



# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra-Ordinary Jurisdiction)

**WP(C) No.27 of 2010**

FR  
19/08/20

1. M/s. Prasad and Company (Project Works) Ltd.,  
having its registered office at Hyderabad,  
P.O. Begumpet, Andhra Pradesh  
represented by and through  
the Manger of the Company.
2. Mr. Renukuntla Shobanbabu,  
S/o Late R. Narendar,  
R/o Flat No.204, Siri Peal House,  
J. J. Nagar, Alwal, Hyderabad.

... **Petitioners**

**versus**

1. The State of Sikkim  
Service through the Secretary,  
Buildings & Housing Department,  
Government of Sikkim,  
Gangtok, East Sikkim.
2. The Chief Engineer,  
Buildings & Housing Department,  
Government of Sikkim,  
Gangtok, East Sikkim.
3. M/s. Civil Engineers Enterprises Pvt. Ltd., Kolkata,  
represented by and through  
Managing Director having address at:  
11, Shakespeare Sarani,  
Kolkata - 700 071.
4. M/s. Consolidated Construction Consortium Ltd., Chennai  
represented by and through its  
Managing Director having address at :  
5, 2<sup>nd</sup> Link Street, C.I.T. Colony, Mylapore,  
Chennai - 600 004.
5. M/s. Mackintosh Burn Ltd., Kolkata,  
represented by and through its  
Managing Director having address at:  
DD-18/8, Sector 1, Salt Lake,  
Kolkata - 700 064.





6. Tender Evaluation Committee,  
represented by and through the Secretary,  
Buildings & Housing Department,  
Government of Sikkim,  
Gangtok, East Sikkim.

... Respondents

- For Petitioners : Mr. A. Moulik, Senior Advocate with  
Mr. N. G. Sherpa, Ms. K. D. Bhutia  
and Mr. Manish Kr. Jain, Advocates.
- For Respondents No.1, 2 & 6 : Mr. J. B. Pradhan, Additional  
Advocate General with Mr. S. K.  
Chettri, Assistant Government  
Advocate.
- For Respondent No.3 : Mr. Bhaskar Raj Pradhan, Senior  
Advocate with Ms. Yangchen Doma  
Gyatso, Mrs. Pema Yeshey Bhutia,  
Mr. Karma Tshering Bhutia and Mr.  
Y. Sharma, Advocates.
- For Respondents No.4 & 5 : None present.

**BEFORE : HON'BLE MR. JUSTICE P. D. DINAKARAN, CHIEF JUSTICE.  
HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE.**

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Last date of hearing : 10-08-2010

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**DATE OF JUDGMENT : 19-08-2010**

## **J U D G M E N T**

**Wangdi, J.**

By this writ petition, the petitioners have sought to assail the tender process by which the respondent no.3 was declared as the Firm having scored the highest points in the consolidated score of Technical and Financial Bids and found eligible to be awarded with the contract work, namely, Drawing, Design and Execution of 575 bedded Multi-Specialty Hospital at Sichey (Sochyagang), Gangtok, Sikkim, as being illegal, unconstitutional and in violation of the terms and conditions laid down in the Notice Inviting Tender (In short "NIT").

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2. The essential facts material for the adjudication of the case are that the petitioner no.1 is a Public Limited Company registered under the Indian Companies Act, 1956, having its registered office at Hyderabad, P.O. Begumpet, Andhra Pradesh and the petitioner no.2 is the Manager and the Constituted Attorney of the petitioner no.1 and is a citizen of India. It has been stated that petitioner no.1 is one of the largest Indian Construction Company having engaged in large scale construction projects as well as large scale drawing, designing and execution of projects and has an enviable record of carrying out turnkey projects with an average annual turnover of Rs.400 crores in the last 5 years. Respondents no.3, 4 and 5 are also Construction Companies like the petitioner no.1. These respondents and the petitioner no.1 had taken part in the tender process with regard to the aforesaid work in response to a NIT floated by the respondent no.1, State of Sikkim, through the respondent no.2, who is the Chief Engineer, Buildings & Housing Department, Government of Sikkim. Respondent no.6 is the Tender Evaluation Committee to carry out the tender process with regard to the work in question.

3. As per the petitioners, while clause 4 prescribed the Specific Project Experience (minimum criteria) for selection of firms, clause 8 laid down the Bid Evaluation Procedure and clauses 12.1 to 12.6 provided for the procedure and the modalities for holding negotiation with the successful tenderer declared as such after evaluation of the final score. We may not allude to the details

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of the terms and conditions of these clauses for the moment. But suffice it to say that the evaluation criteria prescribed for selection of firms in terms of clause 4 of the NIT would be quality and cost based selection method and that evaluation will be made in 3 Stages, i.e., Stages I, II and III. Stage I, prescribing essential eligibility criteria as required under clause 2 of the NIT, Stage II being the Evaluation of Technical Bid and Stage III the Evaluation of Financial Bid. It is stated that the petitioner no.1 having fulfilled the essential eligibility criteria prescribed under clause 2 of the NIT, purchased the tender documents on payment of necessary fees and submitted it in the manner prescribed in the tender forms in three separate sealed covers, Part I whereof related to Expression of Interest (EOI), Part II the Technical Bid and part III the Financial Bid as required under clause 3 of the tender documents along with the prescribed earnest money in the form of a Bank Guarantee. On evaluation of the participating firms at the Stage I, i.e., Expression of Interest (EOI), the respondents no.3, 4 and 5 were declared as having qualified for the next II & III Stages, i.e., Technical and Financial Bids and declared the petitioner no.1 and one M/s. Larsen & Toubro, Kolkata, as disqualified. When requests made by the petitioners orally and through a legal notice dated 06-05-2010 for reconsideration of the case of the petitioners were not responded to, they filed a WP(C) no.21 of 2010 before this Court in which it succeeded in getting a favourable Order dated 12-05-2010 by which the State-respondents were compelled to qualify them in the Expression of Interest (EOI) Stage and consequently were





permitted to participate at Stages II and III, i.e., Technical and Financial Bids respectively. It is stated that while the Technical Bid of the respondents no.3, 4 and 5 had already been opened that of the petitioners were opened only after this Court passed the Order dated 12-05-2010 and that since the petitioners were not informed about the date and time of opening of its Technical Bid by the State-respondents, objections could not be raised against the legality and correctness of the Evaluation of the Technical Bids submitted by the respondents no.3, 4 and 5. It is further alleged that the State-respondents did not disclose the marks secured by the Bidders. It was only later that the petitioners were served with a sealed letter conveying to them the marks secured by them in the Technical Bid and the Financial Bid, following which the marks secured by all the contractors after the Technical Bid and the Financial Bid were declared ranking them as L-1, L-2, L-3, L-4, L-5 as required under clause 12 of the tender documents.

4. The petitioners have also challenged the evaluation procedure followed by the Tender Evaluation Committee, respondent no.6, on various grounds which shall be alluded to later, but it will be adequate to mention that the petitioners claim to have complied with all the requirements prescribed by the State-respondents for the purpose of evaluation of all the profiles relevant in terms thereof. It has been alleged by the petitioners that the respondents no.3, 4 and 5 ought not to have been permitted to participate in the tender process as they did not fulfil even the essential criteria as revealed from their Master Data

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available online in the Ministry of Corporate Affairs, Government of India Website. By a letter dated 18-05-2010, filed as Annexure 14 to the writ petition, the writ petitioners had lodged a protest by placing on record such information pertaining to the respondents no.3, 4 and 5. In spite of this, it is alleged that the State-respondents proceeded on with the tender process and declared the results.

