National Highways Builders Federation Vs The National Highways Authority of India and Others

Court: Delhi High Court

Date of Decision: Nov. 3, 2008

Acts Referred: Constitution of India, 1950 â€" Article 14, 19, 19(1), 226

Hon'ble Judges: Mukul Mudgal, J; Manmohan, J

Bench: Division Bench

Advocate: V.P. Singh and Manoj Kumar, Sushant Kumar and Arti Ahuja, A.M. Singhvi and Mahesh Agarwal, Rishi Agarwal, Rohma Hameed and Akshay Ringe, Arun Jaitley and Rajiv Nayyar and Arunabh Chowdhury, Arijit Bhaumik, Atul Sharma, Ravi Varma and Sarojanand Jha, C.A. Sundaram and Rajiv Nayyar and Arunabh Chowdhury, Arijit Bhaumik, Jeevesh Nagrath and Mohit Chadha, P.P. Malhotra, ASG and Dalip Mehra and Rajiv Ranjan, for the Appellant;

Final Decision: Dismissed

Judgement

Manmohan, J.
The National Highways Builders Federation, which is a Society registered under Andhra Pradesh Societies Registration

Act, 2001, has filed the present writ petition seeking quashing of Clause 3.5.2 introduced in December, 2007 by National Highway Authority of

India (hereinafter referred to as NHAI) in the Request for Qualification with respect to highway tenders. Clause 3.5.2 in the Request for

Qualification, hereinafter referred to as RFQ, reads as under:

3.5.2 The Applicants shall then be ranked on the basis of their respective Aggregate Experience Score and short-listed for submission of Bids. The

Authority expects to short-list upto 5 (five) pre-qualified Applicants for participation in the Bid Stage. The Authority, however, reserves the right to

extend the number of short-listed pre-qualified Applicants (""Bidders"") upto 6 (six)

2. The effect of the above tender condition is that although a party may technically pre-qualify, it can only enter the second phase of the tender,

namely, the Request for Proposal or price bid stage, if it is one of the six highest scorers. Therefore, in a given case there may be a large number of

technically pre-qualified bidders but as they had not been shortlisted amongst the first six bidders, they would not be entitled to participate at the

price bid stage.

3. It is pertinent to mention that Clause 3.5.2 was introduced by the Government of India in all infrastructural projects and consequently was

incorporated in the tender by NHAI. However, the Minister for Road Transport and Highways vide his letter dated 7th April, 2008 requested the

Finance Minister for deletion of Clause 3.5.2 The Competent Authority vide its letter dated 22nd September, 2008 on the basis of the

recommendation of the Inter-ministerial Group decided to delete Clause 3.5.2 prospectively for road projects only. But in sixty tenders where

RFQ bids had already been received, evaluated and shortlisted by NHAI, the tender process was to be taken forward on the existing model RFQ

document which includes Clause 3.5.2.

4. Some of the bidders for the sixty highway tenders, who have not been permitted to file their price bids, have filed independent writ petitions

challenging their non-shortlisting. In some of these petitions, the bidders have also challenged the legality and validity of Clause 3.5.2 of the RFQ.

Consequently, we allowed the learned Counsel for the bidders to advance their arguments with regard to Clause 3.5.2 and have, with their

consent, dealt with the same in this order. However, the writ petitions filed by the bidders shall be separately disposed of on merits.

5. Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing for Reliance Infrastructure Limited submitted that Clause 3.5.2 of the RFQ

document is violative of Article 14 and 19(1)(g) of the Constitution of India and same deserves to be set aside. He contended that the shortlisting

of six applicants is totally arbitrary and has no nexus to the object sought to be achieved, namely, ''awarding of a contract regarding construction

and maintenance of roads''. He submitted that once a bidder meets the threshold criteria, then creation of an artificial sub-class within the pre-

qualified bidders would amount to equals being treated unequally. He submitted that this condition is discriminatory, arbitrary and has no nexus to

the object sought to be achieved, because the other bidders who were not shortlisted may give a better price bid to NHAI. According to him, it

will be a loss to public exchequer if other pre-qualified bidders are prevented from bidding in the project.

6. Dr. Singhvi submitted that a party which meets the technical prequalification criteria is qualified for all purposes including that to submit a price

bid. According to him, there is neither any justification nor any rationale in fixing the number of eligible bidders to six. He pointed out that by way of

a clarificatory reply from the Respondent, the number of short-listed bidders was increased from six to ten, but subsequently by way of another

addendum the number of short-listed bidders was reverted back to six. Therefore, Dr. Singhvi contended that fixation of number was affected by

the whim of the Authority and was unconstitutional. He stated that increase in the number of bidders in infrastructural projects would only impart

competition as only a few bidders exist in this field.

