

M/s. Lanco Infratech Limited Vs The Chief General Manager (Contracts) Neyveli Lignite Corporation Ltd.

Court: Madras High Court

Date of Decision: Oct. 10, 2013

Citation: (2013) 6 CTC 667

Hon'ble Judges: K.K. Sasidhar, J

Bench: Single Bench

Advocate: V.T. Gopalan, for Mr. K. Ravindranath, for the Appellant; N.A.K. Sharma, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K.K. Sasidhar, J.

The petitioner wanted the High Court to exercise the power of judicial review in respect of a global contract floated by

Neyveli Lignite Corporation worth Rs. 5900 Crores in a piecemeal manner during the currency of Tender Evaluation Process and before finalising

the composite tender and award of contract.

Brief facts:-The case of the petitioner:

The petitioner is a leading business house in the domains of Engineering, procurement and construction (EPC), Power, Solar, Natural resources

and infrastructure in India. The petitioner is also engaged in the construction of Metro Rail.

2. M/s. Neyveli Lignite Corporation [hereinafter referred to as NLC], issued a notification calling for bids for steam generator and auxiliary

package for its new thermal power project. The notification dated 24 September 2012 was published on 25 September 2012. The petitioner,

pursuant to the said notification, submitted its technical and commercial bids on 10 December 2012. The technical bids were opened on 21

December 2012. There were three bidders: the petitioner, M/s. Bharath Heavy Electricals Ltd, India and M/s. Ansaldo Caldaie S.p.a. Italy. Since

the scope of the work and technical requirements of the tender were complex in nature requiring design and integration of multiple and complex

components and systems, NLC allowed the petitioner and other bidders to take technological and commercial deviations. The bidders were

permitted to submit necessary documents to justify the deviation. NLC by its letter dated 19 April 2013, sought certain clarifications on deviation

suggested by the petitioner. NLC called upon the petitioner and its associates M/s. Harbin Boiler Company (hereinafter referred to as HBC), for a

meeting on 2 May 2013 at Neyveli to discuss technical and commercial deviations. The petitioner and its associate attended the meeting. HBC

provided support to the petitioner for resolution of technical deviations. The petitioner submitted all the necessary information pursuant to the

communication sent by NLC. In the meantime, the petitioner was directed to extend the bid validity up to 17 November 2013. The petitioner

readily complied with the said direction. However, there was no follow up action taken by NLC to call upon the petitioner to submit its revised

price bid. In the meantime, the petitioner was informed that NLC has invited the other two bidders for submission of their revised price bid, which

would be opened on 30 August 2013. According to the petitioner, they have complied with all the requirements as indicated in the communications

sent by NLC. NLC was bound to invite the petitioner for submitting revised price bid. The petitioner therefore seeks a writ of mandamus to

forbear NLC from proceeding further with the bidding process, by opening the price bids on 30 August 2013 without considering the clarifications

submitted on various occasions in relation to tender No. CO/CONTS/0014T/NTTP/NTA1-SG/2012 dated 24 September 2012.

Case of NLC:

3. The Chief General Manager, Neyveli Lignite Corporation Ltd. filed a detailed counter affidavit disputing the claim made by the petitioner.

According to NLC, the petitioner has been delaying the matter under one pretext or the other. The petitioner wanted extension of time by two

months even to submit the bid pursuant to the notification issued by NLC. The petitioner was asked to give certain clarifications with regard to

technical specification on or before 2 May 2013. The petitioner furnished a reply dated 4 May 2013 with regard to certain items and undertook to

give further reply at a later point of time. Since NLC wanted to complete tender process as early as possible, the petitioner was invited to

participate in the techno-commercial discussion from 13 to 15 May 2013. During the said meeting, the petitioner withdrew certain deviations taken

by it in Part-1 of the bid. Certain other deviations were either accepted or resolved. Other major deviations remained and in some aspects the

petitioner promised to revert with replies/clarifications on or before 22 May 2013. However, the petitioner failed to submit clarification within the

time granted. The petitioner maintained at all point of time that it was in discussion with the associate (HBC) and after taking technical advice, they

would revert. NLC thereafter, by letter dated 1 June 2013, reminded the petitioner to give its reply to the pending points without any further delay.