5. It has further been alleged that the State-respondents did not adhere to the schedule of events of the tender works published in their website and the piece-meal manner in which the results of the Technical Bid and the Financial Bid were declared, has given the petitioners sufficient reasons to suspect manipulation of the result of the Technical Bid. It was, therefore, alleged that the entire tender process was illegal, vitiated by factual malice, arbitrariness and unreasonable. It was further alleged that the respondents no.3, 4 and 5 had been given undue advantage in the tender process and although none of them had fulfilled the essential criteria for participating therein, and that unequal and discriminatory treatment have been meted out to the petitioner no.1 by the State-respondents with regard to the allocation and allotment of marks in the Technical Bid also. In the above premises, the petitioners have sought for a *writ of mandamus* to declare that the respondents no.3, 4 and 5 did not fulfil the essential pre-qualifications criteria as contained in the NIT and thus to declare the petitioners as having secured the highest score and thereby entitled to be graded as L-1 and, consequently for a

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direction upon the State-respondents to award the work to the petitioners.

6. Before going into the merits of the case, it would be essential to record certain significant incidents that took place with regard to the matter in *lis* preceding the filing of the present writ petition and during its pendency.

7. As disclosed by the petitioners, WP(C) no.21 of 2010 was filed by them before this Court on 12-04-2010 when the petitioner no.1 was declared as disqualified at the Stage I, i.e., Expression of Interest (EOI), on the sole ground that such disqualification was erroneous as it had fulfilled the requisite essential criteria prescribed under clause 2 and sub-clauses thereunder. It had been prayed in the writ petition, *inter alia*, that impugned notice dated 04-05-2010 filed as Annexure P8 thereto declaring the petitioner company as having disqualified be quashed and that the petitioner be treated as qualified for the purpose of the said project. It is of relevance to note that the said Annexure P8 being the result sheet dated 04-05-2010 put up on the Notice Board in the Office Premises of the respondent no.2, contained the names of all those declared as qualified and those as not.

8. This Court takes judicial notice of the fact being a matter of record that on 12-05-2010 when WP(C) no.21 of 2010 was admitted for hearing by one of us sitting singly (Wangdi, J.) the learned senior counsel on behalf of the petitioners sought for a prayer either for stay of the operation of the notice Annexure P8 or





in the alternative for a direction upon the State-respondents to consider the Technical Bid as well as the Financial Bid submitted by them.

9. Upon hearing the parties and considering the entire records, the Court held *prima facie* that the petitioners appeared to have fulfilled the necessary eligibility criteria and, therefore, directed the State-respondents to consider permitting the petitioners to participate in the tender process on reconsideration of the Expression of Interest (EOI) submitted by them making it clear that the findings reflected in the Order should not be construed as expression of opinion on the merits of the case. On 22-07-2010 when the case came up for hearing, it was submitted on behalf of the petitioners that since they had been permitted to participate in the tender proceedings in pursuance of the Order of the Court dated 12-05-2010 their grievances stood fully redressed and, therefore, the writ petition would not survive having been rendered infructuous, and as such they be permitted to withdraw the writ petition. Upon this, the learned Additional Advocate General submitted that he would have no objection to such withdrawal if it is placed on record that the participation of the petitioner in the tender process was subject to the outcome of the writ petition, that being the underlying substance of the Order dated 12-05-2010 and that the counter-affidavit filed on behalf of the State-respondents be taken on record. Under such circumstances, the writ petition was allowed to be withdrawn and was dismissed as withdrawn by Order dated 22-07-2010.

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**10.** When the present writ petition was moved on 07-06-2010 before one of us (Wangdi, J.), it was stated by Mr. J. B. Pradhan, learned Additional Advocate General, at the outset by placing before this Court Minutes of the Meeting of the Tender Evaluation Committee held on 24-05-2010, that in that meeting attended also by the petitioners, it was decided that the final result giving the consolidated score of Technical and Financial Bids in respect of each of the qualified firms would be given only after conclusion of the departmental enquiry being held into the complaint Annexure P14 lodged by the petitioners. Annexure P14 contained the very allegations of Ineligibility of the respondents no.3, 4 and 5 canvassed in the writ petition. Since disposal of Annexure P14, therefore, would deal with the foundational grievance contained in the present writ petition, it was directed that the departmental enquiry should be disposed of expeditiously in accordance with law, making it clear that until that is done no work order shall be issued without the leave of the Court. The reasons for imposition of this restriction upon the State-respondents were (i) to expedite disposal of the writ petition and (ii) to enable the State-respondents in ascertaining the veracity of the allegations made against the respondents no.3, 4, and 5, lest the work in question in which immense public interest was involved being a Multi-Specialty Hospital, should fall in the hands of incompetent and ineligible persons. In terms of the aforesaid Order, an affidavit was filed by the State-respondents registered as CMApl. No.55 of 2010 by which the State-respondents have

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placed on record as Annexure A1 the findings of the Tender Evaluation Committee on the objection Annexure P14 of the petitioners.

**11.** We have examined Annexure A1 and find that it contains elaborate and detailed findings on every allegation made against each of the respondents being respondents no.3, 4 and 5. Based thereupon, it appears that the Tender Evaluation Committee has come to a conclusion that the decision to qualify those Companies for participating in the tender process did not call for any review/reconsideration thereby rejecting the objection Annexure P14 submitted by the petitioners. It may be noted that out of respondents no.3, 4 and 5 against whom the allegations have been made, only respondent no.3 has chosen to appear before us and contest the writ petition. Under such circumstances, it would not be relevant to deal with matters pertaining to the respondents no.4 and 5.

**12.** Since this Court was of the view that the finding of the Tender Evaluation Committee on the complaint Annexure P14 dealt with the root of the matter in *lis* in the writ petition, this Court did not deem it necessary to call for a counter-affidavit from the State-respondents and, therefore, proceeded to hear the matter on the basis of the materials that was available before us and also upon the counter-affidavit filed on behalf of the respondent no.3.

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**13.** Mr. A. Moulik, learned senior counsel on behalf of the petitioners sought for time to file a reply to the affidavit of the State-respondents placing on record the findings of the Tender Evaluation Committee on the complaint Annexure P14, but as we were of the view that no purpose would be served in allowing any response as it would be inappropriate in law for us to delve into the merits of the findings arrived at by the Tender Evaluation Committee, the prayer was rejected and proceeded to hear the matter. However, before doing so, we made it clear that while disposing of writ petition based on the findings of the Tender Evaluation Committee that liberty would be given to the petitioner no.1 to approach this Court afresh to assail the findings of the Tender Evaluation Committee if they were so advised and that in the event we proceeded to hear the matter on merits such option may not be available to them. On instructions received from the petitioners, Mr. A. Moulik conveyed to us the instructions of the petitioners to go ahead with the hearing of the case in its merits.

