(2010) 09 AP CK 0019

Andhra Pradesh High Court

Case No: Writ Petition No. 11875 of 2010

BGR Energy Systems Limited		APPELLANT
	Vs	
A.P. Power Generation Corporation Ltd.		RESPONDENT

Date of Decision: Sept. 9, 2010

Acts Referred:

- Constitution of India, 1950 - Article 14, 19(1)(g), 21, 226
- Electricity (Supply) Act, 1948 - Section 3
- Electricity Act, 2003 - Section 185, 70(2), 73, 73(m)

Citation: (2013) 1 ALT 696

Hon'ble Judges: P.V. Sanjay Kumar, J

Bench: Single Bench

Advocate: D. Prakash Reddy, for the Appellant; S. Sriram, Special Government Pleader for the Advocate General, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P.V. Sanjay Kumar, J.
Prescription of pre-qualification criteria by the Andhra Pradesh Power Generation Corporation Limited (APGENCO) at variance with the guidelines issued by the Central Electricity Authority (CEA) is called in question. The APGENCO invited pre-qualification bids for selection of qualified bidders for execution of Engineering, Procurement and Construction (EPC) contracts for Balance of Plant (BoP) works for its 1 x 600 MW Coal Fired Thermal Power Station at Kakatiya Thermal Power Plant (TPP) Stage-II in Chelpur Village, Ghanapuram Mandal, Warangal District and its 1 x 600 MW Rayalaseema TPP Stage-IV in Kadapa District, Andhra Pradesh. This invitation to offer was posted on the website of the APGENCO on 25.08.2009 and was published in Hindu English daily newspaper on 29.08.2009. Responding thereto,

eight bidders, including the petitioner company, submitted their bids before the closing date, 10.09.2009. The notification specified the following eligibility criteria, amongst others:

2.1. The bidder should have executed contracts on an Engineering, Procurement and Construction (EPC) basis for at least one (1) no. Coal Based/Lignite Based/Gas Based Combined Cycle Power Plant of installed capacity not less than 300 MW which has been commissioned during last seven (7) years and has been in successful operation for a period of not less than one (1) year as on the date of bid opening....

3.4 The average annual turnover of the bidder/consortium leader should be at least Rs. 500 crore during the preceding three consecutive years....

2. Admittedly, the petitioner company did not satisfy the aforestated eligibility conditions but submitted its bid. By letter dated 25.02.2010 the petitioner company addressed the APGENCO complaining of the above pre-qualification requirements which were not in accordance with the CEA''s guidelines or the previous tenders of the APGENCO and requested it to modify the said requirements so as to permit the petitioner company to participate in the tender process.

3. Stating that it had learnt that the APGENCO had decided in May, 2010 to qualify only three out of the eight bidders to its exclusion, the petitioner company filed the present writ petition. Challenge was laid against the petitioner company''s disqualification on the basis of what it termed to be illegal and unauthorized tender conditions.

4. By order dated 26.05.2010, this Court directed status quo obtaining as on that date to be maintained. However, by subsequent order dated 04.06.2010, this Court permitted the APGENCO to undertake further process in pursuance of the tender notification but restrained it from finalizing the tenders until further orders.

5. Aggrieved thereby, the APGENCO filed the present vacate stay application in WVMP No. 2068 of 2010. However, with the consent of the learned counsel, the main writ petition itself is taken up for consideration and disposal.

6. It is the case of the petitioner company that during the years 2005-08, the APGENCO had issued four tenders relating to execution of BoP works, in all of which the pre-qualification requirements were far lower than those prescribed in the subject notification. The petitioner company claimed to have emerged successful in bidding for the above works. The main thrust of the attack is however as to the disparity between the criteria prescribed in the subject notification and the CEA''s guidelines which are said to be statutory. It is alleged that prescribing such higher pre-qualification requirements is without rationale and would restrict healthy competition. The petitioner company further alleged that these pre-qualification criteria have been prescribed to ensure that the petitioner company is eliminated from the competition as it had emerged the successful bidder in the earlier projects.

7. In its counter, the APGENCO assailed the locus of the petitioner company to challenge the norms of eligibility/pre-qualification prescribed in the tender notification after submitting its bid pursuant thereto. The APGENCO stated that the CEA''s guidelines were only directory in nature and did not preclude it from enhancing the standards of eligibility as per the requirements of the project. It further stated that upon application of mind, it had been resolved to enhance the pre-qualification conditions in respect of the bidders'' turnover. It is averred that only three out of the eight bidders satisfied all the conditions of the pre-qualification bid, viz.,

(1) M/s. Larsen and Toubro Limited;

(2) M/s. Tata Projects Limited and

(3) M/s. Tecpro Systems Limited (Consortium).

