BEFORE

THE HON'BLE MR. JUSTICE AJIT J.GUNJAL,

WRIT PETITION NO.30721/2009(GM-Ten)

BETWEEN :

KLG Systel Limited,
70A, Sect-34, EHTP,
NH-8, Gurgaon-122 004,
Haryana, India,
By its Company Secretary,
Ram Ji Nigam, S/o S.K Nigam,
Aged 31 years, major.

...PETITIONER

(By Sri.Udaya Holla, Sr.Adv. for
Sri.S.Basavaraj &
Sri.H.S.Chandramouli, Adv.)

AND :

1. The State of Karnataka,
By its Secretary to the
Government,
Department of Energy,
Vidhana Soudha,
Bangalore - 560 001.
2. Bangalore Electricity Supply
Company Limited,
Represented by its
Managing Director,
First Floor, 'B' Block.

Corporate Office, K.R.Circle,
Bangalore - 560 001.

3. The Power Finance Corporation,
Urjanidhi - 1,
Barakamba Lane,
Connought Place,
New Delhi - 110 001,
By Director.

4. Ministry of Power,
Shram Shakti Bhavan,
Ratimarg, New Delhi-110 001, ...RESPONDENTS

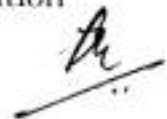
(By Sri.Ashok Haranahalli, AG, a/w.
Sri.N.B.Vishwanath, AGA for R1,
Sri.Kalyan Basavaraj, ASG for R3 & R4,
Sri.Naganand, Sr. Adv., for
M/S.Just Law, Advs. for R2)

This writ petition is filed under Article 226 of the Constitution of India with a prayer to quash the tender invitation notice issued by the R2 Bangalore Electricity Supply Company Limited dated 14.10.2009 copy of which is marked at Annexure 'G' and etc.

This writ petition coming on for *preliminary hearing* in 'B' Group, this day, the Court made the following:

ORDER

The petitioner in this writ petition is questioning the re-tender notification dated 14.10.2009 issued by the respondents for appointment of IT Implementation



Agency, even though the petitioner claims that he emerged as a successful bidder pursuant to the earlier tender notification dated 19.08.2009 under the Re-structured Acceleration Power Development and Reforms. The case of the petitioner is that the 2nd respondent is wholly Government owned undertaking. The subject matter of this writ petition would revolve around the Re-structured Accelerated Power Development and Reforms Programme (for short 'APDRP') during the XI plan. In the year 2003, the Government of India approved Additional Central Assistance of Rs.40,000 crores during the X plan at APDRP out of which a sum of Rs.20,000 crores was towards investment component i.e., towards grant and Loan and Rs.20,000 Crore towards grant under Incentive component. The Ministry took up an evaluation exercise of the programme through independent agencies such as IIM Ahmedabad, Administrative Staff College of India, Tata Consultancy Services, The Energy and Resources Institute (TERI) and



other consultancy services. Suffice it to say that the Ministry of power constituted a Task Force headed by Sri.P.Abraham, former Secretary, Ministry of Power, Government of India, to assess and analyze the current effort and suggestions made by various agencies and to suggest restructuring of the programme to achieve the objectives of APDRP in a better way. The copy of the order passed by the Government of India, Ministry of Power is at Annexure 'A'. A perusal of Annexure 'A' would indicate the guidelines laid down for Restructured APDRP. The case of the petitioner is that the focus of the said APDRP programme is on actual demonstrable performance in terms of sustained energy loss reduction, establishment of reliable and automated systems for sustained collection of accurate base line data. The order at Annexure 'A' would also indicate that the Power Finance Corporation (PFC) would be the Nodal Agency to operationalise the programme under the guidance of Ministry of Power. The said order envisaged that the scheme shall be taken up in two



parts. Part-A shall include the projects for establishment of baseline data and IT applications for energy accounting/auditing and IT based consumer service centers. Part-B shall include regular distribution strengthening projects. Apart from this, the programme was required to enable activities, which would be covered under part 'C'. Part 'A' of the said order would relate to preparation of Base-line data for the project area; Part 'B' would relate to renovation, modernization and strengthening of 11kv level Substations, Transformer Centers; and Part-C would relate to implementation of APDRP and for facilitating the process of reforms in the power sector. Part-C is required to be implemented by Ministry of Power/Power Finance Corporation, which will however include other things like preparation of template for System Requirement Specifications and all other technical data.