**14.** Commencing his argument on the merits of the case, Mr. Moulik most strenuously argued that the entire tender process could not be sustained as ineligible persons particularly the respondent no.3, who failed to fulfil the essential conditions, were allowed to participate and that the findings of the Tender Evaluation Committee could not be sustained as the decision-making process in arriving at such finding was vitiated for violation of the principles of natural justice, in as much as, the petitioners were not given an opportunity of personal hearing by the Tender






Evaluation Committee. It was submitted that the entire process of evaluation of the bids in all the three Stages was erroneous having ignored all relevant considerations and that respondent no.3 was given an undue advantage in the face on the glaring fact that it had failed to qualify even the terms and conditions laid down in the pre-bid meeting. It was urged that the State-respondents failed to adhere even to the standards and norms laid down by it in the pre-bid meeting held in terms of clause 7 of the tender documents. Under such circumstances, the decision declaring the respondent no.3 as the highest scorer and graded as L-1 could not be sustained and was liable to be quashed and set aside.

**15.** Mr. J. B. Pradhan, learned Additional Advocate General appearing on behalf of the State-respondents no.1, 2 and 6, submitted that the very foundation of the writ petition that the respondent no.3 did not fulfil the essential criteria contained in clause 2 and sub-clauses thereunder having found by the Tender Evaluation Committee to be incorrect, the writ petition did not survive any more and was liable to be dismissed. It was further submitted by him that the petitioners did not possess the necessary *locus standi* to bring the present writ petition having participated in the tender process willingly with the full knowledge of the alleged ineligibility of the respondent no.3 and, that they are now estopped from raising such plea after having failed to be the successful in the bid. It was further submitted that the petitioners were permitted to participate in the tender proceedings post-EOI Stage only in due deference to the Order of this Court in WP(C)





no.21 of 2010 and such participation was subject to the outcome of the writ petition. The writ petition having been withdrawn without any liberty, all actions taken in pursuance of the said Order ceased to have any effect with the consequence that the petitioner no.1 stood disqualified having failed to fulfil the essential criteria under clause 2 and sub-clauses thereunder. The present writ petition having been brought post-Stages II and III, i.e., the Technical and Financial Bids, cannot be sustained as the participation of the petitioners in those two Stages was rendered *non est* and a nugatory in the eyes of law. The learned Additional Advocate General submitted that the work in question was construction of a Multi-Specialty Hospital for the benefit of the people of the State and, therefore, immense public interest was involved. Time being the essence of the contract and there being an urgent need for establishment of such hospital which also involved huge expenditure from the Public Exchequer, the State could not be held at ransom by a person who was seeking for a private relief against a rival contender on grounds that were quite erroneous and misconstrued. The complaint lodged by him against the respondent no.3 and others having been duly considered by the competent Expert Committee and disposed of by a comprehensive finding that has belied such allegations, the writ petition deserved to be dismissed.

 **16.** Mr. B. R. Pradhan, learned senior counsel representing the contesting respondent no.3 submitted that the writ petition could not be sustained since the petitioners had failed to raise the





objections in WP(C) no.21 of 2010 despite the knowledge of the fact that the petitioner no.3 had been declared qualified. Even assuming that the facts alleged against the respondent no.3 had come to the knowledge of the petitioners subsequent to the filing of the said writ petition it was incumbent upon the petitioners to have incorporated them duly impleading the respondents no.3, 4 and 5 as parties in that writ petition by way of an amendment, but instead of doing so, they chose to withdraw the writ petition without seeking any liberty. As per Mr. Pradhan, it was now not permissible for the petitioners to agitate those issues in the present writ petition.

**17.** Having considered the pleadings contained in the writ petition, the affidavit filed on behalf of the State-respondents and the counter-affidavit of the respondent no.3 and also upon hearing the rival contentions placed by the learned counsels representing the various parties, we proceed to give our findings as under.

**18.** In order to deal with various contentions raised by the petitioners, it would be essential to reproduce the relevant clauses of the NIT and the tender documents referred to by the petitioners in the writ petition which are set out as under:-

#### **Clauses under NIT**

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#### **2. Eligibility Criteria for Shortlisting of Firms based on Expression of Interest (EOI)**

**2.1** The intending firms should have successfully completed at least one similar type of project on turn-key basis within last 5 years including drawing,

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designing, and execution of multidisciplinary services under one contract of total value, not less than Rs.50 crores. Such credentials would have to be supported by appropriate documents.

- 2.2 The average yearly turnover of the firm should not be less than Rs.25 crores during the past 5 years. Such financial details should have been drawn up by a reputed Chartered Accountant.

4. **Evaluation Criteria for Selection of Firm**

- 4.1 The selection of the firm will be Quality and Cost Based Selection (QCBS) method and the evaluation will be made in three stages as under:

4.2 **Stage I (Evaluation of EOI)**

The Expression of Interest (EOI) of all the intending firms will be evaluated for shortlisting by the Department, based on the above mentioned eligibility criteria. The result of Stage I would be conveyed to the participating firms on 23/4/2010.

4.3 **Stage II (Evaluation of Technical Bid)**

Technical bids of only those shortlisted firms, who qualify in Stage I, will be evaluated by the Department based on the criteria as mentioned in the Bid document. Each technical bid will receive a score. A proposal shall be rejected if it does not achieve the minimum technical marks of 750 out of a maximum of 1000 points. The weightage of the Technical Bid (T) shall be 60 percent. The results of Stage II would be conveyed to the participating firms on 27/4/2010.

4.4 **Stage III (Evaluation of Financial Bid)**

Financial Bids of those firms who qualify in Stage II will be evaluated as under:

The proposal with the lowest financial bid will be awarded a financial score of 100 points. Financial score of other proposals shall be inversely proportional to their quoted price as indicated in the tender document. The weightage of the Financial Bid shall be 40 percent. The results of Stage III would be conveyed to the participating firms on 29/4/2010.

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6. The tenders will be opened as per the schedule given at Clause 3 in presence of the tenderers who wishes to be there.
  7. Successful firms who will meet the minimum qualifying marks in the technical bids as indicated in the tender documents will be intimated and financial bids of only technically qualified firms will be opened in their presence.
- .....
10. Applications from Joint Venture / Association of Firms are not acceptable."

#### **Clauses under tender document**

#### **"4.0 Part-I Expression of Interest (EOI) - Specific Project Experience (Minimum criteria) for selection of firms.**

- 4.1 The intending firms should have successfully completed drawing, design & execution of at least one similar building project in the recent past (i.e. within last 5 years) with Civil Contract costing not less than Rs.50 crores as turnkey contract for execution of civil works with RCC/Structural steel framing, Internal sanitary/plumbing, water supply, electrification, elevators, internal roads, sewerage & drainage works, car parking lot, fire protection & fire fighting works, electrical substation including HT & LT Distribution cable, panel board, Transformers, Generators, Earthing, campus lighting, public address and paging system, furnishing, airconditioning/ventilation, acoustics, centralized medical gas system, arboriculture - etc. under one turnkey agreement.
- 4.2 The average yearly Turn over of the intending firm should not be less than Rs.25 crores during the past 5 years.
- 4.3 Evaluation & selection of the firms will be carried out by the Evaluation Committee appointed by the department based on above mentioned minimum criteria. The intending tenderer must submit the details of EOI as per format prescribed in Appendix I enclosed.

