

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
ITANAGAR BENCH

WP (C) No. 163 (AP) 2017

M/s Gepong-M/s Mepung Enterprises (JV),
Represented by its proprietors, Shri Nabam
Tagi, S/o Shri Nabam Saha,
R/o B-Sector, Naharlagun, & Shri Nabam Rallo,
S/o Shri Nabam Saha, Vill- Rassing, P.O./P.S.-
Sagalee, Papum Pare District, Arunachal Pradesh.

.....**Petitioner**

-Versus-

1. The State of Arunachal Pradesh, represented by the Secretary, Rural Works Department, Govt. of Arunachal Pradesh, Itanagar.
2. The Secretary, Rural Works Department, Govt. of Arunachal Pradesh, Itanagar.
3. The Chief Executive Officer, ARRDA, Govt. of Arunachal Pradesh, Itanagar.
4. The Superintending Engineer, Rural Work Circle, Rupa, Govt. of Arunachal Pradesh, Itanagar.
5. The Executive Engineer/ DPIU-III, Rural Works Division, Seppa, East Kameng District, Arunachal Pradesh.
6. The Tender Scrutiny Board headed by its Chairman, The Superintending Engineer, Rural Works Circle, Rupa.
7. M/s T. N. T. Enterprises, Old Market, Tawang, P.O./P.S. Tawang, Dist-Tawang-790104, Arunachal Pradesh.
8. M/s Samco Construction Co., E-Sector, Itanagar, Papum Pare-791111, Arunachal Pradesh.

.....**Respondents**

-BEFORE-
THE HON'BLE MR. JUSTICE S.SERTO

For the Petitioner	: Mr. D. Panging, Adv.
For the State Respondents	: Mr. K. Ete, Sr. Addl. Adv. General, A.P Ms. R. Basar, Govt. Adv.
For the respondent No. 8	: Mr. P. Taffo, Adv.
Date of hearing	: 29-08-2017
Date of judgment	: 07.09.2017

JUDGMENT & ORDER (CAV)

This is a writ petition challenging the legality and validity of the Impugned Notice No. RWC/R/PMGSY-XI/E/PRO/2017-18, dated 27.03.2017, issued by the Superintending Engineer, Rural Works Circle, Rupa, wherein the bids of the petitioner-firm were declared as non-responsive purportedly for none fulfilment of the condition given at Clauses 4.1.1 and 4.4.B (a) (ii) of the Instruction to Bidders.

2]. The brief facts and circumstances which led to the filing of this writ petition are as follows;

The Executive Engineer/DPIU-III, Rural Works Division, Seppa Division, East Kameng District, Arunachal Pradesh issued a Notice Inviting Tender on 15.02.2015 from approved and eligible contractors registered with CPWD/PWD/BRO & Public Sector Enterprises, for construction of "road from Mebua-I to Rikgiwa AR306022" under Pradhan Mantri Gram Sadak Yojana including their maintenance for 5 (five) years (for Stage-II/Full/Up-gradation construction only) in the East Kameng District, Arunachal Pradesh, to submit their biddings through online bidding system. The approximate value of the contract given was 1343.87 lakhs.

3]. The petitioner being interested procured the bidding document and submitted the same through online after registration on the website from the Department. The Instruction to Bidders (ITB, in short) provided the eligibility criteria of bidders in detail under Clause 3 and in the appendix thereto. As per the criteria provided, the firm has to be registered under CPWD/PWD/BRO or any other Public Sector Enterprises. In the notice, joint ventures were also made eligible subject to the conditions specified therein and the annexures thereto. Clause 4 of the ITB prescribes "Qualification of the Bidder" and as per Clause 4.1.1 bidders should have valid registration with Employees Provident Fund Organization under EPF and Miscellaneous Provisions Act, 1952. Clause 4.4 B Clause (a) (ii) provides that bidders must produce an affidavit stating that the information furnished along with the bidding documents are correct in all respects. The other conditions provided under the ITB are not required to be stated herein since issues under contention are related to only the above stated clauses of the ITB.

4]. The petitioner-firm uploaded all the necessary documents and the bid documents including the EPF registration certificate issued under Employees

Provident Fund Organization under EPF and Miscellaneous Provisions Act, 1952 and an affidavit affirming correctness of the informations furnished in the bid as required under the NIT along with the requisite amount of earnest money and the cost of bid documents on the website of the Department.