2. The Funding Mechanism is pursuant to Part-A. Initially, 100% of the funds for the approved projects shall be provided through loan from the Government of



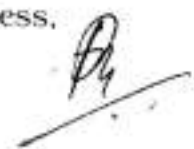
India on the terms decided by the Ministry of Finance. The loan, which is advanced, shall be converted into a grant once it is established that the required system is achieved and verified by an independent agency. The interest on the converted loan shall be capitalized. Indeed the said concession is with a rider that there shall be no conversion of grant according to Part-A, if the project in question is not completed within a period of three years from the date of sanctioning of the project. The project is deemed to have been completed on the establishment of the required system duly verified by an independent agency appointed by the Ministry of Power. As per Part-B, initially up to 25% of the funds of the project shall be provided through loan from the Government of India on the terms decided by Ministry of Finance. For special category States, Government of India loan would be 90%.

3. The case of the petitioner is that Annexure 'B' is an Official Memorandum, which would lay down the guidelines to the APDRP during the X plan. Clause 3.0



of the said Official Memorandum would relate to the Nodal Agency, which is once again, the Power Financial Corporation is deemed to be a Nodal Agency. Suffice it to say that the 2nd respondent has floated a tender. The said tender would indicate that notices are issued for 'IT Implementation Agency' on behalf of all the ESCOMs in Karnataka for implementation of 'IT Infrastructure for Restructured Accelerated power Development and Reforms Programme i.e., R-APDRP. The tender document would also give a time schedule for various activities. Indeed the tender document was issued on 19th August, 2009 and the date of Pre-Bid Conference was 26th August, 2009 and the Bid Security amount was Rs.5 crores in the form of Bank Guarantee from a scheduled Commercial Indian Bank and the last date for submission of the bid was on 7th September 2009.

4. The petitioner along with seven others offered their bids. But however, according to the petitioner, notwithstanding the fact that the petitioner was the lowest bidder inasmuch as he was LI but nevertheless,



the said bid was not accepted and a fresh tender is called for on 14.10.2009. Thus the present writ petition is filed for quashing the tender notice dated 14.10.2009 and also seeking a direction to the respondents to proceed with the tender process initiated by the Tender Invitation Notice dated 19.08.2009.

5. The main contention of the petitioner is that though there is no formal approval of the bid offered by the petitioner, the correspondence inter se between the respondents 1 to 4 is a clear indication of the fact that the same has resulted in a concluded contract. Hence, in the absence of revocation of the said concluded contract, the question of calling for a fresh tender on 14.10.2009 would not arise.

6. On notice, the respondents have entered appearance and have filed their statement of objections. Respondent No.1 - State has filed its objections inter alia contending that after due consideration, the 2nd respondent has taken a decision not to continue with



the tender floated on 19.08.2009. According to the State, the specifications contained in the tender enquiry was found to be different from the specifications contained in the tender floated on 19.08.2009. They would primarily contend that till a bid is accepted and the same is blossomed into a contract, no vested right is created in favour of the petitioner. Since the offer made by the petitioner was not acceptable to the procuring entity, the question of enforcing such an entity for a non-existing contract does not arise. They would also contend that a State level Distribution Reform's Committee was constituted on 18.11.2008 for Re-structured APDRP during the XI plan under the chairmanship of the Chief Secretary to the Government and also the Principal Secretary to the Government as Member of the Committee. During the deliberations it was found that the existing tender, which was floated in the month of August 2009 is not feasible for more than one reason inasmuch as the tender premium was too high i.e., 78% above the amount put to tender and for



other reasons including that technically responsive bids being only two, it is desirable to get more bids and hence a fresh tender is required to be floated inasmuch as there shall be more competitive bids.