#### **5.0 Part II - Technical Bid**

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#### **6.0 Part III - Financial Bid**

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#### **7.0 Pre-Bid meeting**

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## **8.0 Bid Evaluation Procedure**

- 8.1 A three stage procedure will be adopted in evaluating the proposals. In the first stage, eligibility of the firm will be ascertained on the basis of specific project experiences, firm's turn-over and other information required to be submitted in Appendix-I forming part of EOI. The firms failing to meet the minimum requirement will be rejected.
- 8.2 In the second stage, a technical evaluation will be carried out by the evaluation committee of the department on the basis of informations submitted by the firm as per formats attached at Appendix II. Only those technical proposals, which score at least 75 points out of 100 shall be considered for financial evaluation in the third stage.
- 8.3 In the third stage, evaluation of Financial Bid will be carried out by the Evaluation Committee of the department. The lowest Financial Bid (FM) will be given a financial score of 100 points. The financial score (SF) of other proposals will be computed as stated in the Data Sheet.
- 8.4 The firm will be ranked using combined technical & financial scores as indicated in Data Sheet.

## **9.0 Evaluation of Technical Bid**

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## **10.0 Opening and Evaluation of Financial Bid**

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## **11.0 Combined Evaluation of Technical & Financial Bids**

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## **12.0 Negotiations**

- 12.1 Negotiation will be held at the address indicated in the Data Sheet. The aim is to reach an agreement on all points and sign the contract.
- 12.2 Prior to the expiry of tender validity period, the department will notify the successful tenderer whose rank will be No.1 as per combined technical & financial score, (i.e. L-1), in writing by registered letter/ cable telex or facsimile and invite them for negotiation of the Contract.

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- 12.3 No Negotiations will be carried out with the other tenderers except the L-1 tenderer. Changes agreed upon during the negotiation will then be reflected in the financial bid.
- 12.4 In case L-1 does not respond for negotiation, the competent authority of Govt. of Sikkim may negotiate with L-2, L-3 etc. as per their ranking, if their price-bids are considered reasonable.
- 12.5 Having selected the tenderer, among other things, on the basis of an evaluation, the department expects to finalise Contract agreement with L-1, within the tender validity period.
- 12.6 The Contract will be awarded to the successful tenderer i.e. L-1, based on the combined evaluation of technical and financial bids. Only in case he (L1) fails on the ground of conditional bids and / or non-signing of agreement within the stipulated time, the other firms based on their final scoring i.e. L-2, L-3 etc. would be Invited for negotiation & signing of Contract, as per their rankings.

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**19.** The petitioner states that clauses 2.1 and 2.2 prescribes the essential eligibility criteria required to be fulfilled by a party to be eligible for participation in the subsequent Stages, i.e., Stage II Technical Bid and Stage III Financial Bid. It is alleged that from the information gathered from the Company Master Data, the turnover by the respondent no.3 was Rs.19.05 crores for 4 years, i.e., from the years 2005-06 to 2008-09 and that the turnover of the Company for the year 2004-05 was not available in the website since in that year the Company either did not have any works or had negligible turnover. Therefore, the said respondent-company did not fulfil the requirement of having minimum turnover of Rs.25 crores on an average for the last 5 years as prescribed under clause 2.2. It is alleged that such

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being the turnover of the Company, it could not have executed within 5 years a work of similar type including drawing, designing and execution of multi-disciplinary services under one contract of total value of not less than Rs.50 crores as prescribed under clause 2.1. It is submitted that the balance sheet abstract signed by their designated Chartered Accountant ought to have been produced by the respondent no.3 and not a mere director's report as had been done by the respondent no.3 to substantiate the fact that it had a turnover of Rs.25 crores on the average during the last 5 years.

**20.** It was next contended that the respondent no.3 had an unfair advantage over the others including the petitioners in as much as M/s. Archtech Consultancy Pvt. Ltd. whose directors were the same as that of the respondent no.3, had been engaged by the Health Department, Government of Sikkim for preparing the project report, drawing and designing of the Multi-Specialty Hospital. Therefore, the respondent no.3 had the opportunity, knowledge and time to prepare the drawing and design in advance for submission in the present tender.

**21.** Next, it was contended that in the pre-bid meeting held on 19-04-2010 in presence of all the parties it was *inter alia* decided in terms of sl. no.14 of the minutes of the meeting that engaging independent consultants, architects, engineers or any other personnel would be taken as a joint venture and violation of clause 10 of the NIT and would subsequently disqualify the





Bidder. As per the petitioner since respondent no.3 engaged M/s. Archtech Consultancy Pvt. Ltd. they ought to have disqualified once this fact has come to light. It was alleged that despite the knowledge of this fact the respondent no.3 was illegally qualified in the Technical Bid by the State-respondents. This being in clear departure from the laid down standards, norms and procedure the decision was liable to be struck down.

**22.** The petitioner has also challenged the correctness of the tender results by which the respondent no.3 was declared as the highest scorer and rank L-1 and that of the petitioner as the L-4, i.e., the 4<sup>th</sup> highest scorer. The basis of Evaluation of the Technical Bid has also been questioned. It has been alleged that the departmental website did not disclose the different marks obtained by each of the Bidders which left sufficient scope for the Evaluation Committee to act arbitrarily and in a biased manner.

**23.** Similar has been the allegation with regard to the results of the Financial Bid. It has been alleged that from the information and documents that had been submitted by them, the petitioner ought to have been scored the highest marks.

**24.** In order to consider the above contentions, it is of relevance to note that the very allegations contained in paragraphs 36(i), 37, 38, 39 and 40 of the present writ petition in respect of the respondent no.3 have been set out in Annexure 14 to the writ petition. As observed by us in foregoing paragraph 10 of this judgment, it was the case of the State-respondents at the very

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outset on 07-06-2010 before one of us (Wangdi, J.) that it was decided that the final result giving the consolidated score of Technical and Financial Bids in respect of the qualified firms would be given only after conclusion of the departmental enquiry being held on the complaint Annexure P14 lodged by the petitioners. The State-respondents were accordingly directed to do so expeditiously in order to ensure early disposal of the writ petition. On conclusion of the enquiry, the State-respondents filed an affidavit registered as CMApl. no.55 of 2010 informing this Court of the conclusion of the departmental enquiry placing on record the findings of the Tender Evaluation Committee marked as Annexure A1 to the affidavit.