Even though the petitioner agreed to give reply, there was no follow up action. According to NLC, time was extended periodically with a view to

furnish the required particulars. However, the petitioner was dragging the matter under one pretext or the other. NLC wanted the petitioner to

indicate the furnace explosion/implosion withstand capacity. The specification given by the petitioner was less than the specified value of minimum

+/-660mm, and it was not acceptable to NLC. It was further contended that the clarifications given by the petitioner were all incomplete and as

such, a decision was taken to proceed further by negotiating with the other two tenderers.

Summary of Submissions:-

4. Thiru V.T. Gopalan, learned Senior Counsel for the petitioner took me through various correspondence and documents and submitted that

NLC wanted the contract to be given to a party already selected and there is a hidden agenda.

5. The following are the substantial submissions made on behalf of the petitioner:

(i) The contract in question involves Rs. 5907.11 crores. There were only few bidders. Since the contract involves highly technical specifications,

NLC wanted certain clarifications to proceed further. The petitioner clarified its position on various occasions. NLC has been communicating with

the petitioner. However, NLC put an end to the discussion abruptly by giving three days notice and thereafter, proceeded to consider the bids

submitted by the other two tenderers. The limited time given to submit reply would prove the arbitrary and hasty nature of tender process.

(ii) The first tender was cancelled by the petitioner. Thereafter, the second tender was floated on 24 September 2012. Bidders have been

negotiating with the NLC. Nature of clarification sought for by NLC require serious consultations with the collaborator. NLC erred in giving a very

short period to submit reply to various points of highly technical nature.

(iii) The tender in question is a non statutory contract. NLC should have given reasonable time to the petitioner to submit the clarification. (iv) There

is no pre-fixation of any time frame for opening the bids. Even then, NLC proceeded in a hasty manner with a view to help the other two

tenderers. The petitioner being a bidder, is entitled to equality and fair treatment in the matter of evaluation of competitive bids.

(v) The bids offered should be processed in a transparent manner free from any hidden agenda. The very fact that the petitioner was kept in

darkness with regard to submission of revised price bid would show that NLC wanted to show favouritism.

(vi) NLC has not indicated anything about the shortcomings. The petitioner has no knowledge of what is falling short. NLC kept the entire

transaction in secret. NLC by its letter dated 10 July 2013, called upon the petitioner to submit its reply on or before 15 July 2013. The time was

inadequate and in fact, it was unreasonable in the facts and circumstances of the matter.

(vii) The available materials would make the position very clear that NLC had already decided that the bids submitted by the petitioner should be

rejected. NLC issued notice giving three days time for compliance, knowing fully well that it is not possible to submit the required information

within the short period.

(viii) The fixation of such arbitrary time, deliberately calculated to defeat the interest of the petitioner, cannot be treated as reasonable compliance

of the principles of natural justice.

(ix) There was no urgency to proceed with the matter in view of the highly technical nature of contract.

6. Thiru N.A.K. Sarma, learned Senior Counsel for Neyveli Lignite Corporation made the following submissions:-

(i) The petitioner was given extension of time periodically to submit the technical specifications and explanation with regard to deviations;

(ii) Even though time was extended on many occasions, the petitioner failed to give satisfactory explanation;

(iii) NLC wanted a particular kind of boiler. M/s. HBC has been manufacturing a different type of boiler and steam generators. The Consortium

Partner of the petitioner never indicated that they would be in a position to provide steam generator and auxiliaries as per the specification given by

NLC.

(iv) Contract involves about Rs. 5900 Crores. In case the matter is prolonged, NLC would sustain heavy loss and the project cost would increase

substantially. NLC therefore wanted to conclude the contract at the earliest. It was only with this view, time limit was prescribed, before which the

required information should be furnished. Notwithstanding such prescription of time, the petitioner failed to submit the required clarification and

technical information.