8. It is admitted however that the pre-qualification criteria prescribed by the APGENCO in respect of three of its earlier works notified in February, 2005; February, 2005 and May, 2007 respectively set far lower standards, in fact lower than those provided in the CEA''s guidelines, on the basis of which the petitioner company was awarded the three works. It is however alleged that the petitioner company failed to execute these works within time, thereby causing loss to the APGENCO. The APGENCO further denied the allegation that the pre-qualification conditions had been incorporated so as to expel the petitioner from the competitive process.

9. In its reply, the petitioner company asserted that the CEA''s guidelines of August, 2009 were holding the field at the time the subject tender notification was issued by the APGENCO and reiterated its attack that the APGENCO erred in not adopting the said guidelines in respect of the pre-qualification requirements. The petitioner company also affirmed its charge that the APGENCO had itself followed the earlier CEA guidelines for its 2 x 800 MW Power Project in Krishnapatnam in October, 2008 but deviated from this procedure and prescribed onerous conditions in the subject notification leading to the expulsion of the petitioner company. On merits, the petitioner company asserted that technically there would not be much difference in the know-how required for executing the BoP works on EPC basis for Plants with varied capacities, be it 100 MW or 300 MW. The further allegation that the pre-qualification conditions were set with the intention of eliminating the petitioner company and other competent bidders from the competitive scheme is also reiterated. The petitioner company disputed the APGENCO''s claim that it had failed to execute the works awarded to it within time. It alleged that the delay was caused due to the inaction of the other parties involved in the projects. The petitioner company pointed out that the APGENCO had itself granted extensions to it in this regard and no liquidated damages had been imposed upon it for the delay, clearly indicating that the inaction in the completion of these projects was not attributable

to the petitioner company.

10. Heard Sri D. Prakash Reddy, the learned Senior Counsel appearing for Counsel for the Petitioner Company, Sri. Kowturu Pavan Kumar and Sri. S. Sriram, the learned Special Government Pleader representing the learned Advocate General for the APGENCO, assisted by learned Junior Counsel to the Advocate General, Sri. N. Ashwani Kumar. Learned Counsels placed reliance on case law to support their contentions. Sri S. Sriram, learned Special Government Pleader, produced the records of the APGENCO pertaining to the subject tender notification for the Court''s perusal.

11. Though not urged during the course of the arguments, the petitioner company contended in its pleadings that the action of the APGENCO in not communicating its disqualification to the petitioner company vitiated the tender process. The APGENCO retaliated by stating that it had power under the terms and conditions of the tender to accept or reject any tender without assigning reasons. That being so, the APGENCO disclaimed responsibility to communicate to each of the bidders the result of the consideration of their bid. Reliance in this regard was placed on I.V.R. Constructions Ltd. Vs. Sukdevraj Sharma and Bros and others, . However, as this point way not touched upon by Sri D. Prakash Reddy, learned senior counsel appearing for the petitioner company, this ground of attack is deemed to have been discarded by the petitioner company and need trouble this Court no further.

12. There is merit in the contention of the APGENCO that the petitioner company, having unconditionally responded to the tender notification with full knowledge that it did not meet the prescribed qualification criteria, cannot be permitted to assail the same. However, this Court does not propose to non-suit the petitioner company on this technical ground. The matter shall accordingly be dealt with on merits.

13. The Central Electricity Authority (CEA) was established u/s 3 of the Electricity (Supply) Act, 1948. u/s 185 of the Electricity Act, 2003 (for brevity, ''the Act of 2003''), the Electricity (Supply) Act, 1948 stood repealed. However, Section 70(2) of the Act of 2003 provides that the CEA established u/s 3 of the Electricity (Supply) Act, 1948 and functioning; as such immediately before the appointed date would continue as the CEA for the purposes of the Act of 2003. Section 73 of the Act of 2003 deals with the functions and duties of the CEA. Section 73(m) authorizes the CEA to advise any State Government, licensees or generating companies on matters which would enable them to operate and maintain the electricity system in an improved manner.