7. Dr. Singhvi further submitted that a term of a tender can always be challenged by way of a writ petition on the ground that it is violative of

Fundamental Rights. In this context he referred to and relied upon judgment of Hon''ble Supreme Court of Ramana Dayaram Shetty Vs.

International Airport Authority of India and Others, wherein it has been held as under :

12. ...It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into

contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private

individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences etc., must be

confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm

in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the

departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

8. Dr. Singhvi further relied upon the judgment of the Apex Court in LIC of India and Another Vs. Consumer Education and Research center and

Others, wherein it has been held as under :

29. ...The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public

character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power

under Article 226 the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances

in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be

examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between

public law and private law remedy is now narrowed down. The actions of the appellants bear public character with an imprint of public interest

element in their offers regarding terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance. It

is not a pure and simple private law dispute without any insignia of public element. Therefore, we have no hesitation to hold that the writ petition is

maintainable to test the validity of the conditions laid in Table 58 term policy and the party need not be relegated to a civil action.

9. Dr. Singhvi contended that if the intent is to have a highly experienced contractor to bid then the contract should have stipulated a higher

technical criteria. He submitted that restricting the right of a pre-qualified bidder to participate only on the basis of quantum of comparative

experience score is unreasonable for a governmental authority.

10. Dr. Singhvi relied upon the statement made by the Government of India in its affidavit and the observations of NHAI before the Planning

Commission to contend that Clause 3.5.2 is violative of Article 14 and has been found inconvenient even by the Authorities for choosing the best

person and for executing contract of road building. In this context he referred to para 12 of the Government of India''s affidavit filed on 17th

October, 2008 which reads as follows:

12. That though the above mentioned new procedure was totally transparent, objective and systematic yielding exact mathematical numbers for

each of the bidders, it was quite complex involving evaluation of voluminous documents furnished by the bidders in support of their experience of

past five years. Considering these difficulties and other factors relevant to road project, this Department had taken up the matter with the Ministry

of Finance that any restrictions on the shortlisting of applicants would lead to the possibility of cartelization among the new select bidders, and

thereby deprive other small and medium eligible bidders. Further, restrictions would reduce competition among eligible applicants and may be

disadvantageous to the concerned organisation as well as the Government. It was further indicated that the process should not turn out to be

detrimental to Indian players and those who have had specific experience in the Highways sector and have executed projects successfully in the

recent past. It was, therefore, strongly recommended that in the interest of promoting healthy competition, transparency and to encourage small

and medium bidders who have requisite experience and capacity to execute these projects, and that the Clause 3.5.2 in the model RFQ document

which restricts the number of bidders who could have pre-qualified may be done away with. All the bidders who meet specified technical

requirements above a threshold level may be permitted to be shortlisted. As such, it was at the initiative of this Department that the deletion of

Clause 3.5.2 was sought from the Ministry of Finance in April 2008 when the bidding process was only in its initial stage in a few projects.

11. Dr. Singhvi also referred to the minutes of the IMG meeting dated 12th July, 2008 which reads as follows :

3. Chairman, NHAI stated that NHAI has been consistent in its stand that the model RFQ document is not suitable for the road sector with regard

to the stipulation for shortlisting of bidders. The RFQ document may, however, be useful for complex projects where the experience of

collaborators is very crucial for executing world class projects. He stated that the road projects are largely standard projects and that there is

limited scope for any innovation that a concessionaire could carry out. As a result, there is not much value addition in selecting a concessionaire

with a very high experience record. Domestic companies have proved to be adequate to take up several BOT projects which have been

undertaken by NHAI in recent years. Technical and financial pre-qualification criteria will adequately serve the purpose, without any need for

further shortlisting. A "pass-fail" criterion based on technical and financial pre-qualification is strongly advisable, as it is simpler to execute.

12. Dr. Singhvi submitted that once the Clause is found to be arbitrary and irrational by the Government itself, the same is liable to be declared as

unconstitutional. He submitted that the consequence of this declaration cannot justify its application prospectively as once it is found that a

provision is unconstitutional, it is required to be declared as void for all periods of time.

13. Dr. Singhvi submitted that Clause 3.5.2 is severable and by deleting the limitation on the number of eligible bidders, no delay would be caused

as nothing had been finalized as yet. He stated that deletion of Clause 3.5.2 would subserve public good as it would allow pre-qualified candidates

to put in their price bids and the public exchequer would benefit by acceptance of the lowest price bid.

