

**L.MOHAPATRA, J.**

W.P.(C) NO.12509 OF 2010 (Decided on 20.08.2010)

**UMESH KUMAR PODDAR** ..... Petitioner.

. Vrs.

**STATE OF ORISSA & ORS.** ..... Opp.Parties.

**CONSTITUTION OF INDIA, 1950 – ART.226.**

For Petitioner - M/s. H.M.Dhal, & P.P.Mohanty.

For Opp.Parties – Mr. J.Pattnaik (for O.P.No.1)

M/s.Milan Kanungo, s.K.Mishra, Y.Mohanty & S.N.Das  
(for O.P.Nos.2 & 3)

M/s. S.K.Padhi & B.R.Behera (for O.P.No.4).

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**L.MOHAPATRA, J.** The facts leading to filing of this writ petition are as follows:

Opposite party No.2-Orissa Bridge & Construction Corporation Limited issued a notice on 1.6.2010 inviting sealed bids for different toll gates and this case is confined to the IIIrd Toll Gate on Sambalpur-Rourkela ADB Road, Sundergarh. The Bid Invitation Notice clearly indicates that sealed bids from intending bidders for collection of Toll for a period of one year were invited and the sale of bid document started from 7.6.2010. The last date for receipt of the sealed bid was 7.7.2010 up to 5 P.M. during working days within office hours at Head office and Senior Project Managers' Offices. In pursuance of the aforesaid notice inviting sealed bids, petitioner and opposite party No.4 submitted their respective bids. Both the petitioner and opposite party No.4 submitted their respective bids on 7.7.2010. Case of the petitioner is that he had offered a bid amount of Rs.6,40,57,500/- but submitted a revised bid on same day to the tune of Rs.6,95,57,500/-. Opposite party No.4 had submitted a bid of Rs.6,91,00,000/-. Opposite party No.4 having been called for negotiation, the petitioner submitted a representation to the opposite party Nos.2 and 3 stating therein that he being the highest bidder, the agreement should have been executed with him and that the opposite party No.4 the second highest bidder having been called for negotiation, he should have been also called for negotiation.

2. Opposite party Nos.2, 3 and 4 have filed counter affidavit separately taking more or less similar stand. According to the said opposite parties, the tender conditions clearly stipulate that once a bid is submitted in sealed cover, it cannot be modified or altered on any ground. The petitioner initially having submitted a bid for an amount of Rs.6,40,47,500/-, there was no scope to revise the same even if it is accepted that the revised bid had been submitted on 7.7.2010. The question as to whether the revised bid submitted by the petitioner was on 7.7.2010 or the same had been inserted to the record after 7.7.2010 was also in dispute. It is also the case of the opposite parties that after opening of the sealed bids, when it was found that opposite party No.4 is the highest bidder, as per practice he was called for negotiation to raise the bid amount.

3. The writ petition was heard by a Division Bench and there being difference of opinion only on the issue as to whether the petitioner has any right to be called for negotiation because opposite party No.4, the highest bidder had been called by the opposite party Nos.2 and 3 for upward revision of price, this matter has been placed before me and the learned counsel appearing for the parties made submissions only on this issue.

4. Shri H.M. Dhal, the learned counsel appearing for the petitioner submitted that the sanctity of a sealed tender/bid is required to be maintained by the Corporation. In terms of the condition of bid as reflected in the notice, after receipt of the bids, the same should have been opened and whoever is the highest bidder, the agreement should have been executed with him. There being no provision in the bid notice for inviting the highest bidder for negotiation to raise the price quoted by him, such a procedure could not have been adopted by the Corporation. Once the Corporation adopted such method, it obviously means that the process of sealed bid was abandoned by the Corporation and a decision had been taken to settle the contract on negotiation. Therefore, the petitioner should have also been given an opportunity to raise his price quoted in the sealed bid. Shri S.K. Padhi, the learned Senior Counsel appearing for opposite party No.4 and Shri Milan Kanungo, the learned counsel appearing for the Corporation submitted that the practice adopted by the Corporation is to call the highest bidder for an upward revision and that does not give any right to any other bidder to claim for negotiation. This practice adopted by the Corporation does not necessarily mean that the sealed bid process was abandoned and the parties were required to be called for negotiation for the purpose of awarding the contract.

5. From the judgments delivered by both the Hon'ble Judges, it appears that the revised offer alleged to have been submitted by the petitioner on 7.7.2010 is not correct and manipulations were made in the "Register of Letter Received" to show that the revised offer had been received on 7.7.2010 though actually it had been submitted on 8.7.2010, i.e., the date on which the bids were opened. There is no difference of opinion on this issue.