(v) It was a composite tender. The tender process would be over only by awarding contract, after opening the price bids. It was only on account

of the said reason, the petitioner was asked to extend the bid validity. The extension of validity period would not go to show that NLC has taken a

decision to accept the bid submitted by the petitioner.

(vi) The bid submitted by the petitioner was not in accordance with the specification. NLC made it very clear that deviation with respect to boiler,

minimum stable load, re-heater spray and explosion/implosion withstand capacity etc. cannot be condoned. Even then, there was no follow up

action taken by the petitioner to give clarification or to eradicate the deviation. NLC, was therefore justified in proceeding with the tender process

by inviting the other two bidders to submit the revised price bids.

Citations:

7. The learned Senior Counsel for the petitioner placed reliance on the following judgments in support of his contention that Judicial Review is

permitted even in contractual matters.

(i) (2001) 251 ITR 197 (SC) .

(ii) Canara Bank and Others Vs. Shri Debasis Das and Others, .

(iii) Noble Resources Ltd. Vs. State of Orissa and Another,

(iv) Uma Nath Pandey and Others Vs. State of U.P. and Another, .

(v) In Re: Special Reference No. 1 of 2012,

8. There is no dispute with regard to the legal position that if an action of State is violative of Article 14 of the Constitution of India, even in

contractual matters, writ petition is maintainable.

9. The learned counsel for the respondent cited the following judgments:

(i) Tata Cellular Vs. Union of India,

(ii) Meerut Development Authority Vs. Association of Management Studies and Another, .

(iii) PSA Ennore Pte. Limited Vs. Union of India (UOI) and Ennore Port Limited,

(iv) NTPC Limited Vs. Ansaldo Caldaie Boilers India P. Ltd. and Another, .

Discussion:-

10. M/s. Neyveli Lignite Corporation Ltd. is a Central Public Sector Undertaking. NLC was awarded Navaratna status by Government of India in

recognition of its performance. NLC proposed to commission a new mega thermal power project at Neyveli. Since it is a major project, NLC

appointed M/s. Lahmeyer International (India) Private Limited as its Project consultant. The project is proposed to be executed under three

packages viz., (i) Steam Generator & Auxiliaries Package (NTA1) (ii) Steam Turbine Generator Package (NTA2); (iii) Balance of Plant Package

(NTA3). NLC floated tender under international competitive bidding process.

11. We are concerned only with the Steam Generator & Auxiliaries Package. The tender notification contain the relevant dates. The bidders were

expected to submit their bids on or before 17 November 2012. The bids were to be submitted under two cover system. Para 3.8(9) of the

Instructions to Bidders contain a specific clause that failure to furnish all information required in the tender specifications or submission of bid not

substantially responsive to the tender specifications in every respect or bids received in incomplete shape shall be liable for rejection. Para 3.8(10)

provides that material deviation would include any deviation to vital clauses listed in the technical specifications.

12. The petitioner submitted its bid pursuant to the notification issued by NLC. There were two other bidders. Since it is a high value contract for

supply of specialized technical equipment for power generation, the tender process permitted the intending bidders to seek clarifications on

commercial and technical aspects at the pre-bid stage. The petitioner also wanted certain clarifications to be given by NLC. The petitioner by letter

dated 23 October 2012, requested NLC to extend the time for submission by two months. It is also matter of record that NLC, pursuant to the

said request extended time till 21 December 2012 for submission of bid by the petitioner.

13. NLC after opening the technical bids and conducting a preliminary scrutiny of techno-commercial bids, wanted clarifications on many issues

including deviations proposed by the petitioner.

The Relevant Correspondence:

14. The following details would give a clear picture with regard to the notices sent to the petitioner by NLC to clarify its position with regard to

certain deviations, time given for answering the clarifications, actual date of receipt of clarifications by NLC, matters in respect of which

clarifications were not given by the petitioner and submission of piecemeal and incomplete clarifications.