5]. Thereafter, the bids were open on 07.03.2017 by the Tender Evaluation Committee and none of the 4 (four) firms who submitted their bids and participated in the Tender process were declared non-responsive. However, after a period of 20 days from the date of opening of the bid i.e. on 07.03.2017, the Tender Evaluation Committee headed by its chairman i.e. Superintending Engineer, RWC, Rupa issued the impugned notice, dated 27.03.2017, wherein the bid of the petitioner-firm along with another firm, namely, M/s Anupam Nirman Pvt. Ltd. were declared non-responsive and rejected on the ground that the petitioner-firm have failed to meet the requirements given at Clause 4.1.1 and Clause 4.4.B (a) (ii) of the ITB. Having been aggrieved by the rejection, the petitioner has come to this Court challenging the impugned notification.

6]. I have heard the learned counsel for the petitioner Mr. D. Panging, Mr. K. Ete, learned Sr. Addl. Advocate General assisted by Ms. R. Basar, learned Govt. Advocate appearing for the State respondents and Mr. P. Taffo, learned counsel appearing for the private respondent No. 8.

7]. Mr. Panging, learned counsel for the petitioner by referring to Instruction to Bidders (in short, ITB) Clause 4 "Qualification of the bidders" particularly Sub-clause 4.1.1 and (e) of Sub-clause 4.2 and Sub-Clauses 4.4 B (ii) submitted that the petitioner had submitted valid registration certificate of Employees Provident Fund, names of the technical persons to be employed for the contract work and affidavit as required under these clauses. Therefore, the petitioner have met all the requirements given under the ITB. As such, the impugned notification was issued with a malafide intention to favour the private respondent No. 8.

8]. The learned counsel referred to Para-6 of the affidavit-in-opposition filed on behalf of the State respondents, wherein it is stated that the EPF registration filed by the petitioner was not accompanied by vouchers for payment of monthly instalments under the policy and that the petitioner does not maintain the Employees Wages Register of his firm, and that the names of the employees given in the policy papers did not match the names of those persons submitted by the

petitioner who will be employed as and when the work order is given to him and the work is undertaken. After referring to the same, the learned counsel submitted that these conditions were never mentioned in the NIT and the ITB annexed thereto. Therefore, they are nothing but conditions added after thought which is not permissible in law. The learned counsel also submitted that the respondents cannot add and improve the conditions already given in the NIT and ITB through affidavit since the same is public notice. In support of his submission, the learned counsel cited the judgment of the Hon'ble Supreme Court passed in the case of ***Mohinder Singh Gill and Another-vs- The Chief Election Commissioner, New Delhi and Others., as reported in AIR 1978 SC 851*** particularly, para-8 of the same, which reads as follows;

"8 The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. In *Gordhandas Bhanji*.

"Public orders publicly made, in exercise of statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".

9]. The learned counsel also cited the judgment of the Hon'ble Supreme Court in the case of ***Dutta Associates Pvt. Ltd. -vs- Indo Merchantiles Pvt. Ltd. and Others., as reported in (1997) 1 SCC 53***, wherein, it has been held in para-4, 5 & 7 that;

"4. After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant's tender is vitiated by more than one illegality. Firstly, the tender notice did not specify the 'viability range' nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/Government would first determine the 'viability range' and would then call upon the lowest eligible tenderer to make a counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender. They did nothing of that sort. Secondly, we have concept of 'viability range' though Sri Kapil Sibal, learned counsel for the appellant, and the learned counsel for the State of Assam tried to explain it to us. The learned counsel stated that because of the de-control of molasses, the price of rectified spirit fluctuates from time to time in the market and that, therefore, the viability range was determined keeping in view (1) distillery cost price; (2) export pass fees; (3) central sales tax; (4) transportation charges; (5) transit wastage @ 1 1/2% - vide the counter- affidavit filed by the Secretary to Excise Department, Government of Assam pursuant to this Court's orders. Sri Sibal further explained that because of the possibility of the