**25.** We have perused the findings Annexure A of the Tender Evaluation Committee on the complaint Annexure 14 with specific reference to the respondent no.3. For the sake of convenience, we may reproduce such findings as under:-

**"CIVIL ENGINEERS ENTERPRISES PVT. LTD., KOLKOTA**

Ms. Prasad & Company has made the following allegations (as reproduced below) in its representation dated : 18.05.2010 against Civil Engineers Enterprises Pvt. Ltd. Kolkata :

- The last five years turnover of the company, based on their annual returns filed with Registrar of Companies are as under :

<b><u>Year</u></b>	<b><u>Turnover in crores</u></b>
2005-06	1.83
2006-07	1.58
2007-08	7.90
2008-09	7.83





- Based on the above findings, the said company was not eligible to qualify for the Expression of Interest as well as other tender proceedings based on minimum turn over criteria set forth by your department.
- Based on their last 4 years turnovers, the company could not have executed a turnkey hospital project in the last five years thereby there were not eligible either in EOI nor tender proceedings and documents submitted by them seems to be fake or subject to strict scrutiny.
- Based on the information provided by the concerned authorities of the Buildings & Housing Department, the said company has constructed Nightingale Hospital in Kolkata. Owned by Nightingale Diagnostic and Medicare Centre Private Ltd., Kolkata, on turnkey basis, the NDMCPL company identification No. is U85195WB1986PTC041439. It is evident that the said company was incorporated in the year 1986 and whereas the Civil Engineers Enterprises Private Limited was incorporated in 1996.
- It is also observed that the promoters of both the companies are one and the same. It appears that the promoters established the Nightingale Diagnostic Centre prior to setting up of their construction company. Based on the available information, we are the opinion that the medical centre might have been constructed prior to the formation of their construction company and the onus lies on the company to prove otherwise.
- An interesting observation based on ROC company master data, we came to understand that the same promoters are also the promoters of Archtech Consultant Private Ltd. CIN Number : U74210WB1984PTC038323 who were appointed by the Health department of Sikkim to prepare design, drawing of the said 575 bedded multi





specialty hospital in Sichey, Sikkim thereby the construction company is having an undue advantage over and above the other bidders.

- As per Central Vigilance Commission (CVC) norms for the consultants in Section 2 "Forms of bid and qualification information for bidder is neither associated, nor has been associated directly or indirectly with the consultant or any other entity that has prepared the design, specifications and other documents for the project or been proposed as project manager for the contract. A firm that has been engaged by the employer to provide consultancy services for the preparation or supervision of the works, and any of its affiliates shall not be eligible to bid"
- Based on the above norms, the promoters of the construction company and the consultant company are being one and the same and since the said hospital design, drawings were prepared by the same promoters, they are to be disqualified as per CVC norms Section 2, and also the company has undue advantage over the above other bidders and such undue advantage is not permitted as per CVC and tender procedures in India.

In response to our letter No. 162/GOS/PLG/08-09/352 directing the Civil Engineers Enterprises Private Ltd. for their clarifications on the points as mentioned above raised by the firm, M/S Prasad and Company (Project Works) Ltd. Hyderabad, M/S Civil Engineers Enterprises Private Ltd. submitted their clarifications vide their letters No. CEEPL/TND-HOS/2010/07 dated 24/5/2010, CEEPL/TND-HOS/2010/08 dated 2/6/2010 and CEEPL/TND-HOS/2010/11 dated 22/6/2010. The relevant facts submitted by them are as follows.

- They submitted in the reply that their correct turnover figure of Civil Engineers





Enterprises Pvt. Ltd. for the last five years (viz. from 2004-05 to 2008-09) were as under which can be verified from respective audited accounts of the company already submitted with their Expression of Interest.

**Rs. In Lacs**

	Year (2008-09)	Year (2007-08)	Year (2006-07)	Year (2005-06)	Year (2004-05)
Turn over (Net stock Adjustment)	1,832.80	1,580.97	776.67	782.96	941.74

They stated that the above figures can also be verified from the office of the Register of Companies, West Bengal, if deemed necessary. The CIN of the company as allotted by the Register of Companies is U45202WB1996PTC080990.

- They further submitted that the certificate which has been submitted by them in Expression of interest for their group of companies (Average Turnover for last 5 years), the Firm of Chartered Accounts has conservatively computed the same by excluding certain other income of the companies which should be treated as turnover like dividend, rent, bank interest etc. Apart from that, they have completed works upto May 2010 for which they have not yet received payments. This total amount will be to tune of Rs. 40 Crores ie an average of Rs.8 crores during the last five years. As such their actual turnover is much more than reflected in the Expression of Interest.
- Regarding the observation made by M/S Prasad and Company (Project Works) Ltd. which state that the Promoters of both the companies are one and the same. In fact, they reiterated that not both the firms but all the three firms viz, Civil Engineers Enterprises Pvt. Ltd., Archtech consultants Pvt. Ltd and





Nightingale Diagnostic and Medicare Centre Pvt. Ltd are owned and managed by the same group of individuals belonging to one family only. For this purpose they have submitted the shareholding pattern of each of the said three Companies as under, which as per them will amply justify their contention and submission.

Civil Engineers Enterprises Pvt. Ltd.

Sl. No	Name of the Shareholder	Paid Up Capital (No. of Shares)	No. of Shares Held	% of Shares held
01	Mr.Shyamalendu Ghosal	22,200	10,000	45.00
02.	Mrs.Jhumki Ghosal	22,200	1,000	4.50
03.	Ms.Sonali Ghosal	22,200	10,000	45.00
04.	Dr.Samit Ghosal	22,200	500	20.25
<b>TOTAL</b>		<b>22,200</b>	<b>21,500</b>	<b>96.75</b>

Archtech Consultants Pvt. Ltd.

Sl. No	Name of the Shareholder	Paid Up Capital (No. of Shares)	No. of Shares Held	% of Shares held
01	Mr.Shyamalendu Ghosal	62,000	18,000	29.00
02.	Mrs.Jhumki Ghosal	62,000	18,000	29.00
03.	Ms.Sonali Ghosal	62,000	20,500	33.00
04.	Dr.Samit Ghosal	62,000	3,600	6.00
<b>TOTAL</b>		<b>62,000</b>	<b>60,100</b>	<b>97.00</b>

Nightingale Diagnostic and Medicare Centre Pvt. Ltd.

Sl. No	Name of the Shareholder	Paid Up Capital (No. of Shares)	No. of Shares Held	% of Shares held
01	Mr.Shyamalendu Ghosal	37,190	1,500	4.00
02.	Mrs.Jhumki Ghosal	37,190	600	2.00
03.	Ms.Sonali Ghosal	37,910	1,550	4.00
04.	Dr.Samit Ghosal	37,910	10	0.02
05	Civil Engineer Ent. Pvt. Ltd	37,910	26,000	69.00
06	Archtech Consultants Pvt. Ltd	37,910	8,000	20.38
<b>TOTAL</b>		<b>37,910</b>	<b>37,6600</b>	<b>99.40</b>





They have stated that it is evident from the above table that all the three companies are wholly and absolutely owned by four individuals belonging to the same family and each of the companies is being managed by the same individuals. They have also added that it will not be out of place to mention that according to Clause No.22 of the Articles of Association of each of the companies, Mr.Shyamalendu Ghosal, Mrs.Jhumki Ghosal, Ms.Sonali Ghosal & Dr.Samit Ghosal are the permanent Directors and are not liable to retire by rotation. Further, according to Clause No.26 of the Article of Association of each of the companies, Mr.Shyamalendu Ghosal will be the Managing Director of each of the Companies. Photocopies of the relevant portion of the Articles of Association of each of the companies were attached for reference.

They have submitted that Civil Engineers Enterprises Pvt. and two other companies viz Archtech consultants Pvt. Ltd. and Nightingale Diagnostic and Medicare Centre Pvt. Ltd are considered to act as one entity under the same management and which does not violate any of the existing laws/regulations.

The matter has also been explained by them in their Expression of Interest.

- They have further submitted that the distribution of turnover figures of M/s Civil Engineers Enterprise Pvt. Ltd erstwhile M/S Engineers Enterprise and group of Companies under the same management at 11, Shakespeare Sarani , Kolkata 700071 for the last 5 years (viz from 2004-05 to 2008-09) as under, which has been drawn from the respective audited accounts of the said group of companies already submitted with their Expression of Interest indicating an average yearly turnover of Rs. 28.16 crore and duly certified by the registered Chartered Accountant Firm.