(i) NLC by letter dated 19 April 2013, called upon the petitioner to give clarification on certain vital issues on or before 2 May 2013. The

petitioner furnished reply by email on 4 May 2013 with respect to certain items and agreed to give a further reply at a later point of time;

(ii) NLC convened a meeting of all the prospective tenderers for a discussion with regard to clarification of bids. The meeting was conducted from

13 May 2013 to 15 May 2013. The Associate of the petitioner and the officials of NLC attended the meeting. The petitioner during the course of

meeting withdrew certain deviations taken in Part I of its bid. Certain other deviations were either accepted or resolved. Certain material deviations

remained unanswered. The petitioner agreed to clarify with respect to those deviations on or before 22 May 2013.

(iii) The petitioner failed to submit the replies/clarifications by 22 May 2013.

(iv) The petitioner, by e-mail dated 24 May 2013, submitted a reply to some of the pending points. However, with respect to few other material

points, the petitioner stated that they were in discussion with HBC and a reply would be sent shortly.

(v) The clarification with regard to certain major issues, such as provision of After Burning Grate, water lances, re-heater Spray, minimum stable

load without oil support as well as furnishing of filled Data Sheets, Boiler Bunker layout drawings etc. remained pending.

(vi) NLC by letter dated 1 June 2013, reminded the petitioner to submit its reply with regard to the pending points without any further delay.

(vii) The petitioner by email dated 4 June 2013, promised to respond soon.

(viii) Since the petitioner failed to clarify the pending points, NLC by letter dated 7 June 2013, requested the petitioner to furnish reply in full form

on or before 12 June 2013.

(ix) Since the petitioner failed to submit the filled data sheets, which in the normal course should have been annexed to Part I of the bid, NLC by e-

mail, called upon the petitioner to submit the filled data sheets.

(x) The petitioner by email dated 11 June 2013, furnished reply to some of the points and submitted filled Data Sheets numbering only 64 sheets.

(xi) Even though data sheets contain numerous technical parameters and the bidder was required to fill up the specifications/parameters, so as to

enable NLC to ascertain whether the specifications/parameters offered were within the Technical Specifications annexed to the package and within

statutory/regulatory/acceptable specifications, the petitioner deliberately kept the data sheets unfilled. The petitioner indicated that the required

information would be furnished during detailed engineering or as per specification requirement.

(xii) NLC by letter dated 14 June 2013 called upon the petitioner to withdraw all the deviations and confirm compliance to technical specification

on or before 21 June 2013, failing which it was indicated that the bid will be processed as per tender conditions based on available documents.

NLC along with the said communication annexed a list of pending issues awaiting clarification.

(xiii) NLC by letter dated 18 June 2013 called upon the petitioner to offer its comments on the filled data sheets. NLC in the said letter very

specifically stated that response of the petitioner that the information would be furnished during detailed Engineering, does not answer the pending

points.

(xiv) The petitioner by e-mail dated 21 June 2013 submitted a set of revised filled data sheets and replied only few pending points.

(xv) Since the reply dated 21 June 2013 was incomplete, NLC by letter dated 28 June 2013 sought further clarification.

(xvi) The petitioner by e-mail dated 28 June 2013 replied that for Water Lances and After Boiling Grate they would take responsibility. However

the petitioner wanted further time to submit its answers to the remaining issues.

(xvii) The petitioner by e-mail dated 29 June 2013 informed NLC that they are in the process of discussion with their OEM and shall revert shortly

on other pending issues.

(xviii) NLC by letter dated 10 July 2013 informed the petitioner about the importance of ten pending points. The petitioner was asked to submit its

reply positively by 15 July 2013. It was specifically stated that the reply has to be filed before the prescribed date and no further extension of time

would be granted and no correspondence shall be entertained thereafter.