fluctuation, the tender notice contains clause (16) which reserves to the Government the power to reduce or increase the contract rate depending upon the escalation or deceleration of the market price in the exporting States. We are still not able to understand. Clause (16) deals with post-contract situation, i.e., the situation during the currency of the contract and not with a situation at the inception of the contract. The tenderers are all hard-headed businessmen. They know their interest better. If they are prepared to supply rectified spirit at Rs. 11.14 per LPL or so, it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher viability range. Not only the rate obtaining during the period when the tenders were called was Rs.11.05 per LPL, the more significant feature is that during the period of about more than two years pending the writ petition and writ appeal, the appellant has been supplying rectified spirit @ Rs. 9.20 per LPL. If it was not possible for anyone to supply rectified spirit at a rate lower than Rs. 14.72 [the lower figure of the viability range], how could the appellant have been supplying the same at such a low rate as Rs.9.20 for such a long period. It may be relevant to note at this stage the circumstances in which the appellant volunteered to supply at the said rate. Indo Mercantiles, the respondent herein, filed the writ petition and asked for an interim order. The learned Single Judge directed [vide order dated 02-06-1994] that while Dutta Associates (appellant herein) shall not be given the contract, he "shall be allowed to execute the contract at the lowest quoted rate which is stated to be 9.20 by the writ petitioner. The respondent No.3 [Dutta Associates] states that the lowest quoted rate is 11.14. If the lowest quoted rate is 9.20, it is that rate at which the contract shall be given to the respondent No.3" It is pursuant to the said order that the appellant-Dutta Associates has been supplying rectified spirit @ Rs. 9.2. per LPL since June 1994 till October 1996. The said order did not compel the appellant [Respondent No.3 in the writ petition] to supply at the rate of Rs.9.20p. If that rate was not feasible or economic, he could well have said, "sorry". He did not say so but agreed to and has been supplying at that rate, till October, 1996. It is equally significant to note that pursuant to the interim orders of this Court [which directed the Government to implement the orders of the Gauhati High Court with respect to interim arrangement] negotiations were held with both the appellant and the first respondent herein; both offered to supply at Rs.9.20p. The Commissioner, of course, chose the first respondent, Indo Mercantiles, over the appellant, for reason given by him in his order dated 14-10-1996. The rate, however, remains Rs.9.20p. and the appellant's counsel has been making a grievance of the Commissioner not accepting the appellant's offer. All these facts make the so-called 'viability range' and the very concept of 'viability range' looks rather ridiculous - and we are not very far from the end of the three year period for which the tenders were called for. Neither the interlocutory order of the learned Single Judge dated 02-06-1994 aforesaid nor does the order of the Commissioner dated 14-10-1996 passed pursuant to the interim orders of this court provide for any fluctuation in the rate of supply depending upon the fluctuation in the market rate in the exporting States, as provided by clause (16) of the Tender Conditions, which too appears rather unusual. The order of the learned Single Judge aforesaid does not also say that the rate specified therein is tentative and that it shall be subject to revision at the final hearing of the writ petition. As a matter of fact, no such revision was made either by the learned Single Judge or by the Division Bench. It is in these circumstances that, we said, we have not been able to understand or appreciated the concept of 'viability range', its necessity and/or its real purpose. Thirdly, the Division Bench states repeatedly in its judgment that having determined the 'viability range', the Government called upon only the appellant-Dutta Associates [third respondent in the writ petition/writ appeal] to make a counter-offer to come within the 'viability range' and that his revised offer at the higher limit of the 'viability range' [Rs.15.71] was accepted. The Division Bench has stressed that no such opportunity to make a counter-offer was given to any other tenderer including the first respondent. As the Division Bench has rightly pointed out, this is equally a vitiating factor.

"5. It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates [appellant herein] is unfair and opposed to the norms which the Government should follow in such matters, viz., openness, transparency and fair dealing. The Grounds No.1 and 2, which we have indicated hereinabove, are more fundamental than the third ground upon which the High Court has allowed the writ appeal".

“7 In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above and direct that fresh tenders may be floated in the light of the observations made in this judgment. We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bonafide error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate penalties at the hands of the courts, following the law laid down by this court in shiv [Sagar Tiwari v. Union of India](#) (re.: Capt. Satish Sharma and Smt. Sheila Kaul)”.