Hon'ble Justice B.P. Das held that opposite party No.4 even after being declared as highest bidder was called for negotiation by the Corporation for upward revision of price and therefore, the petitioner was also required to be called for negotiation. Hon'ble Justice B.N. Mahapatra was of the view that the petitioner never built a case alleging that he had a right to be called for negotiation as opposite party No.4 had been called by the Corporation for negotiation and on the other hand in the writ petition he claimed to be the highest bidder on the basis of the revised bid and therefore, in absence of any pleading, no such submission could be advanced. It was also held while differing with Hon'ble Justice B.P. Das that the petitioner had not come to Court in clean hands and therefore, he is not entitled to any equity, and merely because the highest bidder opposite party No.4 was called for negotiation to raise the bid price, that itself does not create any right in favour of the petitioner to claim that he had a right to be called for a negotiation.

6. Shri H.M. Dhal, the learned counsel appearing for the petitioner submitted that even accepting the case of the Corporation and opposite party No.4 that the petitioner had no right to revise his bid, it was open for the Corporation to settle the contract in

favour of opposite party No.4, his bid being higher than that of the petitioner. Without settling the contract in favour of opposite party No.4, the Corporation called opposite party No.4 for negotiation in order to raise the bid price quoted by him which he refused to do. According to Shri Dhal, the learned counsel appearing for the petitioner, the Corporation being desirous of getting better offer called opposite party No.4 for negotiation, otherwise they could have settled the contract with him for the bid amount quoted by the said opposite party. Once the opposite party No.4 was called for negotiation, the entire bid process is deemed to have been abandoned and therefore, all the parties who had participated in the bid process should have been called for negotiation.

Shri S.K. Padhi, the learned Senior Counsel appearing for opposite party No.4 and Shri Milan Kanungo, the learned counsel appearing for the Corporation submitted that opposite party No.4 being the highest bidder, a decision was taken to award the contract in his favour. However, before execution of agreement, as per practice adopted by the Corporation, opposite party No.4 was called for negotiation in order to raise the bid amount. This act itself does not create any right in favour of the petitioner to claim that he should have been also called for negotiation, once the highest bidder rejected the request for enhancing the bid amount. This was the practice adopted by the Corporation in respect of all contract awarded by it and this case is not an isolated one. It was also contended by the learned counsel for the said opposite parties that merely because the opposite party No.4 being the highest bidder was called for negotiation by itself does not give any right to the petitioner to claim for negotiation. Shri S.K. Padhi, the learned Senior Counsel drew attention of the Court to the CVC Guidelines and submitted that though the CVC Guidelines are not applicable to the present case, it clearly stipulates that only the lowest tenderer should be called for negotiation.

7. In order to appreciate the rival contentions of the learned counsel appearing for the parties, it is necessary to take note of certain dates and the provisions contained in the bid notice.

7.7.2010 Last date for submission of sealed bid.

7.7.2010 Petitioner and opposite party No.4 submitted their respective sealed bids.

7.7.2010 Petitioner alleges to have submitted a revised bid.

8.7.2010 Bids were opened and it was found that the offer of the petitioner was Rs.6,40,57,500/- where as the offer of opposite party No.4 was Rs.6,91,00,000/-. The offer of the third bidder Shri Ganesh Ram Agarwal was Rs.6,23,00,301.00.

16.7.2010 Opposite party No.1 was called for negotiation for upward revision of the rate quoted by him in the sealed bid. Opposite party No.4 appeared before the Corporation officers, participated in the process of negotiation and declined to revise his offer.

22.7.2010 Opposite party No.4 was intimated that his bid was accepted and he was required to approach the Corporation for execution of agreement.

23.7.2010      The agreement between the Corporation and opposite party      No.4  
was executed.

So far as the terms and conditions of the bid notice are concerned, clause 16 thereof provides that any request found along with the bid document or afterwards regarding modification/ alternation, if any, will not be considered on any ground. In view of this clause, even if we accept the contention of the learned counsel for the petitioner that the revised bid had been submitted by the petitioner on 7.7.2010, the same could not have been accepted by the Corporation. Therefore, undisputedly the petitioner having quoted an amount lower than that of opposite party No.4, the said opposite party No.4 was declared to be the highest bidder.

Clause-31 of the bid notice provides that the authority reserves the right to reject any or all the bids without assigning any reason thereof. Much reliance has been placed by the learned counsel for the petitioner on this clause in order to substantiate his contention that merely because opposite party No.4 was the highest bidder, no right accrued in his favour and the Corporation reserved the right to reject even the highest bid.

Admittedly there is no provision in the bid notice to invite the highest bidder for upward revision of the price quoted by him.

Admittedly after opposite party No.4 was found to be the highest bidder by letter dated 16.7.2010, the Managing Director of the Corporation intimated opposite party No.4 to attend his office on or before 23.7.2010 for upward negotiation of the rate quoted by him. The contents of the letter is quoted below:

“With reference to your bid on dtd.08.07.2010 for the above toll gate, you are hereby requested to attend this office on or before dtd.23.07.2010 positively for upward negotiation of the rate quoted by you in the above bid of the toll gate. This may be noted that this negotiation letter does not confer any right for award of this work.”