14. In exercise of the aforestated power, the CEA issued ''Guidelines for Qualifying Requirements for Bidders of Balance of Plants for Coal/Lignite based Thermal Power Stations'' in June, 2008. As per these guidelines a bidder, to qualify for executing contracts on EPC basis of BoP works for coal/lignite based thermal power stations, is required to have executed at least one contract on EPC basis for a power plant of an installed capacity of not less than 100 MW for a proposed plant capacity upto 1200

MW and 200 MW for a proposed plant capacity beyond 1200 MW, which should have been commissioned during the previous seven years and should be in successful operation for a period not less than one year as on the date of the bid opening. The average annual turnover of the bidder, as per these guidelines, should be at least Rs. 400 crore during the preceding three consecutive years. The ''Revised Draft Guidelines for Qualifying Requirements for Bidders of Balance of Plant for Coal/Lignite based Thermal Power Stations'' were issued by the CEA in August, 2009 almost replicating the aforestated conditions with regard to the required work-wise and financial turnovers of the bidder. Thereafter, in November, 2009, the CEA issued ''Guidelines for Qualifying Requirements for Bidders of Balance of Plant for Coal/Lignite based Thermal Power Stations'' affirming the conditions in the revised draft guidelines to the effect that the bidder should have executed contracts on EPC basis for at least one power plant of installed capacity of not less than 100 MW for plant capacity upto 1200 MW and 200 MW for plant capacity beyond 1200 MW, which should have been commissioned during the previous ten years and should be in successful operation for at least one year seven days prior to the date of opening of the bid. The condition as to the financial turnover was reiterated, i.e., a minimum of Rs. 400 crore during each of the preceding three consecutive years. Relevant to note, the subject notification was issued in August, 2009 and therefore, the question of the APGENCO following the CEA''s guidelines of November, 2009 does not arise.

15. The issue however is whether the APGENCO was statutorily bound to follow the CEA''s guidelines of June, 2008, or the revised draft guidelines of August, 2009.

16. The contention of the APGENCO is that these guidelines are only directory and subject to maintaining the minimum standards prescribed therein, it had the liberty to prescribe higher standards to suit the project requirements.

17. I find force in this contention.

18. Section 73(m) authorizes the CEA to ''advise'' the State Government and the generating companies on the matters specified therein. There is no indication in the scheme of this provision that such advice is binding upon the State Government or the generating companies. That being so, the APGENCO was at liberty to prescribe pre-qualification standards on its own. Relevant to note, the standards so set were higher than those advised by the CEA. It is the case of the APGENCO that as there is no other 600 MW plant in operation, the enhanced pre-qualification criteria were prescribed so as to secure reputed and technically equipped bidders who could successfully complete the project within time without any hindrance.

19. Another crucial aspect requires to be taken note of. The APGENCO in the meeting of its Board of Directors held on 02.06.2007 discussed general issues with regard to tender procedures. The decision taken during the said meeting is of relevance:

The issues with regard to adoption of G.O.Ms. No. 94 to various works of APGENCO were also taken up. It was decided to adopt the above GO with reference to EMD. Hence, in future in all the tenders the value of EMD should be as per the above G.O.

Regarding turnover, it was decided that the above GO will be adopted in case duration of work is more than one year. However, for works duration below less than one year, the pre-qualification of turnover should be equal value of the work. Henceforth, the revised order may be applicable for future tenders of APGENCO.

20. Pertinent to note, under G.O.Ms. No. 94, Irrigation and CAD (PW-COD) Department, dated 01.07.2003 the qualification criteria prescribed are:

A. To qualify for award of contract, each bidder in his name should have, during the last five years (specified financial years i.e. they should be immediately preceding the financial year in which tenders are invited).

(a) Satisfactorily completed as a prime contractor, similar works of value not less than Rs. /- (usually not less than 50% of estimated value of contract) in any one year.

(b) Executed in any one year, the following minimum quantities of works:

-...

-...

-...

- (usually 50 percent of the expected peak quantities of construction per year).

21. Therefore, the aforestated qualification criteria pertaining to turnover prescribed in G.O.Ms. No. 94 dated 01.07.2003 were adopted by the APGENCO for its tender procedures. The contention of the petitioner company that the APGENCO had issued a notification in October, 2008 following the CEA''s guidelines with regard to the qualification criteria and not in accordance with G.O.Ms. No. 94 dated 01.07.2003 does not hold water. The said notification was issued not by the APGENCO but by the Andhra Pradesh Power Development Company Limited. The argument of the petitioner company that the APGENCO was a shareholder of the Andhra Pradesh Power Development Company Limited and that the Managing Director of both the companies is one and the same, obviously with the intention of attributing the said notification to the APGENCO, does not commend acceptance. Once the two companies are separate corporate personalities, merely because the APGENCO is also a shareholder in the other company, the actions of the same cannot be attributed to or be made binding on the shareholder, the APGENCO.