- In this connection, they have further stated that M/S Civil Engineers enterprises Pvt. Ltd erstwhile M/S Engineers Enterprises is the promoters company of the group of Companies under the same management viz M/S Archtech Consultants Pvt. Ltd and M/s Nightingale Diagnostic & Medicare Centre Pvt. Ltd and the same group of individuals belonging to one family only is holding more than 96% of the shares of all these group of companies and therefore the average annual turnover of the group of companies have been reflected in their Expression of Interest and which as per them does not violate any of the existing laws on the subject as a promoter company.

Annual Turnover for Last five Years as Certified by Chartered Accountant

Amounts in Rs.

Group of Companies under same Management	2004-05	2005-06	2006-07	2007-08	2008-09	Total	Average
Civil Engineers Enterprises Pvt. Ltd	76620297	57336989	64619891	146266052	156876480		
Archtech Consultants Pvt. Ltd	65885733	77752403	68528656	160750106	168368040		
Nightingale Diagnostic & Medicare Research Centre Pvt. Ltd	47373782	45877819	49086550	92961433	129865261		
	189879812	180967211	182235097	399977591	455109781	1408169492	281633898

Average Annual Turnover for M/S Civil Engineers Enterprises Pvt. Ltd and group of Companies for last five years. : 28.16 crore

- As regards the successful completion of drawing, design & execution of Nightingale Hospital during the past period of 3 years, ending on 01<sup>st</sup> February 2006,





they have submitted the completion certificate for the same. Furthermore, a xerox copy of the Trade Mark Patent of Nightingale Hospital issued by Govt. of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Controller, General of Patents Designs and Trade Marks Registry dated 08 February 2008 have also been submitted by them as evidence to completion of work and operation of hospital business.

- They have once again reiterated that M/S Civil Engineers Enterprises Pvt. Ltd. was established in the year 1996, whereas Nightingale Hospital was commissioned in the year 2006 and patented by Government of India in the year 2008.

In the tender documents (Expression of Interest) submitted by M/S Civil Engineers Enterprises Ltd. Kolkata, the Company has given details of the group company under the same management complementing each other. So far as the present project "Drawing Designing & Execution of 575 bedded Multi Specialty Hospital Project at Sichey (Sochygang), Gangtok" to be under taken by the State Government is concerned, the Company, in addition to Drawing Designing & Execution of Hospital Project at 11 Shakespeare Sarani Kolkata with a project cost of Rs. 120 crores in 2006, has executed or has been executing a number of other projects, some of which are as follows :

- i) Tourist Villa cum socio Cultural and Amusement Park at Ranka, East Sikkim on Turnkey Basis for Rs.67.00 crore.
- ii) New Raj Bhawan at Gangtok, Sikkim for Rs.11.37 crore
- iii) Paljor Stadium at Gangtok for Rs.32.23 crore and so on.

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The Archtech Consultancy Pvt. Ltd (ACPL), which is a part of the group, has reportedly undertaken a number of projects involving conceptual plans and detailed architectural, structural & service designing and drawing. Ms Nightingale Diagnostic and the Medicare Centre Pvt. Ltd. (NDMC) is managing the Nightingale Hospital at Shakespeare Sarani, Kolkata. The above shows that the bidder has expertise not only in Hospital Construction but also in providing health care facilities and establishing such health care infrastructures. Being under the same management and treated as one enterprise, the company has the required expertise and specialization not only in Hospital Construction but also in Health Care facilities. There was no infirmity in considering the bidder in question as eligible for evaluation of their bids on merit. It is not in dispute that the group has an average turnover of more than Rs.25 crores and had undertaken and completed project work more than Rs. 50 crores during the past 5 years.

With reference to the allegation that Archtech Consultancy Pvt. Ltd (ACPL) were appointed by the department of Health Care Human Service and Family Welfare for preparation of design, drawing of 575 bedded Multi Specialty Hospital, Sichey and reference made to the Central Vigilance Commission Norms, firstly the said norms have not been made applicable in the State of Sikkim nor incorporated in the form of any policy formulation by the state government. The Health Care Human Service and Family Welfare Department vide its letter No.496/HCS-HS&FW/PD dated: 3/06/2010 has stated that the Archtech Consultancy Pvt. Ltd (ACPL) was engaged as a consultant for preparation of master plan and detailed project report along with architectural and structural design and other related services for 500 bedded Multi Specialty hospital at the existing STNM hospital premises and Sokeythang, Gangtok.





As per the NIT, the Company has to fulfill the following eligibility criteria for qualification into Stage II of the tender process.

- i) The intending firms should have successfully completed at least one similar type of project on turnkey basis within last 5 years including drawing, designing, and execution of multidisciplinary services under one contract of total value, not less than Rs.50 crores. Such credentials would have to be supported by appropriate documents.
- ii) The average yearly turnover of the firm should not be less than Rs.25 crores during the past 5 years. Such financial details should have been drawn up by a reputed Chartered Accountant.

As Civil Engineers Enterprises Pvt. Ltd. Kolkata, has given their clarifications on the allegations made against them by M/s. Prasad and Company, the decision to qualify the Company into Stage II of the tender process by the tender evaluation committee does not call for any review/reconsideration."

**26.** From the above, it is quite eminently evident that each of the allegations against the respondent no.3 has been set out and dealt with individually as clarified by the said respondent. It, therefore, certainly cannot be said that the conclusion of the Tender Evaluation Committee is arbitrary and is in departure from the standards and norms laid down by the State-respondents.

**27.** Apart from the fact that the allegations with regard to the non-fulfilment of the pre-bid essential eligibility criteria have been explained as being incorrect, we find that the other aspect of





the allegation that the respondent no.3 having engaged an independent consultant, namely, M/s. Archtech Consultant Pvt. Ltd. it ought to have been disqualified in terms of serial 14 of the minutes of the meeting dated 24-05-2010 read with clause 10 of the NIT, have also been reflected in the report as follows:-

- “• Regarding the observation made by M/S Prasad and Company (Project Works) Ltd. which state that the Promoters of both the companies are one and the same. In fact, they reiterated that not both the firms but all the three firms viz, Civil Engineers Enterprises Pvt. Ltd., Archtech consultants Pvt. Ltd and Nightingale Diagnostic and Medicare Centre Pvt. Ltd are owned and managed by the same group of individuals belonging to one family only. For this purpose they have submitted the shareholding pattern of each of the said three Companies as under, which as per them will amply justify their contention and submission.

.....

They have stated that it is evident from the above table that all the three companies are wholly and absolutely owned by four individuals belonging to the same family and each of the companies is being managed by the same individuals. They have also added that it will not be out of place to mention that according to Clause No.22 of the Articles of Association of each of the companies, Mr.Shyamalendu Ghosal, Mrs.Jhumki Ghosal, Ms.Sonali Ghosal & Dr.Samit Ghosal are the permanent Directors and are not liable to retire by rotation. Further, according to Clause No.26 of the Article of Association of each of the companies, Mr.Shyamalendu Ghosal will be the Managing Director of each of the Companies. Photocopies of the relevant portion of the Articles of Association of each of the companies were attached for reference.