As is evident from the above, in absence of any provision in the bid notice, opposite party No.4 was called for negotiation and it is clear from the letter dated 16.7.2010 that till that day no final decision had been taken to settle the contract in favour of opposite party No.4. Now the question that raises for consideration is when the contract had not been settled in favour of any one as on 16.7.2010 and a notice was sent to opposite party No.4 being the highest bidder for upward revision of the rate quoted by him, whether the entire tender process was abandoned and the process of negotiation was taken up by the Corporation or as a matter of practice, the Corporation invited opposite party No.4 for negotiation.

8.      In this connection some judgments cited by the learned counsel for the parties are required to be referred to.

The learned counsel for the petitioner placed reliance on a decision of the apex Court in the case of **Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries, reported in (1993) 1 Supreme Court Cases 71**. In the said case Food

Corporation of India who was the appellant before the apex Court invited tenders in relation to stocks of damaged food grains. The bid given by respondent-tenderer was the highest. The Corporation not being satisfied about the adequacy of the amount offered in the highest tender, instead of accepting any tender, invited all the tenderers to participate in the negotiation. The respondent refused to revise the rate offered in its tender. In the negotiation, the appellant was offered an excess amount of Rs.20 lakhs. The respondent carried the matter to the High Court by way of filing a writ petition challenging the action of the Corporation in refusing to accept the highest tender submitted by it on several grounds. The action of the Corporation was alleged to be arbitrary and therefore in substance violative of Article 14. The High Court accepted this contention of the respondent and allowed the writ petition. Before Hon'ble Supreme Court it was contended by the respondent that even though the appellant-Corporation had the right to reject any tender including the highest tender and thereafter negotiate with all the tenderers to procure the highest price, yet this right has to be exercised reasonably and not arbitrarily. The apex Court did not accept such contention raised by the respondent and allowed the appeal with certain observations which are necessary to be quoted:

“ In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

The mere reasonable or legitimate expectation of a citizen, in such a situation, may not be itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand

judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.

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From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good.”

9. Reliance was also placed on another decision of the apex Court in the case of ***Ram and Shyam Company v. State of Haryana and others, reported in (1985) 3 Supreme Court Cases 267.*** In the said case, in an auction of minor mineral quarries in respect of a particular plot, the bid of the appellant therein was Rs.3,87,000/- for a period of 3 years and it was the highest. The said bid was accepted by the Presiding Officer but the State Government declined to confirm the same as the highest bid did not represent the market price. The Respondent No.4 in the said case who had also participated in the auction approached the Chief Minister with certain complaints and offered to pay Rs.4,50,000/- per year if the contract would be for a period of 5 years. The said offer of Respondent No.4 was accepted by Chief Minister and the same was challenged by the appellant by way of a writ petition in the High Court. The High Court dismissed the writ petition on a preliminary ground that the appellant has not exhausted the alternative remedy available to him. In a Special Leave Appeal, on the asking of the Hon'ble Supreme Court, the appellant filed an affidavit before the Court stating that if the highest bid at a re-auction fell short of Rs.4,50,000/-, the appellant would undertake to accept the contract at the value of Rs.5,50,000/-. The Respondent No.4 was given opportunity to raise his offer. As a result of the competitive offers made by the parties, the last offer of Respondent No.4 came out to Rs.22 lakhs whereas the offer of the appellant was Rs.25 lakhs. The Hon'ble Supreme Court allowed the appeal on merits by

setting aside grant of quarry lease in favour of Respondent No.4 and directed the State Government to grant contract to the appellant at the rate of Rs.25 lakhs per year for 5 years. The Hon'ble Supreme Court took up the pain of permitting the parties to bid before the Court itself solely considering the fact that by adopting such a process of negotiation, the State Government would be immensely benefited financially and therefore, it was required to be done in public interest without violating Article 14 of the Constitution of India. A similar view has also been expressed by this Court in the case of ***M/s. Blue Star Ltd. v. State of Orissa & others, reported in 2005 (I) OLR 521***. In the aforesaid case, tenders were invited in sealed cover for supply of instrument and equipment items for eight Regional Diagnostic Centres and in response to the said tender call notice, the petitioner and opposite party No.3 therein along with others had submitted their bids for C.T. scan machines. On ultimate analysis of the case, in paragraph-12 of the judgment, the Court came to the following conclusion:

"In this case, the terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government represented the rules for selection of the tenderer for such supply and to ensure transparency and fairness should have contained certain and clear terms for determination of the lowest suitable tenderer and should not have left any doubt as to how the lowest suitable tenderer will be selected. But, as we have seen, the terms and conditions therein were such as to create doubts in the mind of the tenderers as well as the State-level Purchase Committee as to whether the lowest suitable tenderer will be determined by taking into consideration price plus CMC or only price without CMC. The result was a choice was left to the authorities to either include CMC or exclude CMC from the price for determination of the lowest tenderer and the ultimate decision to include the CMC in the price for determining the lowest tenderer has resulted in not giving any opportunity to the petitioner to negotiate and bring down its CMC and make a competitive offer. Thus, the procedure followed in this case for selection of the lowest tenderer was obviously unfair to the petitioner and has affected its right to equality under Article 14 of the Constitution. In these peculiar facts and circumstances, we are of the view that the authorities must also negotiate with the petitioner to bring down its CMC and if the petitioner agrees to supply the C.T. scan machines at the composite price at which the opposite party No.3 has agreed to supply the C.T. scan machine, opposite parties 1 and 2 will place orders for supply of equal number of C.T. scan machines on the petitioner and the opposite party No.3 and the purchase order in Annexure-6 to the writ petition be modified accordingly. These directions have been given because it is stated before us that the funds will lapse unless the supply of the C.T. scan machines is made within March, 2005 and there is no time at all either for a re-tender or for a re-consideration by the Government and because these directions will ensure fairness to both the petitioner and the opposite party No.3."

Shri S.K. Padhi, the learned Senior Counsel appearing on behalf of opposite party No.4 placed reliance on a decision of the Hon'ble Supreme Court in the case of ***Directorate of Film Festivals and others v. Gaurav Ashwin Jain and others, reported in (2007) 4 Supreme Court Cases 737***. The said decision deals with the power of judicial review in policy matters. There is no dispute that the scope of judicial review of governmental policy is well defined and Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a

policy, nor are the courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review while examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or any statutory provision or manifestly arbitrary. There is no quarrel over the above proposition of law which is settled by the Hon'ble Supreme Court in several decisions.

10. On perusal of what has been laid down in the aforesaid decisions of the Hon'ble Supreme Court as well as this Court, it is found that in the matter of tender invited by the State or its instrumentality, the prime consideration is the public interest. It is the duty of the State to see that it gets the best price for the work entrusted by it to a private individual or organization. While doing so, if necessary, the State can also enter into negotiation with the intending parties to get the best price. Here is a case, where the Corporation had fixed the upset price at Rs.5,36,00,250/- and bids submitted by all the three bidders was more than the upset price fixed by the Corporation. Undisputedly amongst the three bids, the bid submitted by opposite party No.4 was the highest. The note sheet maintained by the Corporation shows that even though the bid submitted by opposite party No.4 was much more than the upset price, it was suggested that the said bid may be accepted or opposite party No.4 may be asked to negotiate his price. When the matter was placed before the higher authorities with the above note, a decision was taken to direct the opposite party No.4 to attend the office for negotiation of its quoted rate and accordingly, the letter dated 16.7.2010 was issued to opposite party No.4 to enhance the bid amount. The said letter also clearly indicates that the offer of negotiation given by the Corporation does not confer any right for award of the work in favour of opposite party No.4. There is no dispute that in response to the above letter, opposite party No.4 appeared before the Corporation and refused to enhance the bid amount. Thereafter only the matter was placed before the Managing Director for acceptance of the bid submitted by opposite party No.4. It is, therefore, evident that as on 16.7.2010, no decision had been taken by the Corporation to award the contract in favour of anyone and therefore, as on the said date, no right accrued in favour of anyone of the tenderers. If the Corporation was of the view that the bid amount quoted by opposite party No.4 is much higher than the upset price, there was no necessity of inviting opposite party No.4 for negotiation for upward revision of the price quoted by him. There is some substance in the contention of the learned counsel appearing for the petitioner that not being satisfied with the amount quoted by opposite party No.4, the Corporation decided to call him to negotiate for upward revision of the quoted price. Opposite party No.4 having refused to raise the price any further, the petitioner should have been also called to enhance his offer. Having called the opposite party No.4 for negotiation in spite of the fact that his offer was much more than the upset price clearly indicates that the Corporation wanted to settle the contract for a better offer and accordingly, it was the duty of the Corporation to call all the three tenderers for the purpose of negotiation. This view is supported by the observations made by the Hon'ble apex Court in the case of Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries (supra). Having not invited the petitioner for negotiation after opposite party No.4 refused to enhance the bid amount quoted by him violates Article 14 of the Constitution of India as has been held by the Hon'ble apex Court in the aforesaid case. Merely because the Corporation adopted the practice of inviting the highest bidder only for negotiation cannot make such action legal, the same being violative of Article 14 of the Constitution of India.



11. For the reasons stated above, I respectfully agree with the view taken by Hon'ble Justice B.P. Das.