22. As matters stand, there is no indication that the APGENCO deviated from the decision taken in the meeting held on 02.06.2007 with regard to following the qualification criteria prescribed in G.O.Ms. No. 94 dated 01.07.2003. Relevant to note, the notifications issued by the APGENCO prior to the said date appear to have

prescribed standards lower than those indicated in the CEA''s guidelines and the petitioner company was awarded those works. This Court is not concerned with the execution of those works or the allegations made in relation thereto. The records reflect that the same did not form part of the decision milking process while prescribing the pre-qualification criteria in the subject notification or disqualifying the petitioner company thereunder.

23. The further allegation of the petitioner company that G.O.Ms. No. 94 dated 01.07.2003 pertaining to the Irrigation Department of the State had no relevance and was not germane to the kind of work to be undertaken pursuant to the subject tender notification cannot be countenanced. It was for the APGENCO to decide as to what procedure should be followed by it while inviting tenders and as long as such decision making process is not tainted by arbitrariness, unreasonableness or mala fides, it is not for this Court to sit in appeal over the same or substitute its view therefor. The APGENCO having considered the matter adopted the norms prescribed by the Irrigation Department of the State in so far as EMD and turnover, work-wise and financial, were concerned. There is no material placed before this Court to categorize such decision as unreasonable, arbitrary or mala fide. Having adopted this procedure, the records reflect that the APGENCO decided to follow the CEA''s guidelines and the Government of Andhra Pradesh guidelines without deviation in so far as the subject notification is concerned. That being so, the subject notification, prescribing higher pre-qualification criteria in accordance with the APGENCO''s decision and meeting all other norms as per the CEA''s guidelines, cannot be said to be illegal, unreasonable or arbitrary.

24. Sri D. Prakash Reddy, learned senior counsel, placed reliance on Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, and more specifically the observations of the Supreme Court in para 36:

36.... "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation"". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it

should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

Reference was made by the Supreme Court to its earlier Judgment in Union of India (UOI) and Another Vs. International Trading Co. and Another, wherein it was stated:

15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

25. The learned senior counsel also placed reliance on Global Energy Ltd. and Another Vs. Central Electricity Regulatory Commission, wherein the Supreme Court observed:

When a disqualification is provided, it is to operate at the threshold in respect of the players in the field of trading in electricity. When, however, a regulatory statute is sought to be enforced, the power of the authority to impose restrictions and conditions must be construed having regard to the purpose and object it seeks to achieve. Dealing in any manner with generation, distribution and supply and trading in electrical energy is vital for the economy of the country. The private players who are permitted or who are granted licence in this behalf may have to satisfy the conditions imposed. No doubt, such conditions must be reasonable. Concededly, the doctrine of proportionality may have to be invoked.

26. The learned senior counsel also placed reliance on the Judgment of a Division Bench of the Delhi High Court in Dhingra Construction Co. Vs. Municipal Corporation

of Delhi and Others, and more specifically the observations made in Paras 36 and 37 thereof:

36. After giving our anxious consideration, we cannot but hold that the impugned policy, in effect subverts rather than subserves the purpose of fair competition based upon a reasonable estimate of what constitutes similar works. It effectively eliminates a wider participation, and keeps out parties who are otherwise eligible, on unreasonable considerations. By drawing a very high threshold or eligibility condition (contained in Para 3(viii), i.e. three similar completed works during the last three years not less than Rs. 480 lakhs; or worth Rs. 6 crores each for two years or worth Rs. 9.6 crore in any one year) the impugned policy is unreasonable and arbitrary.

37. The public interest, in a fair competition, in this case, in our view, based upon a reasonable and fair assessment of all factors that are relevant, and germane, far outweighs the interest of the State agency in being left alone to formulate its policies, with sufficient "elbow room". The considerations that seemed to weigh with MCD while fixing the criteria in the impugned policy, were based on non-existing, or irrelevant factors. This led to elimination of a large number of tenderers, even though the actual estimated work was far less than Rs. 12 crores. If the estimate for fixing similar works were based upon figures that had some semblance of relationship with the actual estimates, this result would not have ensued. The impugned condition in our view is based upon an assumption or conclusion so unreasonable which no reasonable authority or person could ever have come to having regard to the facts presented in this case. Accordingly, we hold that the overwhelming public interest requires for intervention, under Article 226 of the Constitution.

27. The learned senior counsel therefore contended that the higher standards prescribed by the APGENCO were unreasonable, arbitrary and based on irrelevant considerations warranting interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution.

28. Per contra, Sri. Sriram, learned Special Government Pleader, argued that the petitioner company''s allegation that the subject standards were tailor-made to exclude the petitioner company was without basis. He pointed out that though the petitioner company alleged mala fides, no specific averments or imputations were made in this regard. He reiterated the stand that the CEA''s guidelines were only directory and that it was open to the APGENCO to opt for higher standards as per project requirements.