(xix) The petitioner by e-mail dated 15 July 2013 stated that they have already withdrawn the deviations with regard to Water Lances and After

Burning Grates (ABG) and promised to produce a letter to that effect from M/s. Harbin Boiler Company. The petitioner by the very same e-mail

furnished the Bunker Bay drawing for the first time. It was found that the Bunker Bay had been shifted to the rear side of the Boiler as against the

tender specification requiring it to be located in the front portion. Similarly instead of rectangular boiler, the petitioner showed it as circular.

(xx) The petitioner submitted an unsigned letter from M/s. M/s. Harbin Boiler Company which was also not as per specification.

(xxi) The petitioner by e-mail dated 23 July 2013 gave confirmation with respect to two pending points. However, other pending points remain

unanswered.

15. The factual matrix clearly shows that the petitioner has been buying time under one pretext or the other. The petitioner failed to answer the

basic issues relating to After Burning Grate (ABG), Water lances, Reheater Spray, Minimum Stable load without oil support. The

correspondences exchanged between the parties would give a prima facie impression that the petitioner was not sure as to whether they would be

in a position to supply the boiler as per the specification given by NLC.

16. NLC time and again extended the dead line so as to enable the petitioner to answer the query. The communications sent by the petitioner to

NLC one after another very clearly indicates that the petitioner was only in the stage of preparatory process to comply with the tender

requirements.

17. The documents produced by NLC shows that the technical doubts entertained by the petitioner were all answered as early as on 29 October

2012. It is also not in dispute that the consortium partner of the petitioner M/s. Harbin Boiler Company Limited is not manufacturing the type of

steam generator shown in the specification given by NLC. HBC was not prepared originally to supply After Burning Grate and Water Lances as

per specification. NLC wanted to supply After Burning Grate strictly as per their requirement as shown in the tender notification. It was only on 16

July 2013 M/s. Harbin Boiler Company Limited has sent an unsigned communication confirming to the design and supply of After Burning Grate

and Water Lances. Since it was an unsigned letter NLC was not bound to consider it for proceeding further. Even according to the petitioner, the

value of the contract is Rs. 5907.11 crores. The petitioner should have taken the issue little seriously, given the nature of contract and the cost

factor. The fact that NLC was tolerant should not be taken in the negative manner. NLC waited for months together taking into account the fact

that there are only three bidders. It was only to give an opportunity to the petitioner to prove its technical competence to supply steam generator

and auxiliary package, time was extended on innumerable occasions.

18. There is no dispute that in the usual course of tender process, in case technical bid submitted by a bidder does not confirm to the eligibility

criteria, it would summarily be rejected. NLC, considering the volume of work and money involved, granted sufficient time to the petitioner to

comply with technical specifications. However, the petitioner was giving only evasive replies and never adhered to the time schedule. NLC was not

bound to give periodical extension in an indefinite manner. In case extension is given and the matter is dragged, naturally, cost would escalate. The

project cost would go up considerably in the event of delay. It was only under such circumstances, NLC issued an ultimatum to the petitioner

directing rectification of deficiencies earlier noted before a particular period. It is a matter of record that even then, the petitioner was not in a

position to answer several basic issues which goes to the root of the matter.

19. The learned Senior Counsel for the petitioner has taken up a contention that even after opening the technical bid, the petitioner was directed to

keep the bank guarantee alive. According to the learned Senior Counsel, this act would show that the technical bid of the petitioner was not

rejected. I am not inclined to accept the said submission. The tender notification very clearly shows that it is a composite tender and the bidders

have to keep the bank guarantee alive till the award of contract. The contract being a composite one, it would be awarded only after opening the

price bid.