14. Dr. Singhvi lastly referred to para 4 of the Government of India"s letter dated 3rd October, 2008 which recommended deletion of Clause

3.5.2 prospectively. The said para reads as follows:

...any restrictions on the shortlisting of the applicants would lead to the possibility of cartelization among the few selected bidders and thereby

deprive the small and medium eligible bidders. Further, restrictions would reduce competition among eligible applicants and may be

disadvantageous to the concerned organization as well as the Government. It is further indicated that the process should not turn out to be

detrimental to Indian players and those who have had specific experience in the Highway sector and have executed projects successfully in the

recent past. It was, therefore, strongly recommended that in interest of promoting healthy competition, transparency and to encourage small and

medium bidders who have the requisite experience and capacity to execute these projects, and that Clause 3.5.2 in the model RFQ document

which restricts the number of bidders who could have pre-qualified may be done away with. All the bidders who meet specified technical

requirements above a threshold level may be permitted to be shortlisted.

15. Mr. V.P. Singh, learned Senior Advocate who appeared on behalf of the Petitioners i.e. National Highways Builders Federation as well as on

behalf of M/s. Larsen & Toubro Limited, (hereinafter referred to as "L&T"), stated that Clause 3.5.2 ought to be deleted as it lays down

conditions which favour foreign companies on account of discrepancies in weightages assigned to project development and construction

experience. According to him, these conditions have resulted in an imbalance in favour of foreign companies which clearly prejudices Indian

companies, even of the stature and size of M/s L&T, and denies them a level playing field, to which they are entitled to.

16. Mr. Singh further submitted that the Respondents themselves having deleted the said Clause for future road contracts could not have retained

them for the present sixty road projects. He also laid emphasis on para 4 of the Government of India"s letter dated 3rd October, 2008 as

according to him it contains an admission by the Respondents themselves that the said Clause is detrimental to Indian players even though they

have specific experience in the Highway sector and have successfully executed projects in the recent past.

17. Mr. Singh submitted that his client M/s. L&T has also impugned the introduction of an additional condition namely Clause 2.1.18 vide letter

dated 28th August, 2008 in the RFP document after receipt of RFQ document way back in June 2008 on the ground that it tantamounts to

"changing the rules of the game midway".

18. Clause 2.1.18 is reproduced hereinbelow for ready reference:

Clause 2.1.18:

A Bidder shall not be eligible for bidding hereunder if the Bidder, its Member or Associate was, during a period of 2 (two) months preceding the

Bid Due Date, either by itself or as member of a consortium:

(i) pre-qualified and short-listed by the Authority for the Bid Stage comprising RFP in relation to 8 (eight) or more projects for the Authority; or

(ii) declared by the Authority as the selected bidder for undertaking 4 (four) or more projects of the Authority; of

(iii) unable to achieve financial close, for 2 (two) or more projects of the Authority, within the period specified in the respective concession

agreements entered into with the Authority.

Provided that in the event the Bidder, its Member or Associate, as the case may be, shall have, within one week of receiving a note of pre-

qualification and short-listing for the Bid Stage o any such project, withdrawn from the bid process thereof and notified the Authority of the same,

the project so notified shall be excluded from the purview of this Clause 2.1.18.

19. He further stated that the additional condition set out in Clause 2.1.18 was introduced as a consequence of allegation of cartelization resulting

from introduction of Clause 3.5.2 of RFQ. But as the said Clause 3.5.2 has been deleted, the consequential condition set out in Clause 2.1.18

should also be deleted.

20. Mr. Singh further contended that none of the projects have attained finality since as a consequence of introduction of Clause 2.1.18 there is a

moving window of projects wherein upon the shortlisted bidders withdrawing from the project, the next in the waiting list is called upon to either

withdraw or submit his RFP. He stated that the respondents were only at the first stage presently and there would be no change in the time lines if

all those eligible to bid are allowed to submit their RFP documents. According to him, the same would be just expedient and would not jeopardize

the whole process.

21. Mr. Arun Jaitley, learned Senior Counsel who appeared for GMR Infrastructure Ltd., submitted that Clause 3.5.2 vested discretion with the

Government to ""play around with"". He submitted that possibility of cartelization as well as possibility of restricting the competition cannot be ruled

out. He, therefore, submitted that this Clause be set-aside by this Court.

22. Mr. C.A. Sundaram, learned Senior Counsel appearing for M/s. Madhucon Projects Pvt. Ltd. submitted that the decision to delete Clause

3.5.2 prospectively is vitiated with malice and malafides as the said Clause has still been applied to sixty projects worth about Rs. 50,000 crores.

He contended that the Government in its counter-affidavit as well as correspondence having admitted that Clause 3.5.2 creates arbitrariness,

discrimination, lack of transparency and cartelization could not have decided to include sixty projects which would be visited by the ill-effects of

the said Clause. He further submitted that in law, such a Clause cannot be retained even on the ground of expediency. He further contended that

there would be no delay in Hyderabad Vijayawada Project if Clause 3.5.2 is deleted as the said Project is still at an evaluation stage. He further

submitted that the said Clause should have been deleted for all road projects including the Hyderabad - Vijayawada Highway Project and having

not done so, the decision to prospectively delete it is self-discriminatory, arbitrary, whimsical and actuated by malice.