10]. The learned counsel further submitted that the rulings given in the above judgments have been followed by this Court in the judgment passed in the case of ***Sargous Tours & Travels & Anr.,-vs-Union of India & Ors., as reported in 2003 (3) GLT 202***, and referred to para-22 to 26 in particular but led emphasis on para-23 to 26, reproduced as under;

“23 From a close reading of what have been observed above by the Apex Court, it is clear that there were altogether three grounds, which according to the Apex Court, made the acceptance of the tender by the government unsustainable. Out of these three grounds, ground No. 1 and 2 aforementioned were held to be more fundamental than the third ground. This clearly shows that since ground Nos. 1 and 2 are fundamental in nature, the grounds laid down therein are imperative and must be followed in every tender process and omission to follow the law laid down in the ground Nos. 1 and 2 will vitiate the acceptance of tender. In other words, the law laid down in Dutta associates (supra) with regard to, at least, ground Nos. 1 and 2 are general in nature and must be applied in every tender process. A close reading of ground Nos. 1 and 2 aforementioned clearly shows that the tender notice, according to the Apex Court, ought to have stated that after receiving the tenders, the Commissioner/government would, first, determine the 'viability range' and would, then, call upon the lowest eligible tenderer to make a counter-offer and, secondly, the concept of 'viability range' was not appealing to reasons. In the present case, since the question of viability range is not involved, one has no option, but to hold that if in a tender process, the tender notice does not state as to what considerations would prevail upon the authorities concerned in accepting or rejecting the tender, then, such, a tender process is not sustainable. In other words, every NIT must disclose the procedure, which would be followed in the matter of acceptance of tender so that the entire tender process becomes transparent, fair and open.

“24 I am guided to adopt the above view from the following further observations made in Dutta Associates (supra)

"We reiterate that whatever procedure the government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate penalties at the hands of the Courts, following the law laid down by this Court in shiv Sagar Tiwari-Vs-Union of India, (1996) 6 scc 558 (In re, Capt. Satish Sharma and Sheila kaul). " (Emphasis is added)

“25 In the case at hand, there is no dispute before me that the NIT did not speak of the fact that there would be RR determined by the authorities concerned and if any tenderer quotes a rate, which is lower than 20% of the rr, then, such a tender would be rejected.

“26 In view of the fact that I have already held that the law laid down in Dutta associates (supra) is bound to be followed in every tender process and the primary requirement of a tender process to remain valid is that it must notify the intending tenderers of the procedure that the authorities concerned propose to follow in accepting the tender, it clearly follows that omission to mention about the concept and working of RR is fatal in the present case. It is, no doubt, true that the petitioners have been working with the authorities concerned and those, ordinarily, they were likely to know about the existence of the RR, the fact remains that in the fact of categorical assertions made, on oath, by the writ petitioners that they had not been informed about the RR, it was the duty of the respondent-authorities to show by producing materials on record that the RR were within the knowledge or information of the writ petitioners. In this regard, the respondent-authorities have miserably failed inasmuch as there is nothing in the materials on record to show that the petitioners were aware of, and/or had been informed about, the existence of the RR and/or of the fact that the tender, which quotes a rate, which is lower than 20% of the RR, would not be accepted. Viewed from this angle, omission to mention in the NIT the fact that quoting of rates must not be less than 20% of the RR, which may be fixed by the authorities concerned, one has no option but to hold that the procedure to be followed had not been notified in the NIT and in such a situation, the procedure adopted cannot be said to be, as held in Dutta associates (supra), transparent, fair and open”.

The learned counsel emphasising that decision making process of Government or public functionaries ought to be guided by norms as provided in relevant rules or notifications because they have to be transparent and non-discriminatory. Further cited the case of ***New Horizons Limited and Another-vs-Union of India and Others.***, reported in ***(1995) 1 SCC 478***, particularly, para-17 of the judgment, which is reproduced below;

“17 At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of [Article 14](#) of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere”.

11]. The learned counsel further submitted that the respondents based on extraneous reasons or consideration which were not given in the NIT and the ITB annexed thereto had outset the petitioner and denied him of equal treatment which is his right under Article 14 of the Constitution of India, therefore, the impugned notification is liable to be quashed. The learned counsel also cited the judgment of Hon'ble Supreme Court in the case of ***Nagar Nigam, Meerut-vs-AL Faheem Meat Exports (P) Ltd and Others.***, as reported in ***(2006) 13 SCC 382***, particularly, para-

16 of the judgment in support of his submission. The contents of the same are reproduced as below:-

"16 The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'".