7. The 2nd respondent has also filed the Statement of Objections inter alia contending and reiterating what has been sated by the State. They would also fall back upon the deliberations of the State Level Reforms Committee in its meeting held on 14.08.2009. They would also contend that the lowest bid was found to be 77.18% higher than the approved cost of project and that the earlier request for additional fund was also pending and the representation of 2nd respondent to Power Finance Corporation seeking guidance regarding acceptance of any tender also did not elicit any response. The sum and substance is that the said bid not having been crystallized into a contract, the question of enforcing the terms of tender notification, which has become obsolete does not arise. They would also contend that this Court cannot step in and



interfere with the tender deliberations unless it is pointed out that the floating of the second tender is accentuated by malafides and suffers from unreasonableness and arbitrariness. They would further contend that they being the master of the procurement agency and they having found that the amount, which was put to tender was much less than the one quoted by the petitioner, they are entitled to re-think and float a new tender. The 2nd respondent has also made available certain documents relating to the proceedings of the Tender Scrutiny Committee which was held on 24.09.2009 which consisted of The Directors, Technical of several ESCOMS. They have also made available the proceedings of the meeting of group of MDs held on 26.09.2009 indicating that they are required to appraise the State level Distribution Reforms Committee of the steps taken in evaluating the ITIA and finalization of L1 Bidder. Indeed the proceedings of the State Level Distribution Reforms Committee is also made available along with the Statement of Objections.



8. On a request made by the petitioner, respondents 3 and 4 i.e. The Power Finance Corporation and the Ministry of Power are impleaded and Statement of objections are also filed by them. They would contend that in the first instance the 2nd respondent had communicated that the earlier amount sanctioned by the Power Finance Corporation is in deficit and they would require an additional sum of Rs.200 and odd crores, which was being considered by the Power Finance Corporation. But however, according to them, the communication on which reliance is placed by the petitioner, do not reflect true facts inasmuch as nowhere the Government of India has committed that they would advance the said amount.

9. Mr.Udaya Holla, learned Senior Counsel appearing for the petitioners would candidly refer to the Broad Guidelines issued by the Government of India with reference to Annexure 'A' which has already been eluded in the earlier part of the order. He would



contend that without revoking the contract in favour of the petitioner, the 2nd respondent could not have floated the second tender. He would pointedly refer to Section 14 of the Transparency Act. He would further contend that the communication issued by the Government of India and which is replied by the 2nd respondent would conclusively prove that the 2nd respondent had finalized the tender proceedings inasmuch as the petitioner being L1 was awarded the contract. He submits that notwithstanding the fact that there is no formal communication issued by the respondents awarding the contract in favour of the petitioner, a compendious reading of the correspondence inter se between the 1st respondent and 2nd respondent and respondent No.4 would clearly indicate that the terms of the tender are finalized. Hence, it is not open for the respondents now to give a go by to the earlier tender dated 19.08.2009 and come up with another fresh tender on 14.10.2009. According to him the petitioner had legitimate expectation of the contract being awarded inasmuch as



he was the lowest bidder. He would also submit that pursuant to the directions issued by this Court, the petitioner had participated in the second tender also and he was also found to be a serious contender for the said contract. He further submits that the petitioner has also come forward for a negotiation.

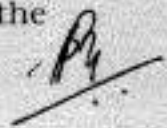
10. Mr.Naganand, learned senior counsel appearing for the second respondent in support of the statement of objections, would contend that there is no concluded contract between the petitioner and the respondent. He further submits that the tender in normal parlance is only an invitation to bid and does not conclusively give an indication that once a bid is offered pursuant to a tender, the same is deemed to have been accepted. He would pointedly refer to Clause No.37 of the tender document to buttress his contention that it is within the domain of the purchaser's right to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to awarding of contract, without thereby incurring any liability to the



bidders. He would primarily contend that a communication of State Level Distribution Reforms Committee has found that the existing tender notification issued in the month of August 2009 is not workable and the bid amount itself was more than the bid offered. He would pointedly further refer to the committee meetings. Insofar as the request for additional grant is concerned, he submits that the documents do not by themselves conclude that the grant has been made. The correspondence, according to him, is only to assess what would be the cost for putting into action the proposed APDRP. He would also press into service Clause 40 of the tender document to indicate that the contract is to be awarded to a successful bidder in writing and that there must be an acceptance on the part of the bidder also. Hence, he submits that it will not come in the way of the second respondent floating a second tender so as to see that the cost of APDRP is minimized.