23. On the other hand, Learned Senior Counsel for NHAI, Mr. Dushyant Dave stated that the tender in question involves a two stage bid process.

While the first stage involves a Request for Qualification, the second stage involves Request for Proposal or financial bid stage. He stated that the

model RFQ document prescribes a threshold technical and financial capacity of bidders who could submit their application for being shortlisted.

He stated that all those who wanted to bid for the tender were entitled to apply for the RFQ document. Thereafter all those who fulfilled the

techno-economic eligibility criteria are evaluated in the form of an experience score and the bidders are ranked according to their experience. He

stated that the practice of selecting few of the pre-qualified bidders during the pre-qualification process is known as shortlisting. According to him,

the general practice across the world is to shortlist a few firms and engage with them for the final stage of bidding. The model RFQ document in the

present case specifies that 5 or 6 pre-qualified firms could be shortlisted on the basis of their respective scores in evaluation.

24. Mr. Dave submitted that the process of shortlisting is adopted because, unlike a normal bid for sale of goods and services against payment, a

PPP (Public Private Partnership such as Build, Operate and Transfer) Project involves large private investments as well as transfer of commercial

and construction risks to the successful bidder for a considerable period say 15 to 30 years. Consequently, the bidders are required to invest

significant time and cost in making a PPP bid and these bidders do not find it worth their while to compete if the number of shortlisted bidders is

large and includes firms with a significantly lower track record as that virtually amounts to competition amongst unequals. He stated that it is in this

background that the Government of India decided to seek high qualified bidders by restricting pre-qualification to a limited number of firms that

have a reasonably uniform capacity.

25. According to him, pre-qualification of a large number of firms could imply that smaller firms with a comparatively lower capacity may get

included and offer lower financial bid to get selected even when significantly better and larger firms are also competing. The smaller firms usually

possess lower levels of technical experience, equipment, staff, resources, quality assurance system and they can often undercut and quote lower

bids as compared to their better qualified counterparts. He stated that this at times could compromise public interest because a potentially lower

level of service could well be the outcome of selecting a firm with lower capacity. He stated that though minimum performance standards are

specified in the project agreement, the quality of service may often differ according to the capacity and track record of the selected firm.

26. He stated that firms with greater capacity are likely to provide more reliable services as they are better equipped to manage the project risks

which are typically assigned to the successful party in PPP Projects. Greater assurance of successful delivery of infrastructural projects is certainly

a public policy objective that needs to be kept in mind while devising the selection process. Evidently shortlisting has the inherent advantage of

choosing amongst the very best for providing a public service.

27. Mr. Dave admitted that the process of shortlisting can at times lead to a monopoly where a single large firm may be able to capture large

number of contracts. However, he stated that in the present case this apprehension has been taken care of by inserting Clause 2.1.18 which

specifies quantitative restrictions to obviate monopolies.

28. Mr. Dave submitted that classification in the present case brought about by shortlisting the six best technically qualified persons is entirely

reasonable and bears a rational nexus to the object sought to be achieved namely to get the most technically competent party to carry out the task

of Highway building which undoubtedly is a matter of public and national importance. He contended that it is impossible to predict in advance the

kind of response that a particular tender would attract and therefore, it was thought necessary by the Government and the Planning Commission in

its expert wisdom to first fix a tentative threshold limit for attracting a large catchment area of bidders and then to shortlist the best technically

qualified parties from within them. He stated that it is not possible for the Government to anticipate in advance the response to the tender and if

there is too much of disparity between those who have pre-qualified by crossing the threshold limit, then it is possible that even a relatively

inexperienced party will be able to make a financial bid even where there may be several parties who are much more technically qualified on the

experience score board.

29. Mr. Dave submitted that economic policy decisions specially those taken at highest level after due and detailed deliberations as borne out by

minutes of interministerial group should not be easily interfered with by a Court in its writ jurisdiction. He submitted that the Government has a right

to adopt the "trial and error method" in matters of economic policies and the executive has to be given a reasonable "play in the joints".

30. He also submitted that several vested rights had been created by following the shortlisting process under Clause 3.5.2 in several projects.

According to him, there can be no question whatsoever of affecting these vested rights which have accrued to these shortlisted parties.

31. Mr. Dave further laid great emphasis on the fact that the individual members of the Petitioner Association having unconditionally participated in

various tenders for different projects and having unconditionally submitted to Clause 3.5.2 have forfeited any right to assail the same. Mr. Dave

submitted that all the bidders having participated in the tender without demur, are now not entitled to raise the plea that Clauses 3.5.2 and 2.1.18

are unconstitutional, illegal and arbitrary.

32. Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the Union of India not only adopted the arguments of Mr. Dave but

pointed out that the Government had taken ten months to shortlist the bidders in some of the sixty highway tenders and deletion of any Clause of

the tender would result in delay of the same amount of time as the process shortlisting of bidders would have to be redone. He stated that public

interest requires that infrastructural projects be completed at the earliest. He further submitted that in the present case, the doctrine of prospective

over-ruling had been applied. He submitted that the doctrine of prospective over-ruling is well known and the Hon''ble Supreme Court had applied

it in a number of cases while striking down many legislative provisions or executive actions by directing that the judgment of the Apex Court would

operate prospectively and would not affect the decision already taken and implemented.

33. We are of the view that even though some of the bidders had participated in the tender, they would still be entitled to challenge the

constitutionality of Clause 3.5.2 on the ground that it is violative of Articles 14 and 19(1)(g) of the Constitution. It is well settled that a fundamental

right can never be waived and even a concession made by a petitioner in a legal proceeding that he will not enforce his fundamental right cannot

create an estoppel against him. The Apex Court in Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, has

held as under :

15. Such being the true intent and effect of Article 14 the question arises, can a breach of the obligation imposed on the State be waived by any

person ? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the

State to disobey the constitutional mandate merely because a person tells the State that it may do so ? If the Constitution asks the State as to why

the State did not carry out its behest, will it be any answer for the State to make that ""true, you directed me not to deny any person equality before

the law, but this person said that I could do so, for he had no objection to my doing it."" I do not think the State will be in any better position than

the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State''s above answer will be as

futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear, on the

language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object

of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person

can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental

right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred

on him by this constitutional mandate directed to the State.

34. In Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, , the Apex Court has further held as follows :

28. ...No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether

under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel

against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument

of estoppel valid, an all-powerful state could easily tempt an individual to forego his precious personal freedoms on promise of transitory,

immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental

right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that

any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and

scope of the right claimed by the petitioners is well-founded is another matter. But, the argument has to be examined despite the concession.

35. Consequently, in our opinion it is open to the Petitioners to challenge the validity of Clause 3.5.2 on the ground that it is violative of Articles 14

and 19(1)(g) of the Constitution.

36. Before we advert to the merits of Clause 3.5.2, it may be relevant to first advert to the legal position in cases where tender terms are

challenged on the ground that they are violative of Articles 14 and 19(1)(g) of the Constitution. It is well settled that fundamental rights guaranteed

under Article 19 of the Constitution are not absolute and the same are subject to reasonable restrictions. The reasonableness of a restriction is to

be determined in an objective manner with reference to circumstances relating to trade/business in question.

37. A tender norm or policy decision would be struck down as violative of Article 14 of the Constitution only if the same is demonstrably

capricious or arbitrary and not informed by any reason, whatsoever. In this context, it may be relevant to refer to the observations of the Hon''ble

Supreme Court in Krishnan Kakkanth Vs. Government of Kerala and ohters, wherein it has been held as under:

26. After giving our careful consideration to the facts and circumstances of the case and submissions made by the learned Counsel for the parties, it

appears to us that the fundamental right for trading activities of the dealers in pump sets in the State of Kerala as guaranteed under Article 19(1)(g)

of the Constitution has not been infringed by the impugned circular. Fundamental rights guaranteed under Article 19 of the Constitution are not

absolute but the same are subject to reasonable restrictions to be imposed against enjoyment of such rights. Such reasonable restriction seeks to

strike a balance between the freedom guaranteed by any of the clauses under Article 19(1) and the social control permitted by the Clauses (2) to

(6) under Article 19...

29. It may be indicated that where a right is conferred on a particular individual or group of individuals to the exclusion of others, the

reasonableness of restrictions has to be determined with reference to the circumstances relating to the trade or business in question. Canalisation of

a particular business in favour of specified individual has been held reasonable by this Court where vital interests of the community are concerned

or when the business affects the economy of the country...

32. It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the

Government or any other individual for doing business with him. Any government or an individual has got a right to enter into contract with a

particular person or to determine person or persons with whom he or it will deal...

36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise

for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision

could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for

which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever

or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision can not be struck down. It

should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, court should

avoid ""embarking on uncharted ocean of public policy.

37. The contention that the impugned circular suffers from hostile discrimination meted out to the farmers in northern region of the State covered by

the financial assistance under the governmental schemes, by fastening such assistance with an obligation to purchase pump sets only from two

approved dealers, cannot be accepted in the facts of the case. The reasons for fastening the farmers of northern region with the obligation to

purchase pump sets from the said two dealers have been indicated by Mr. Bhat and Mr. Gupta and, in our view, it cannot be held that such

reasoning suffers from lack of objectivity. The law is well settled that even in the matter of grant of largesse, award of job contracts etc. the

Government is permitted to depart from the general norms set down by it, in favour of particular group of persons by subjecting such persons with

different standard or norm, if such departure is not arbitrary but based on some valid principle which in itself is not irrational, unreasonable or

discriminatory....