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They have submitted that Civil Engineers Enterprises Pvt. and two other companies viz Archtech consultants Pvt. Ltd. and Nightingale Diagnostic and Medicare Centre Pvt. Ltd are considered to act as one entity under the same management and which does not violate any of the existing laws/regulations.

The matter has also been explained by them in their Expression of Interest."

**28.** We find that the above position is also an admitted fact in paragraph 39 of the writ petition which we reproduce as under:-

"39. .... The Directors of M/s Archtech Consultants Pvt. Ltd. and those of the respondent No.3 company are the same persons. ...."

**29.** On examination of the report Annexure A1, this Court did not find any infirmity in the procedure followed in the disposal of the objection. Mr. A. Moulik sought time to file objection to the affidavit and the findings of the Tender Evaluation Committee Annexure A1 to the affidavit, but considering the limited jurisdiction of this Court in the present proceedings in reviewing such decisions we rejected the prayer.

**30.** In any case we find that each of the allegations and every aspect thereof have been duly explained by the respondent no.3 and accepted by the State-respondents. This is obvious from the fact that the allegations of the petitioners have been set out individually and responses to each of them placed by the respondent no.3 have also been set out. It, therefore, becomes clear that due consideration of the entire facts and circumstances, have been given by the Tender Evaluation Committee in arriving at

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the finding in the last paragraph reproduced above whereby the decision qualifying the respondent no.3 was upheld.

**31.** The parameters of the power of judicial review in respect of tender awarded by a public authority for carrying out contract works is well-settled. In ***Tata Cellular vs. Union of India : (1994) 6 SCC 651*** after analysing a conspectus of its decisions the Apex Court laid down the following:-

**"94.** The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

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32. In the case of **Ramana Dayaram Shetty vs. International Airport Authority of India and Ors. : (1979) 3 SCC 489**, the relevant portions in paragraphs 12 and 21 spells out the law laid down by the Apex Court and they are reproduced below:-

"12. .... It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. .... and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

21. This rule also flows directly from the doctrine of equality embodied in Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. .... The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. ....."  
[emphasis supplied]

33. In the case of **Air India Ltd. vs. Cochin International Airport Ltd. & Ors. : (2000) 2 SCC 617**, the Hon'ble Supreme Court in paragraph 7 has held as follows:-

"7. 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*, *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India*, *CCE v. Dunlop India Ltd.*, *Tata Cellular v. Union of India*, *Ramniklal N. Bhutta v. State of Maharashtra* and *Raunaq International Ltd. v. I.V.R. Construction Ltd.* 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. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene." [emphasis supplied]

Apart from the above, there are other innumerable decisions reiterating the same view which may not be dealt with for the sake of brevity and to avoid multiplication.

34. The petitioners have not alleged that the decision to qualify the respondent no.3 was arrived at for any collateral purpose and the pleadings in the writ petition are devoid of any specific allegation of *mala fides* against either the respondent no.2 or respondent no.6 or any other authority under the State-respondents. It would, therefore, be impermissible for this court to interfere. We find support on this view from the decision of the





Apex Court in the case of ***Asia Foundation & Construction Ltd. vs. Trafalgar House Construction (I) Ltd. & Ors. : (1997) 1 SCC 738*** the relevant portion of which is reproduced below:-

"9. .... We are of the considered opinion that it was 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 mala fides or favouritism in the grant of contract in favour of the appellant. ...."

35. Mr. A. Moulik submits that as the very capacity of the respondent no.3 to participate in the tender proceeding is being questioned in the present writ petition they having failed to fulfil the essential criteria prescribed under the NIT, the question of jurisdiction of the Tender Evaluation Committee would, therefore, arise making it permissible for this Court to examine the legality of such action. In our view, this submission does not hold water in view of the above findings. If the eligibility of the respondent no.3 is permitted to be gone into at this stage the same would also apply to the petitioners as their participation in the tender process was on the basis of the Interim Order of this Court in the earlier writ petition which was withdrawn without any liberty. This is a case where the petitioner initially did not fulfil the qualifying criteria apart from it being a failed Bidder having been allowed to bid under an Order of this Court. On this account, the very *locus standi* of the petitioner to question the capacity of the respondent no.3 becomes suspect. We do not find that the State-respondents have given any undue advantage to the respondent no.3 either by





granting relaxation or for any extraneous consideration. We also do not find any allegation of such considerations.

**36.** As held in *Tata Cellular (supra)* in a matter such as the present one, judicial review is concerned with reviewing not the merits of the decision but the decision-making process itself. It is different from an appeal where the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic school master substituting its judgement for that of the administrator.

**37.** We are not in a Court of Appeal to examine the decision of the State-respondents but our only concern is with the decision-making process. We find that the State-respondents have been quite fair by taking a decision to make inquiry into and consider the objections raised by the petitioner in his objection Annexure 14 before declaring the final score of the different bids. From the findings of the Tender Evaluation Committee on the complaint filed as Annexure A1 in CMApl. no.55 of 2010, we find that necessary explanation was called for from the respondent no.3 and the explanations given by the said respondent against each of the allegations have been dealt with. The Tender Evaluation

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Committee after due considerations of all the explanations, in their wisdom, have accepted the explanations thereby upholding its previous decision qualifying the respondent no.3 for participation in the subsequent Stages of the bid. We are of the view that it would be impermissible in law for us to go into the merits of the findings in exercise of our powers of judicial review in matters falling within the domain of the State-responses which has the necessary expertise to decide on such matters. The views it forms and decision it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations.

**38.** In so far as the other allegations of the State-responses having committed certain infractions as set out in foregoing paragraphs 19 to 22 of this judgment are concerned, we hold that they are not so grave as to vitiate the entire process and no prejudice appear to have been caused to any of the parties. All the parties including the petitioner had been subjected to identical advantages and disadvantages alleged to arise from such infraction. It is to be noted again that the petitioners had participated in the entire bid process culminating in the final result and that it was only after they failed to succeed in the bid that they have come up with these allegations. In any case, it is trite that the Government is entitled to make pragmatic adjustments in matters of contract in public interests. We may refer to the decision in **Netaji Bag & Ors. vs. State of W.B. & Ors. : (2000) 8 SCC 262**. It is also well-settled that there is presumption of





*bona fides* in all actions of the State. Whenever challenge is thrown to any of such action, initial burden of showing the *prima facie* existence of violation of the mandate of the law or the Constitution lies upon the person approaching the Court. We find that the petitioners have failed to place on record or to point out any constitutional vice or illegality. It is not permissible for us to make a roving enquiry particularly in the writ petition filed at the instance of a rival contractor. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the *bona fide* opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process [**Netai Bag (supra)** - para 19].

39. As held in **Tata Cellular (supra)** the Government must have freedom of contract and a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere which, of course, is subject to being decided by application of the *Wednesbury principle*.

40. When we consider the present case on the anvil of the law laid down by the Apex Court in the case of **Ramana Dayaram Shetty (supra)** we do not find that the State-respondents had made any departure from the standard or norm prescribed in the NIT and the tender documents but was rather based on valid principles as revealed from the finding of the Tender Evaluation





Committee (supra) and which we do not find to be irrational, unreasonable or discriminatory. Mr. Moulik raised the plea of violation of principles of natural justice by the Tender Evaluation Committee in not affording the petitioners an opportunity of making oral submissions before them. However, right of hearing does not necessarily imply a right of personal hearing.