11. Mr. Ashok Haranahalli, learned Advocate General, with reference to the cost and also the modalities at Annexure-A would contend that the entire 100% of the cost is initially by the grant payable by the Power Finance Corporation and if the project is completed within three years, the said grant will not be converted into a loan. He further submits that the amount put to tender was Rs.338.43 Crores and the offer made by the petitioner is to the tune of Rs.620 Crores. Thus there is a deficit of Rs.200 and odd crores. He further submits that there are 24 empanelled agencies and out of them 8 agencies had participated and 6 of them were non-responsive and 2 were left in fray, i.e., the petitioner and one M/s. Indra L & T. He further submits that High Power Committee has found that there are certain technical modifications which are required to be done. Hence to that extent a fresh tender is required to be called and that could be done having regard to the fact that there is no concluded contract in favour of either to L1 who is the



petitioner or L2 i.e., M/s.Indra L & T. Insofar as the applicability of Section 14 is concerned, he submits that it is within their power to reject the bid so long as it has not crystallized into a contract. Section 14 of the Act, by itself will not come in the way of the State in floating a new tender if the earlier tender is found to be defective for various reasons both, technical and financial.

12. Mr.Kalyan Basavaraj, learned Assistant Solicitor General would support the State as well as the second respondent. He would contend that if the Union is going to be benefited by floating a fresh tender on 14.10.2009 and if it is beneficial, he would submit that in the absence of a concluded contract, the petitioner cannot question the floating of the second tender.

13. The moot question which falls for consideration in this writ petition would be whether it is open for the second respondent to float a second tender when only two bidders were left in the fray after the



tenders of 6 other bidders were found to be non-responsive.

14. Indeed, the argument of Mr.Udaya Holla, learned senior counsel would proceed on the premise that there is a concluded contract. Even otherwise, his submission is that the correspondence, by itself, would give an indication that it is a concluded contract. During the course of argument, the petitioners have made available certain correspondences between the parties i.e., the petitioner, the second respondent and the Power Finance Corporation to contend that there is a concluded contract. But however, before adverting to the correspondences inter se between the parties, it is necessary to dispose of one contention raised by Mr.Udaya Holla, learned senior counsel regarding applicability of Section 14 of the Karnataka Transparency in Public Procurements Act, 1999 (for short, the Transparency Act).



15. Section 14 of the Transparency Act would read as under:

"14. General rejection of tender. - (1) The Tender Accepting Authority may at any time before passing an order of acceptance under Section 13 reject all the tenders on the ground of changes in the scope of procurement, failure of anticipated financial resource, accidents, calamities or any other ground as may be prescribed which would render the procurement unnecessary or impossible and report the same to the Procurement Entity.

(2) The Procurement Entity shall thereafter communicate the fact of the rejection under this section to all the Tenderers and also cause the same to be published in the Tender Bulletin."

A compendious reading of Section 14 would indicate that the tender accepting Authority may, reject all the tenders on several grounds before it is accepted. Indeed, a reading of the said provision indicates that once the tender offered is accepted, Section 14 of the Transparency Act would not come into play. But however, if the tenders are not accepted and if they are still at the nascent stage, inasmuch as, they



are being considered and there is no positive indication that it is likely to be crystallized into a concluded contract. It is open for the tendering authority to invoke Section 14 of the Transparency Act and reject all the tenders on the ground of certain changes which are stated therein. The said rejection of tenders are on couple of grounds

- (1) ground of change in the scope of procurement and
- (2) failure of anticipated financial resource, accidents, calamities or any other ground as may be prescribed which would render the procurement unnecessary or impossible.

One will have to assess and see whether the floating of the second tender is justified and if not, all or one of the ingredients would satisfy the rejection of the tender of the bidders. In the case on hand, it is to be noticed that initially the amount which was put to tender was Rs.368.38 Crores and the bid amount was Rs.652.77 Crores thus there was a substantial difference between the amount put to tender as well as the bid amount as



quoted by the petitioner. To my mind, it would fall squarely into the category of failure of anticipated financial resource. Even otherwise, it is to be noticed that the minutes of the State level distribution Reforms Committee (DRC) has, in their minutes of the meeting, have recorded, after due deliberations, to re-tender because of the following reasons:

- (1) Tender premium is too high i.e., 78% above the amount put to tender
- (2) The technical responsive bids being only two, it is better to get more bids which may result in more competitive bids.
- (3) The GOI has revised certain technical specifications of router midway when last bids being evaluated, retendering would allow these changes which may result in economy.
- (4) Negotiations are not feasible because of lack of benchmarks in the project.
- (5) The process of retendering should be complete by 31.10.2009

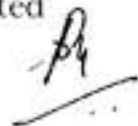


(6) The DRC would meet in the first week of November 2009.