38. In Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, the Apex Court has observed as follows:

10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle

down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being

the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on

the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee

or a bankers'' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was,

therefore, rightly set aside by the Division Bench.

39. In the present case, we find that Clause 3.5.2 was introduced by NHAI pursuant to a policy decision taken at the highest level by the

Government of India after due and detailed deliberations. The said Government of India''s decision was applied uniformly for all infrastructural

projects, across the board.

40. The objective behind introducing Clause 3.5.2 was to identify credible bidders who would provide world class infrastructural services in India.

This objective was sought to be ensured by pre qualifying only high quality firms with best available track record on the basis of an objective and

transparent criteria. As far as the rationale behind fixing the number of shortlisted bidders as ''six'' is concerned, we are of the view that a line has to

be drawn somewhere. In case, the line was drawn after twelve, the bidders below that level would have raised the same argument. We are of the

view that Clause 3.5.2 is based on international best practice, promotes competition and weeds out non serious bidders.

41. Moreover, the Government has the power to classify persons and/or entities. In our opinion, the Government by introducing Clause 3.5.2 has

attempted to ensure that there is real competition between the best qualified firms so that world class infrastructural services can be created in

India. Consequently, the Government has demonstrated that the said classification is founded on an intelligible differentia and the differentia has a

rational relation to the object sought to be achieved as stipulated in The State of West Bengal Vs. Anwar Ali Sarkar,

42. Though Dr. Singhvi submitted that this objective could have been attained by stating a high threshold limit for pre qualification purposes, in our

view, it is very difficult for the Government to pre-judge the bidder''s response for any particular project and the Government may in advance fix a

threshold criteria that could eventually turn out to be too high or too low. For example, as pointed out by the Planning Commission''s document,

the list of shortlisted bidders for Amritsar Airport scored about 28,000 points while for Udaipur Airport score was as low as 11,000 points. Thus

there is no way the Government can anticipate in advance a response to a tender. In our opinion, if pre qualification of firms had been undertaken

on the basis of threshold alone, the Government could have either ended up with a large number of pre qualified bidders or only one or two

bidders as pointed out by the Planning Commission''s document in the cases of Delhi and Mumbai Airports. It is also not for us to state that the

Government could have achieved the same purpose by stipulating a higher threshold criteria. It is well settled that while exercising the power of

judicial review, the Courts would not interfere where two views are possible and the Government has accepted one of such two views. Reliance

Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others,

43. It is further settled law that the Government has to be given ''sufficient play in the joints'' with regard to economic policy decisions and the

petitioners cannot require this Court to either sit in an appeal over that decision or to go behind its wisdom. In BALCO Employees Union (Regd.)

Vs. Union of India and Others, the Supreme Court has observed as under :

46. It is evident from the above that it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as

to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at

the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

47. Process of disinvestment is a policy decision involving complex economic factors. The courts have consistently refrained from interfering with

economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on

economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts

would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to ""trial and error"" as long as

both trial and error are bona fide and within limits of authority....

97. ...Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation

of constitutional or statutory provisions or non-compliance by the State with its constitutional or statutory duties. None of these contingencies arise

in this present case.

98. In the case of a policy decision on economic matters, the courts should be very circumspect in conducting any enquiry or investigation and

must be most reluctant to impugn the judgment of the experts who may have arrived at a conclusion unless the court is satisfied that there is

illegality in the decision itself.

44. In our view, the Government has a right to enter into a contract with particular class of companies/entities and although a citizen/company has a

fundamental right to carry on trade or business, it has no fundamental right to insist upon the Government for doing business with it. We are of the

opinion that with reference to the circumstances relating to the tenders in question, the restriction of shortlisting of bidders, as initially introduced by

inserting Clause 3.5.2, is a reasonable one and does not violate Article 19(1)(g) of the Constitution.

45. Moreover, the decision to shortlist is based on a policy decision of the Government which is neither capricious nor arbitrary or infringes any

statute or provision of the constitution. We are of the view that in fact the Government''s policy decision is based on a valid principle which is

informed by reason. Consequently, in our view, shortlisting of six bidders by introducing Clause 3.5.2. does not, in any manner, violate the tenants

of equity or fair play as long as it is done in an honest and transparent manner.

46. As far as Mr. V.P. Singh''s argument that shortlisting would throw the smaller Indian firms out of business is concerned, we are of the view that

the rationale behind pre qualification is meant to select high quality firms and weed out the less competent firms. The small firms, in any event, have

the option to form a consortium to bid for a larger project. But to our mind this argument would apply even if the process of shortlisting is

substituted by a high threshold for pre qualification of bidders. In any event as Clause 3.5.2 ensures that only the most suitable firm is chosen for

the project delivery, we do not find any infirmity with the same.