20. The learned Senior Counsel for the petitioner mainly focussed on the contention regarding limited time given to the petitioner to answer the

issues and deviations. According to the learned Senior Counsel, letter was sent on 10 July 2013. Since 13 and 14 July 2013 were holidays for the

Company (Saturday and Sunday) there were only three days time to submit the reply. The learned Senior Counsel by placing reliance on the

Division Bench decision of this Court in Commissioner, Corporation of Chennai Vs. R.S. Vaideeswaran and Others, and (2001) 251 ITR 197

(SC) submitted that this Court has already held that two days notice is not a reasonable notice. The argument on the basis of three days notice is

liable to be rejected for more than one reason.

(a) This is not a statutory notice given for undertaking a particular act or a show cause notice giving two or three days notice. The notice period

here has to be computed from the initial period. The bids were opened on 21 December 2012. Thereafter, discussions with regard to deviations

commenced. Since the petitioner failed to adhere to the time schedule, NLC started issuing notices from 19 April 2013. The notice dated 10 July

2013 was nothing but continuation of the earlier notices. It was not first of its kind. It is too strange on the part of a bidder, who is in the race for

securing a contract worth Rs. 5900 crores to come up with a contention that Saturday and Sunday were holidays and as such time was too short

to reply.

(b) The petitioner was expected to meet the technical specifications indicated in the bid document. Deviations without effecting the structure of

package were permitted. The petitioner failed to meet the technical specifications. The petitioner wanted to supply Boiler and Steam Generators

manufactured by its consortium partner notwithstanding the fact that those items were not the one NLC wanted to erect at Neyveli.

21. The learned Senior Counsel while narrating the background of the petitioner Company and its experience submitted that the petitioner was

awarded several contracts in recognition of its past performance and adherence to time schedule.

22. The learned counsel for NLC by placing reliance on the recent order terminating the contract given to the petitioner by Metro Rail submitted

that the contract for a sum of Rs. 178 Crores awarded to the petitioner in August 2011 for construction of elevated stretch between Officers

Training Academy and Chennai Airport was cancelled on account of slow progress. The learned counsel again by placing certain reports submitted

that the petitioner had a net debt of Rs. 34,770 Crores as on 30 June 2013. Since those details are not germane to decide this writ petition, there

is no need to refer those submissions.

23. Even though the learned Senior Counsel for the petitioner accused NLC of giving only three days time to rectify certain major deficiencies, the

fact remains that even after the expiry of two months from the deadline, the petitioner has no case that they have complied with the requirements

pointed out by NLC earlier in respect of which, final notice was given on 10 July 2013. This shows the lack of bonafides on the part of the

petitioner and the justification put forward by NLC that the petitioner wanted to drag on the matter till they are in a position to meet the tender

requirements.

24. The petitioner now wanted this Court to exercise judicial review during the currency of tender evaluation process. The contract is a major one

involving several crores of rupees. Even though the tender process with regard to the other two packages viz., Steam Turbine Generator Package

(NTA2) and Balance of Plant Package (NTA3) proceeded as scheduled, the fact remains that the process regarding Steam Generator &

Auxiliaries Package (NTA1) was kept in abeyance on account of the failure of petitioner to furnish required information. It is not open to this Court

exercising the power of judicial review to test the correctness of the steps taken by NLC and to substitute its opinion. In fact, NLC has appointed

an expert consultant and the tender was drafted in such a way that NLC would be in a position to offer the contract to a bidder, who satisfies all

the technical specifications and is in a position to execute the work within the prescribed period. The petitioner took extension of time even for

submitting the bid. Thereafter the petitioner took months together to submit its response with regard to technical specifications. In case the matter is

dragged like this, it would not be possible for NLC to award the contract and to execute the project before the prescribed period.

The Law:

25. The Supreme Court in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , observed that the authorities

should be given discretion in the matter of awarding contract without violating the norms.

12. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with

persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while

dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the

Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so

many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts.

Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess

the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in

bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice

Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of play in the joints to the

executive.

26. The Supreme Court in *Tata Cellular Vs. Union of India*, indicated the extent of judicial review in contractual matters.

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 from 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.

27. The Supreme Court in *Meerut Development Authority Vs. Association of Management Studies and Another*, indicated the salient features of

tender and the nature of right of bidders.