Indeed, the last i.e., point No.6 is not relevant for our purpose. But if one were to go by the deliberations as well as the reasons given by the committee as to why the subsequent tender is required to be floated, to my mind, appears to be justifiable. It is to be noticed that the tender premium is certainly too high i.e., 78% above the amount put to tender. The amount put to tender is Rs.368.38 Crores and the amount quoted is Rs.652.77 Crores.

16. Indeed, in this regard, one will have to take into consideration, the amount as quoted by various bidders and as to the reasons why their earlier bids were rejected. The respondent No.2 has made available the proceedings of the Tender Scrutiny Committee meeting which was held on 24.09.2009. Indeed, it is to be noticed that in all 8 bids were received on 14.09.2009 and they were

(1) M/s.Infinite Computer Solutions (India) Limited

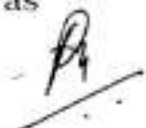


- (2) M/s.BEL
- (3) M/s.Wipro Infotech
- (4) M/s.HCL Infosystems Limited
- (5) M/s.Larsen & Toubro Limited
- (6) M/s.KLG Systel
- (7) M/s.Infosys Technologies Limited
- (8) M/s.Indra L&T

The proceedings of the Tender Scrutiny Committee would indicate that the scrutiny was undertaken to see the compliance with respect to Section IV of the RFP conditions which relates to eligibility criteria for system integrator and all 8 bidders were found eligible as per Section IV of the RFP. The Tender Scrutiny Committee has found that M/s.Infinite Computer Solutions (India) Limited was treated as non-responsive as the disclosure of the price details either in part or complete is violative of tender process. Insofar as M/s.BEL is concerned, the System Application Products in data Processing (SAP) Manufacturer's Authorization's Forms (MAF) furnished contradicted clause 5.2 of the RFP. Hence, the said offer was recommended to be treated as non-responsive.



Insofar as M/s.Wipro Infotech is concerned, the said offer was recommended to be treated as non-responsive as, part of the price bid is included in the hard copy of the technical proposal. Insofar as HCL Infosystems Limited is concerned, it was found that the credentials of the company itself were questionable and the committee was of the view that it needs to evaluate whether to consider the firm's bid. Hence, it was found to be non-responsive. Insofar as M/s.Larsen & Toubro Limited is concerned, it was also found to be non-responsive for the absence of mandatory technical requirement and insofar as Infosys Technologies Limited is concerned, it was found to be non-responsive for the reason that most of the required information was not furnished. The remaining two who were left in the fray, as observed earlier, were M/s. KLG Systel, i.e., the petitioner which was classified as L1 and M/s.Indra L&T classified as L2. Both the petitioner and M/s.Indra L&T were found to have complied with the clauses of RFP. Hence they were recommended to be treated as



responsive and was recommended for further evaluation.

17. The proceedings of the meeting of group of MDs was held on 26.09.2009. The assessment was once again done in the proceedings held on 30.09.2009 which consisted of the Managing Director of KPTCL and other Managing Directors of ESCOM. It was observed that the technical score of the petitioner firm is 42.70 out of 50 and the financial score of the petitioner firm is 50 out of 50 i.e., his total score is 92.70. Insofar as the other competitor i.e., M/s.Indra L&T, the technical score is 41.59 and financial score is 39.24 and the total score is 80.83. But however, with a caveat that the matter was required to be placed before the State Level Distribution Reforms Committee (SLDRC) for approval. Indeed, on deliberation, the SLDRC under the chairmanship, was of the view that the bid of the petitioner was Rs.652.77 Crores and that of M/s.Indra L&T was Rs.790.83 Crores. Thus the technical score of two bidders were 42.70 of petitioner and 41.59 of



M/s.Indra L&T. The committee has further found that the issues which were discussed and put forward before the SLDRC were as under:

- (1) In the light of PFC(Power Finance Corporation/MOP (Ministry of Power) neither confirming nor rejecting the financial ability arising out of relatively higher quote which is Rs.284.36 Crores above the amount put to tender which is Rs.368.43 crores.
- (2) If the above proposal is approved who should bear the additional cost
- (3) Whether to negotiate prices with the bidders to bring down the prices or not.