47. We are also not impressed by the argument that introduction of Clause 3.5.2. creates a monopoly and/or cartel. After referring to various

dictionary meanings, the Hon''ble Supreme Court in the case of Union of India and others Vs. Hindustan Development Corpn. and others, defined

the concept of cartel as under :

...The cartel therefore is an association of producers who by agreement among themselves attempt to control production, sale and prices of the

product to obtain a monopoly in any particular industry or commodity. Analysing the object of formation of a cartel in other words, it amounts to

an unfair trade practice which is not in the public interest. The intention to acquire monopoly power can be spelt out from formation of such a cartel

by some of the producers. However, the determination whether such agreement unreasonably restrains the trade depends on the nature of the

agreement and on the surrounding circumstances that give rise to an inference that the parties intended to restrain the trade and monopolise the

same....

48. In the present case we do not find that the intent is to exclude competition amongst the bidders. In fact, there is no material on record to show,

leave alone prove, that introduction of such a clause would lead to cartelization. As stated hereinabove, the Government by introducing Clause

3.5.2 has attempted to ensure that there is real competition between the best qualified firms so that world class infrastructural services can be

created in India.

49. In any event, Clause 2.1.18 takes care of any apprehension of cartelization or monopoly being conferred upon the ''big players''. Further we

are of the opinion that it is not open to the parties such as L&T to on the one hand challenge Clause 3.5.2 as being anti-competitive and in the

same breath challenge Clause 2.1.18 which is intended at curbing the apprehension of monopoly complained of by them.

50. We are further of the opinion that it is not open to M/s. L&T to challenge the validity of Clause 2.1.18 after having continued to participate in

the tender after insertion of the said Clause and moreso, after having withdrawn from certain projects by relying upon the said Clause. In this

context we may refer to the judgment of the Apex Court in New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others, where it has

held as under:

48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the

contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the

other terms of the same contract which might be disadvantageous to him. The maxim is qui approbate non reprobate (one who approbates cannot

reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party

to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can

accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co.; see

Douglas Menzies v. Umphelby; see also stroud''s judicial dictionary, Vol. I, p. 169, 3rd Edn.).

49. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by

tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned

Condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution. In this connection, it will bear repetition,

here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character also. It is true that a person cannot

be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a

transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver.

51. Averments in para 12 of the Government of India''s affidavit dated 17th October, 2008, para 3 of the IMG minutes dated 12th July, 2008 and

para 4 of the Government of India''s letter dated 3rd October, 2008 are, in our view, concerns/shortcomings pointed out by the Department of

Road, Transport and Highways while implementing Clause 3.5.2 in respect of Highway tenders. These averments certainly do not constitute an

admission on the part of the Respondents that the initial policy of shortlisting when introduced by insertion of Clause 3.5.2 was illegal and

unconstitutional. In our opinion, if certain shortcomings are found in future while implementing an economic policy, it does not make that economic

policy illegal and void from its inception. Undoubtedly, every economic policy has its own drawbacks and shortcomings but that does not make the

policy void ab initio. In any event, as stated hereinabove, the State and its instrumentalities are entitled to adopt a "trial and error method" with

regard to economic policies and to have a reasonable play in the joints.

52. As far as the challenge to Government of India"s decision to to only prospectively delete Clause 3.5.2. is concerned, we are of the view that

the reasons for the same have been succinctly set out in the Ministry of Shipping, Road Transport and Highways" letter dated 3rd October 2008.

The relevant portion of the said letter is reproduced hereinbelow for ready reference:

6. The Ministry of Finance while conveying the decision for deletion of Clause 3.5.2 has already indicated that in case of all other projects (other

than the sixty) the RFQ, if already issued, will be cancelled and a fresh RFQ will be issued. The decision to exclude the sixty cases in respect of

which bids have already been received and the evaluation by NHAI has already been completed or is in final stage of completion is in the interest

of ensuring early award of these projects to the successful bidders as the National Highways Development Project (NHDP) is a time bound

flagship national programme of the Government. A lot of efforts have been made by the NHAI and the Government to bring these projects to such

an advanced stage as the procedure for evaluation requires considerable time and due diligence. With the deletion of Clause 3.5.2, all the

prospective bidders with minimum threshold experience would become eligible to participate in the RFP stage as against the erstwhile stipulation

for shortlisting only the best five/six bidders at the RFQ stage. Any retrospective deletion of Clause 3.5.2 a this stage when the RFQ bids have

already been received and have either been already evaluated or are in final stage of evaluation would necessitate cancellation of the entire bidding

process so that all th bidders could take part in a fresh bidding. Therefore, in the interest of transparency and equity, it will not be correct to apply

the Clause 3.5.2 retrospectively restricting participation only to the bidders who have already responded to the ongoing RFQ tender process

which is already closed in case of sixty projects.