29. Relying on case law, the learned Special Government Pleader submitted that the scope of judicial review in matters of this nature was restricted and that the liberty of the ''State'' in prescribing tender conditions as per its considered wisdom would not be trampled upon by this Court merely because an alternative view way

possible. He pointed out that higher standards with regard to work-wise and financial turnovers brought out the proven track record of the bidders, which could not be said to be an irrational consideration for award of the EPC contract for undertaking a work unprecedented in nature. The learned Special Government Pleader relied on the observations of the Supreme Court in para 38 in Reliance Energy Ltd. (2 supra) to the effect that the terms and conditions of the tender should indicate with legal certainty, the norms and bench marks. Only if there is vagueness or subjectivity in the said norms, the Supreme Court was of the opinion that it would result in unequal and discriminatory treatment thereby violating the doctrine of ''level playing field''.

30. The learned Special Government Pleader asserted that as the prescribed pre-qualification criteria spelt out in no uncertain terms as to what was required from the bidders, both in respect of work-wise turnover as well as financial turnover, and the same was founded on a rational, germane and well-considered policy decision, the same did not brook any interference. He also pointed out that the Division Bench of the Delhi High Court in Dhingra Construction Co. (5 supra) observed as follows:

32.... The object of any criteria fixing exercise is, two-fold. First, ensuring that only those concerns which have proven track record with sufficient experience and sound financial standing are permitted to bid. Second, ensuring fair competition. Both these considerations are of paramount importance as per the guidelines of the CVC, and to our mind, also as facets of reasonableness, fairness and non-arbitrariness in the context of the tendering process.

31. He asserted that as the exercise undertaken by the APGENCO in the present case fell within the four corners of the aforestated observations, the factual scenario obtaining in the Delhi case being altogether different, the subsequent observations of the Delhi High Court had no relevance. He also pointed out that three reputed concerns had been shortlisted as per the prescribed pre-qualification criteria and that it was not a case of the APGENCO being left with a ''Hobson''s choice''. He further submitted that having made its bid without meeting the eligibility conditions, the action of the petitioner company in approaching this Court and stalling the tender process was untenable.

32. In this regard, reference may be made to Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, wherein the Supreme Court dealt with the considerations which would weigh in a commercial transaction and said:

9. 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 of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

33. Reference may also be made to the scope of judicial review in the matter of tenders as laid down by the Supreme Court in Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another,

11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in Tata Cellular Vs. Union of India, It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down....

34. In Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, the Supreme Court observed that even if two views are possible but no mala fides or arbitrariness is shown, there is no scope for interference with the view taken by the authorities in inviting tenders.

35. In Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, the Supreme Court observed:

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract.

That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

13.... The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.

36. In Association of Registration Plates Vs. Union of India (UOI) and Others, the Supreme Court observed:

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous

manufacturers, judicial interference is uncalled for.

37. In Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others, the Supreme Court held that it is always open to the State to give effect to a new policy which it wished to pursue while prescribing conditions of eligibility in a tender keeping in view public interest but subject to principles of ''Wednesbury reasonableness''.

38. The aforestated case law indicates that preponderance of judicial thought inclines towards great circumspection being exercised by the Courts in interfering with eligibility conditions prescribed in tenders. Unless such tender conditions are shown to be arbitrary, unreasonable or mala fide, interference would normally not be called for.

39. In the present case, insistence on the bidder having completed successfully a work of half the capacity of and having a turnover of half the value of the subject notified work cannot be said to be unreasonable or arbitrary by any stretch of imagination. It is not for this Court to evaluate whether ''know-how'' or ''capacity'' should be the criterion for assessing the bidders at the pre-qualification stage. The argument of the learned senior counsel in this regard must therefore fail. It was for the APGENCO to formulate its policy in this regard and the policy decision of the APGENCO to adopt a norm by taking recourse to a similar policy decision of the Irrigation Department of the State cannot be termed to be unreasonable or arbitrary. The Judgment of the Delhi High Court in Dhingra Construction Co. (5 supra) is distinguishable on facts as the Delhi High Court found in that case that the conditions imposed were based upon assumptions or conclusions so unreasonable that no reasonable authority or person could have come to. No such situation is obtaining in the present case.

40. Except for a bald allegation, the petitioner company has not substantiated that the tender conditions were tailor made to exclude it from the competitive process or that its disqualification was actuated by malice or malafides. That being so, the prescription of higher standards in the pre-qualification criteria by the APGENCO cannot be said to be illegal. The consequential disqualification of the petitioner company by application of such higher standards is therefore equally free of illegality. The Writ Petition is devoid of merit and is accordingly dismissed but in the circumstances of the case, without any order as to costs.