**41.** In the case of ***The State of Maharashtra & Anr. vs. Lok Shikshan Sansatha & Ors. : (1971) 2 SCC 410***, it has been held by a Constitution Bench of the Apex Court as follows:-

**"25.** When all the relevant circumstances have been taken into account by the District Committee and the educational authorities, there is no violation of any principle of natural justice merely for the reason that the applicants were not given a hearing by the educational authorities before their applications were rejected. The particulars which have to be mentioned in the prescribed application form are very elaborate and complete. ...."

**42.** We find that the complaint Annexure P14 lodged by the petitioners have been duly taken cognizance of and each of the allegations have been elaborately dealt with in the findings. This, in our view, is substantial compliance of the principle of natural justice having regard to the facts and circumstance of the case and, therefore, the plea of Mr. Moulik cannot be sustained.

**43.** On the allegations of discrimination meted out against the petitioners, we find that the petitioner no.1 was allowed to fully participate in the tender proceedings in all its Stages but failed to succeed in the bid in a fair competition amongst all the Bidders





including respondent no.3. No grievance, therefore, can be made out by the petitioners that they were in any manner discriminated.

44. The tender in question pertains to a 575 bedded Multi-Specialty Hospital being constructed at Gangtok for the benefit of the people of the State of Sikkim. There can be no denying that the fact that the work has immense public importance. When public interest is pitted against individual interest of private parties, public interest would prevail. It is only when public interest compels that it would be permissible for the Court to interfere. As held in the case of ***Air India Ltd. (Supra)*** the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. This is held to be true even when some defect is found in the decision-making process. This is not the situation in the present case.

45. As already observed above the challenge is being thrown by a contractor who was unsuccessful in the bid. As in the case of ***Raunaq International Ltd. vs. I.V.R. Construction Ltd. & Ors. : (1999) 1 SCC 492*** the only substantial ground of challenge in the present writ petition is that the respondent no.3 did not fulfil the qualifying criterion. But the challenger, M/s. Prasad & Company, also did not fulfil the qualifying criterion. Under this circumstance also we fail to see any reason for us to interfere.





46. The other part of the submission of Mr. Moulik of the Tender Evaluation Committee having exercised a jurisdiction not vested in it by allowing the respondent no.3 to participate and, therefore, this Court ought to exercise its power to judicial review cannot, in our view, be accepted. It was very much within the jurisdiction of the Tender Evaluation Committee to decide as to whether a party is eligible or not. As observed earlier, we find that there are no specific allegations of *mala fide* against the State-respondents or any of its authorities other than a vague pleading to that effect. There is also no allegation that power has been exercised for any collateral purpose.

47. It is a well-settled principle of law that the burden of establishing *mala fides* is heavy on the person who alleges it. A mere allegation that power was exercised *mala fide* would not be enough and in support of such allegation specific material should be placed before the Court. In the case of **Federation of Railway Officers Association & Ors. vs. Union of India : (2003) 4 SCC 289** it has been held in paragraph 20 as follows:-

"20. .... Allegations regarding *mala fides* cannot be vaguely made and it must be specific and clear. In this context, the Minister concerned who is stated to be involved in the formation of the new zone at Hajipur is not made a party who can meet the allegations." [emphasis supplied]

48. In the Constitution Bench judgment of the Supreme Court in the case of **E. P. Royappa vs. State of Tamil Nadu & Anr. : (1974) 4 SCC 3** it has been laid down as under:-

"92. Secondly, we must not also overlook that the burden of establishing *mala fides* is very heavy on





the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. ...."

49. In *Asia Foundation (supra)* it has been held in paragraph 10 as under:-

"10. Therefore, 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 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. ...."

50. The petitioner having failed to satisfy the above tests, the vague allegation of *mala fide* cannot be accepted and the impugned action cannot be faulted for this reason also.

51. Apart from the above, the case can be considered in another aspect also. As observed in foregoing paragraphs 7, 8 and 9, when the petitioner was found to have been disqualified for non-fulfilment of the essential pre-bid qualifications prescribed under clause 2 and sub-clauses thereunder of the NIT, they filed WP(C) no.21 of 2010 before this Court, seeking to assail such decision of the State-respondents on the sole ground that it was erroneous on the face of the documents submitted by them that indicated otherwise. On 12-05-2010 this Court directed the State-respondents to consider permitting the petitioners to participate in the tender process, and the State-respondents in due deference to such direction had allowed the petitioner to do so. The present writ petition was filed on 03-06-2010. On 22-07-2010 when WP(C) no.21 of 2010 was taken up for hearing the petitioners sought





permission of this Court to withdraw the writ petition being infructuous, the petitioners having participated in the tender proceedings which was the sole relief sought for in that writ petition. Accordingly, the writ petition was dismissed as withdrawn by Order dated 22-07-2010.

**52.** As also observed earlier, at the time of filing WP(C) no.21 of 2010, the petitioners were aware of the parties that had been declared as qualified having fulfilled the essential criteria laid down under clause 2 and sub-clauses thereunder of the NIT. It is an admitted position as revealed from paragraphs 19 and 20 of the writ petition and Annexure 8 thereto, that as early as 24-05-2010 the petitioners were aware of the marks and the rank obtained by each of the Bidders and that the highest rank, i.e., L-1 was secured by the respondent no.3. The petitioner, however, chose not to take any step in WP(C) no.21 of 2010 to assail the said result as regards its correctness that now find place in the present writ petition in paragraphs 22 to 34. From the paragraph 35 of the present writ petition, it is an admitted position that the petitioner became aware of the alleged ineligibility of the respondent no.3 sometimes after the Order dated 12-05-2010 in WP(C) no.21 of 2010 in pursuance of which the petitioners were allowed to participate in the tender process. Yet the petitioners failed to take any step in that writ petition in seeking to incorporate such facts therein. Instead of doing so, they chose to withdraw the said writ petition on 22-07-2010, i.e., almost 2 months after acquiring such knowledge without seeking any liberty.






53. The above facts and circumstances in our view would amount to an abandonment of right and clearly hit by the principle of waiver, estoppel and acquiescence. Apart from this, it is a case where principle of constructive *res judicata* would also come into play in as much as the petitioner ought to have taken such grounds in WP(C) no.21 of 2010 but had failed to do so. Rule 113 of the Sikkim High Court (Practice and Procedure) Rules, 1991, provides as under:-

**"113. Application of C.P.C.:-** In all matters for which no provision is made by these rules, the provisions of the Code of Civil Procedure, 1908, shall apply *mutatis mutandis*, in so far as they are not inconsistent with these rules."

54. Therefore, by application of Explanation IV to Section 11 of the Code of Civil Procedure, 1908, which prescribes that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit". The present case, therefore, is undeniably hit by the principles of constructive *res judicata*. For this reason, we are of the view that the writ petition would not be maintainable and is liable to be rejected as such.

55. In the result, the writ petition is dismissed.

56. No order as to costs.

  
( S. P. Wangdi )  
Judge  
19-08-2018

  
( P. D. Dinakaran )  
Chief Justice  
19-08-2018