7. The retrospective application of deletion of Clause 3.5.2 will be contrary to the process of transparency as many companies who may not have

participated in RFQ in view of the restriction on number of bidders to five/six will have to be given full opportunity of participation by inviting the

bids afresh. This will be given a setback to the entire process of completing the project in accordance with the given time frame with the resultant

cost escalation and thereby extra cost to the NHAI. It is a well established principle of tendering/bidding process that any change in the bid

document should be made only with a prospective effect. The decision of the Government to delete Clause 3.5.2 has, therefore, been made

applicable prospectively.

8. When this Ministry had taken up the matter initially with the Ministry of Finance recommending deletion of Clause 3.5.2 in the Model RFQ

document, the projects were still at the stage of preparation of RFQ documents. The sixty projects excluded from the purview of the Department

of Expenditure OM dated 22nd September, 2008 are those projects in respect of which the RFQ process is already closed with the expiry of the

last date for receiving the bids quite some time ago. All these projects have already reached the final stage and in many cases the RFP documents

have also been issued to the shortlisted bidders seeking financial bids. All these sixty projects are scheduled to be awarded over a period of next

three months

9. I am directed to convey that the Government is against any retrospective application of the decision to delete Clause 3.5.2 as it will not only be

against the principles of transparency and equity but it will also result in a serious setback to a development programme of national importance.

53. In fact, the minutes of the Inter Ministerial Group held on July 12, 2008 proves that Clause 3.5.2 is deleted with regard to NHAI projects only

on the ground that these projects are relatively simple, standardized and do not involve complex, interactive project development as envisaged in

other large PPP projects. The conclusions as recorded in the IMG Minutes dated 12th July, 2008 are reproduced hereinbelow for ready

reference:

15. Summarizing the discussion, Additional Secretary (Exp) stated that from the views put forth by the various members of the IMG it was

observed that a bulk of the problems relating to short-listing of bidders was being faced by NHAI. She pointed out that it has been brought out

that the NHAI projects were largely of standard nature and the kind of complex, interactive project development, envisages in large PPP projects

would not be involved for executing such projects. Hence the need to curtail the shortlist to a small number of five or six is not there. Therefore, the

provisions specified in Clause 3.5.2 of the model RFQ document could be reviewed for NHAI projects....

17. Secretary (Exp) heard the views of all ministries based on their experience of one year. She stated that there is undoubtedly a need for rigorous

appraisal of projects and a need to recognize that best international practices must be brought in the road sector. However, considering the large

number of projects involved and the standard size/scope of the projects, highways will have to be given a dispensation which ensures speed and

efficiency. She recommended that the NHAI may be given a dispensation that they can follow the model RFQ document by excluding Clause

3.5.2 for standard projects of NHAI. This special dispensation is being provided to the NHAI projects since they have a large number of projects

in the pipeline and since their projects are relatively simple and standardized. Moreover, so far Department of Expenditure has received

representations for removal of this clause only for NHAI projects.

18. The IMG recommended that this dispensation may be brought up for approval of the Committee on Infrastructure, at the earliest. This

dispensation would imply that NHAI would have to modify the document by deleting this clause and apply the document for its BOT projects. If,

however, the process of consultation and scrutiny of bid documents/shortlisting of bidders, being carried on in DoRTH on a campaign basis,

concludes with acceptable results to the satisfaction of DoRTH, this recommendation need not be taken further.

54. From the above extract it would be apparent that Clause 3.5.2. has still been retained for all infrastructural projects except highway tenders

and that too due to the fact that road projects are relatively simple and standardized. If Clause 3.5.2. is deleted retrospectively, as urged by the

Petitioner, then it would lead to initiation of a new tender process as deletion of the said Clause would amount to changing the rules of the game

midway. In our view, any delay in award of Highway projects to the successful bidder would constitute a serious setback to a development

programme of national importance and would be detrimental to public interest. We are also of the view that several vested rights have been

created by following the shortlisting process under Clause 3.5.2. and any claim for retrospective deletion of the said Clause would itself amount to

a violation of Article 14 of the Constitution vis-Ã¯Â¿Â½-vis the shortlisted parties.

55. Consequently, we are of the view that Clauses 3.5.2. and 2.1.18 of the RFQ are legal, valid and constitutional. The Government of India''s

decision to prospectively delete Clause 3.5.2. and to retain the same for sixty road projects wherein RFQ bids have been received, evaluated and

shortlisting completed is also legal and valid. Therefore, the present writ petition being devoid of merits is dismissed but with no order as to costs.