26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in

the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender

cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in

cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a

view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of

competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One

cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender

are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations

unless the terms and conditions of notice so provided for such negotiations.

28. The Supreme Court in *Arun Kumar Agrawal Vs. Union of India (UOI) and Others*, considered the scope of judicial review of complex

economic decision taken by the State or its instrumentalities. The Supreme Court held:

41. We notice that the ONGC and the Government of India have considered various commercial and technical aspects flowing from the PSC and

also its advantages that ONGC would derive if the Cairn and Vedanta deal was approved. This Court sitting in the jurisdiction cannot sit in

judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial

implications, unless the decision is in clear violation of any statutory provisions or perverse or for extraneous considerations or improper motives.

States and its instrumentalities can enter into various contracts which may involve complex economical factors. State or the State undertaking being

a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions,

ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that

decision has ultimately proved to be a wrong, that itself is not a ground to hold that the decision was mala fide or done with ulterior motives.

29. NLC wanted After Burning Grates and a specified steam generators as suggested by its technical consultant. The documents available on

record very clearly shows that the consortium partner of the petitioner was not manufacturing steam generators as shown in the tender bulletin

issued by NLC. When it was realised that NLC would not accept any other type of steam generators, the petitioner obtained an unsigned letter

from its consortium partner agreeing to supply steam generators as per tender specification.

30. The importance of the condition regarding supply of steam generators was indicated by the Supreme Court in *NTPC Limited Vs. Ansaldo*

Caldaie Boilers India P. Ltd. and Another, :

35. The importance of the above condition is manifested in the functioning of the steam generator which handles high pressure steam for the

purpose of turning the turbines for generating electricity. The design and engineering of the evaporator and the boiler itself has to be such as to

withstand the very high temperatures and pressures generated. The importance of the variable pressure operations is of great importance as far as

generation and wastage of energy is concerned. The importance of the evaporator in controlling pressure during operations is to automatically

regulate the flow of water, generation of pressure and temperature of the steam to the desired level.

Concept of Judicial Review:

31. There is no dispute that Judicial Review is essentially against the decision making process and not against the merits of the decision. This is

more in the realm of contract. The State should have the freedom to prescribe terms and conditions of contract. In case a tender notification is

issued, it is open to all concerned to apply if they are interested to take part and eligible to participate in the process. If the tender conditions are

tailor-made to suit the chosen few, and the process is arbitrary and action is violative of the equality clause enshrined under Article 14 of the

Constitution of India, the Court would be justified in exercising the jurisdiction under Article 226 of the Constitution of India to correct the decision

and to ensure a level playing field to all the competitors. However the question here is whether the Court would be justified in interfering with the

tender process in each and every stage. In case of Courts interference in every now and then at the instance of those who are in the race and

convinced that they would not be in a position to secure the contract, it would paralyse the very system. The Government agencies would not be in

a position to proceed independently in the event of such routine exercise of judicial review. There should be materials before the Court that the

concerned bidder was fully qualified and in spite of eligibility his tender was not considered on extraneous reasons. The party must demonstrate

that there is a conscious attempt to part with the privilege in favour of those who are not eligible for such benefits and not withstanding the eligibility

of others, who are in a better position to make a claim. The Court is expected to strike a balance in such cases. The larger public interest must

guide the Court in a case of this nature involving substantial public money.

Conclusion:

32. The petitioner wanted its technical bid to be evaluated after submitting clarifications with regard to technical specifications. NLC evaluated

technical bids on the basis of available materials and found that the petitioner failed to comply with technical specifications. Thereafter NLC called

upon the other two bidders to submit its supplemental/Addendum Price. It was only at that point of time the petitioner woke up from slumber and

filed this writ petition. There is absolutely no merit in the contention taken by the petitioner. In the upshot, I dismiss the writ petition. Consequently,

the connected MP is closed. No costs.