The Committee, after due deliberations, have decided to retender because of certain reasons which are already extracted in the preceding paragraphs. Thus Section 14 of the Transparency Act will not come to the aid of petitioner.

18. This takes us to the correspondences which was pressed into service by Mr.Udaya Holla, learned



senior counsel to buttress his contention that it amounts to concluded contract, though not specifically stated so. The documents which are made available along with the memo dated 02.11.2009 would commence from a communication issued by respondent No.2. A perusal of the said communication, no doubt, at the first blush, gives an indication that the contract is concluded, but however, on a closer scrutiny of the said communication would reflect only what has taken place till 30.09.2009. The subject matter of this communication is finalization of ITIA. Reference is in respect of the firms i.e., L1 and L2 and their technical as well as financial scores and total. The communication would indicate that the petitioners have quoted Rs.652.77 Crores and as per the above, M/s.KLG Systel scored the highest. But however, pursuant to the said communication, it was brought to the notice of the Director, Power Finance Corporation that the total project cost of Rs.460.84 Crores for 100 towns approved for Karnataka and out of which



Rs.391.34 Crores is the loan portion and the balance being utilities portion of cost. The IT consultants revised the DPR cost to Rs.439.75 crores and on that basis tenders were invited. The bid is Rs.213.02 crores, more than the amount put to tender. Indeed, the communication also indicated that the Power Finance Corporation is requested to consider and confirm the sanction of the additional grant. A compendious reading of the entire communication does not give an indication that it is a concluded contract and the contract is awarded to the petitioner.

19. Indeed, Mr.Udaya Holla, was at great pains to convince this Court that the second respondent has not come out with the true facts before this Court, inasmuch as, the Ministry of Power as well as the Power Finance Corporation had come forward to make good the deficit. A perusal of the said communication no doubt indicates that the Power Finance Corporation as well as the Ministry of Power had stated that a fresh calculation regarding the amount is required be sent.



But that by itself it cannot be presumed or said that there is a suppression of fact and the respondents have withheld certain information and brought the matter before the standing committee. Indeed, it is to be noticed that suppression of material facts, assuming that it is there, must tilt the decision. The Apex Court, in the case of **SJS BUSINESS ENTERPRISES (P) Ltd., Vs. STATE OF BIHAR AND OTHERS** reported in **(2004)7 SCC 166** has observed that suppression should be detrimental to the interest and if it is not so it cannot be said that it is suppression of fact. In the case on hand, I am of the view that it cannot be presumed that there is a suppression of material fact.

20. Indeed, Clause No.37 of the tender document would relate to the Purchaser's right to accept any bid and to reject any or all bid. Clause No.37 would indicate that the tendering authority reserves right to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to award of contract.



21. Clause 40 is in respect of notification of the award of a contract. Clause 40.2 would state that until a formal contract is prepared and executed, the notification of award shall constitute a binding contract. Indeed, in the case on hand, there is no formal contract prepared and is executed. Indeed, the tendering authority reserves its right to accept any bid, or reject any or all the bids. In the case on hand, there were certain compulsions on the part of the respondent to float a new tender having regard to the cost and also regarding certain technical evaluation which was done during the course of the deliberations.

22. Indeed, one more contention was raised by Mr. Udaya Holla, learned senior counsel that without rejecting the bid of the petitioner and without communicating the same, the tendering authority could not have floated a second tender. In this regard, the records are made available by the learned counsel



appearing for the second respondent. The communication would read as under:

"Sub: Appointment of ITIA for RAPDRP Part-A Project in Karnataka.

Ref: Bid Identification No.BESCOM/PROJECTS/RAPDRP/33/09-10 dated 19.08.2009

It is decided to drop the tender called under reference and go for new tender for the appointment of ITIA for RAPDRP Part-A project in Karnataka.

Further, a new tender vide Tender Enquiry No.BESCOM/PROJECTS/RAPDRP/39/09-10 dated 14.10.2009 has been floated. The last date for submission for RFP is fixed as 26.10.2009 at 15:00 Hrs (IST)

BESCOM on behalf of all the ESCOM'S in Karnataka looks forward for your valuable participation.