12]. Referring to the provisions of Sub-clause 4.2 (e) of Clause 4 of ITB Mr. Panging further submitted that these conditions are required to be fulfilled as per the terms under these clauses. According to him, it is only submission of details of technical personnel proposed to be employed for the contract having the qualifications defined in Sub-clause 4.3 B (b) (ii) of ITB for the construction that is essential and nothing more. Therefore, to say that the bidders are required to submit vouchers and list of names of the employees and the same should match with the names of the persons who would be employed when the work is undertaken are requirements alien to what is mentioned in the Sub-clause of the ITB. The learned counsel also submitted that the private respondent No. 8 also did not meet these requirements but his bid was not rejected. Therefore, action of the State respondents amounts to arbitrariness and discrimination which is not permissible under Article 14 of the Constitution of India.

The learned counsel, in support of his submission referred to Annexure-A series (Page Nos. 14 & 15) of the additional affidavit filed by the petitioner containing the names of the Employees given in the Electronic Challan cum return (ECR) of Employees Provident Fund Organization submitted by the respondent No. 8 and the names of those technical personal proposed to be employed in the contract work. In that except one all the names were different. After referring to the same, the learned counsel submitted that this clearly shows that there was mala fide intention on the part of the respondents to favour the respondent No. 8.

The learned counsel further submitted that what was required under the ITB was to submit the names of technical persons, the bidder or bidders are proposing to employ when the contract work is undertaken. Therefore, the requirement as mentioned in the affidavit of the State respondents is extraneous and not a part of the conditions mention in the ITB.

13]. The learned Sr. Addl. Advocate General Mr. K. Ete started his submission with the opening remark that it is those who authored the document who are the best persons to interpret the same. The Sr. Addl. Advocate General thereafter submitted that what is required under the NIT/ITB was valid registration of EPF. It is not only the registration certificate i.e. required but the bidder must show that the registration certificate is valid at that relevant point of time. The learned Sr. Addl. Advocate General went on to explain that Employees Provident Fund registration certificate is renewed from month to month by making the required payment, otherwise, the same can lapse or be cancelled by the EPF authorities. The only way bidders can prove that the registration certificate is still valid is by producing vouchers for monthly payment of the required contributions/ instalments by the firm or contractor/ employer concerned, this has not been done by the petitioner. Therefore, it was presumed that his EPF registration certificate is no longer valid and he has failed to meet the requirement given at Sub-clause 4.1.1 of Clause 4 of the ITB. The learned Sr. Addl. Advocate General further submitted that the registration certificate produced by the petitioner is dated 14.03.2004 and there has been a long gap between the date of registration and the time the bids were submitted as such, without any supporting document or documents it could not have been presumed that the Registration certificate is still valid. The learned Sr. Addl. Advocate General emphasised on the word 'valid' and submitted that according to ***Black Law Dictionary*** the word 'valid', means "legally sufficient; binding" and concluded that the registration certificate therefore should have been valid in all respects. Therefore, it was for the petitioner to prove that it was still valid by producing necessary documents like vouchers for money deposited. Since that have not been done, the respondents cannot be faulted for having presumed that the registration certificate is no longer valid.

The learned Sr. Addl. Advocate General also submitted that as per Clause 4.4 (B) (ii) bidders were required to submit the affidavit an affidavit each affirming that the informations furnished by them along with the bid documents is correct in all

respects, however, the petitioner's affidavit is not valid because it is not based on the facts which are true. The learned Sr. Addl. Advocate General concluded his submission by citing three judgments of Hon'ble Supreme Court passed in the following cases.

(1) Jagdish Mandal-vs- State of Orissa and Others., as reported in **(2007) 14 SCC 517**, relevant para-22 is referred to;

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tendered/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

(2) Afcons Infrastructure Limited-vs- Nagpur Metro Rail Corporation Limited and Another., reported in **(2016) 16 SCC 818**, relevant paras referred to are para-12, 13 & 15 of the judgment, it is held that;

"12. In *Dwarkadas Marfatia and Sons v. Port of Bombay*⁶ it was held that the constitutional courts are concerned with the decision-making process. *Tata Cellular v. Union of India*⁷ went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal v. State of Orissa* as mentioned in *Central Coalfield*.

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to

interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given”.

(3) *Montecarlo Limited -vs- National Thermal Power Corporation Limited*, reported in **(2016) 15 SCC 272**, relevant paras referred to are para-19, 24, 25 & 26 of the judgment;

“19. In *Sterling Computers Limited v. M/s. M and N Publications Limited and Ors.*, the Court has held that 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. It has also been observed that by way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry.