The new tender document can be downloaded by visiting our website www.bescom.org.

Thanking you."



Indeed, in the face of the said communication, the petitioner cannot be heard to say that he was not informed that the earlier tender notification was annulled and a new tender was being floated which would necessarily mean that the bids stood rejected impliedly.

23. This takes us to the next question regarding the powers of this Court under Article 226 of the Constitution of India regarding judicial review. Time and again, it is stated that unless it is pointed out that the State has acted in an arbitrary manner, unreasonable with malafide intentions and the actions suffers from vices of malafides, the court should restrain from exercising its power under Article 226 of the Constitution. I am of the view that the petitioner has failed to prove that State has acted in an arbitrary and unreasonable manner and the action suffers from vices of malafides. The decisions which are cited at the Bar are many. But it is enough if couple of decisions are referred to. The first of the decisions is in the case of



RAJASTHAN HOUSING BOARD AND ANOTHER Vs. G.S.INVESTMENTS AND ANOTHER reported in **(2007)1 SCC 477**. The relevant portion reads thus:

"Even if some defect was found in the ultimate decision resulting in cancellation of the auction, the Court should exercise its discretionary power under Article 226 of the Constitution with great care and caution and should exercise it only in furtherance of public interest. The Court should always keep the larger public interest in mind in order to decide whether it should interfere with the decision of the authority."

The Apex Court in the case of **ASIA FOUNDATION & CONSTRUCTION LTD. Vs. TRAFALGAR HOUSE CONSTRUCTION (i) LTD. AND OTHERS** reported in **(1997)1 SCC 738** has observed thus:

"Though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in



the matter of award of a contract power has been exercised for any collateral purpose. It is not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the Court has not found any malafides or favouritism in the grant of contract in favour of the successful bidder."

In the case of **AIR INDIA LIMITED Vs. COCHIN INTERNATIONAL AIRPORT LTD. AND OTHERS**

reported in **(2000)2 SCC 617**, it is observed thus:

"The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty V. International Airport Authority of India* [(1979)3 SCC 489], *Fertilizer Corpn. Kangar Union (Regd.) V. Union of India* [(1981)1 SCC 568], *CCE V. Dunlop India Ltd.*, [(1985)1 SCC 260: 1985 SCC (Tax) 75], *Tata Cellular V. Union of India* [(1994)6 SCC 651], *Ramniklal N.Bhutta v.State of Maharashtra* [(1997)1 SCC 134] and *Raunaq International Ltd. V.*



IVR Construction Ltd. [(1991) 1 SCC 492]. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is



found vitiated by mala fides, unreasonableness and arbitrariness.”

In the case of **RAUNAQ INTERNATIONAL LTD. Vs. IVR CONSTRUCTION LTD AND OTHERS** reported in **(1999)1 SCC 492**, it is observed thus:

“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 decide in deciding whether any public interest is involved in intervening in 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."

The apex Court in the case of **ANIL KUMAR SRIVASTAVA VS. STATE OF U.P AND ANOTHER** reported in **AIR 2004 SC 4299** has observed thus:

"An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin."

Indeed, when the matter was listed before this court on 23.10.2009, I had directed that the last date for submission of bid in respect of the second tender be extended till 28.10.2009 in respect of all the participants. Pursuant to the same, the petitioner, it appears, has also participated in the tender. The second respondent has made available the bid offered by the other competitors. The list enclosed would disclose the



technical scores obtained by each of the firm out of 50 and also the price bid details. A perusal of the same would indicate that the price quoted by the petitioner is Rs.525 Crores and the technical scores of the petitioner is 40.94. Hence, it was found that even in the second attempt, the petitioner was not eligible, inasmuch as, the price quoted by him was much above the amount put to tender. The nearest it appears is M/s.Infosys, the price quoted by them is Rs.398.68 and their technical score is 43.51. Of Course, it is not for this Court to adjudicate upon the outcome of the second tender. But for the present, I am of the view that the question of interference does not arise. Having regard to the finding recorded by me that there is no arbitrariness or unreasonableness or the action suffers from any vices of malafides, the petitioner is not entitled for any of the reliefs.

Petition stands rejected.



Learned Advocate General is relieved of the undertaking given by him.

Sd/-
JUDGE

SPS/AI/-