24. In *Michigan Rubber (India) Ltd. (supra)* the Court referred to the earlier judgments and opined that before a court interferes in tender or contractual matters, in exercise of power of judicial review should pose to itself the question whether the process adopted or decision made by the authority is mala fide or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the judicial conscience cannot countenance. Emphasis was laid on the test, that is, whether award of contract is against public interest.

25. Recently in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* a two-Judge Bench eloquently expounded the test which is to the following effect:

We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure

adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints”.

14]. Learned counsel Mr. P. Taffo, who appeared for the respondent No. 8 submitted that he is in total agreement with the submissions of the Sr. Addl. Advocate General but he has only one point to add to it. The learned counsel submitted that the writ petition is not maintainable because as per the Power of Attorney given by the firm to the Attorney holder Miss Durik Loyi was not given the power to file the writ petition. The learned counsel drew my attention to the acts/functions authorized to the Attorney Holder as given in the specific power of Attorney, copy of which has been furnished in the I.A. to the writ petition by the respondent No. 8 which reads as under:-

- 1. To sign submit the tender and subsequently execute the contract works jointly and severally in the name of M/s Gepong-M/s Mepung Enterprise.*
- 2. To sign and attach any further documents, Paper of Copies thereof as may be require.*
- 3. To make corrections, modification and alterations, additions and deletions in the said Application for Tender, Documents, papers, Forms, Returns or Copes thereof attach thereto.*
- 4. To deliver the file said Tender Documents, paper, Forms, Returns or Copies attach thereto, to any authority as may be filled with such authority.*

15]. After having heard the learned counsels representing the parties and after having perused the affidavits and the documents filed by the contending parties and after having gone through the judgments referred to by the learned counsels, this court has come to the following conclusions;

(i). It is found from the record that the writ petition is filed by M/s Gepong and M/s Mepung Enterprises, the Joint Venture partners as petitioners. From Annexure-3 of the writ petition, it is seen that one Shri Sange Dakpa Loda was authorised on behalf of the Joint Venture to participate in the tender process throughout and swear affidavit in Court of law and file legal petition in connection with the work and the said Sange Dakpa Loda, being acquainted with the facts of the

case has sworn the affidavit. As such, I find the objection on the ground maintainability baseless hence, the same is rejected.

(ii). Coming to the merit of the writ petition, there cannot be any disagreement with the rational of the law laid down by the Hon'ble Supreme Court in the judgments cited by the parties. However, the factual matrix in the present writ petition has to be considered keeping in mind the settled position of law relating to public contracts as dealt with in the said judgments.

Before I go any further I feel that it is appropriate to reproduce here the relevant Clauses of the NIT and the ITB (Instruction to Bidders) under which the petitioner has been declared as non-responsive and the impugned notice itself wherein the same declaration was made, therefore, the same are reproduced here below;

**“SECTION 1
GOVERNMENT OF ARUNACHAL PRADESH
OFFICE OF THE EXECUTIVE ENGINEER/DPIU-III
SEPPA DIVISION/DISTRICT, EAST KAMENG**

NOTICE INVITING TENDER (NIT)

1. *The Executive Engineer/DPIU-III, Seppa Division, District East Kameng, on behalf of Governor of Arunachal Pradesh invites the items rate bids, in electronic tendering system, for construction of roads under Pradhan Mantri Gram Sadak Yojana for each of the following works including their Maintenance for Five years (for Stage-II/Full/Up-gradation construction only) from the eligible and approved contractors registered with CPWD/PWD/BRO & Public Sector Enterprises.
Name of the District : East Kameng
.....
.....*
2. *Date of release of Invitation for Bids through e-procurement ; 15/02/2017 (dd/mm/yyyy).*
3. **Cost of Bid Document** : Rs. 15000/- per package (non-refundable) only in the form of demand draft in favour of “ARUNACHAL RURAL ROAD DEVELOPMENT AGENCY (ARRDA), payable at ITANAGAR, Arunachal Pradesh.
4. **Availability of Bid Document and mode of submission:** *The bid document is available online and bid should be submitted online on website www.pmgstenders.gov.in. The bidder would be required to register in the web-site which is free of cost. For submission of bids, the bidder is required to have **valid** Digital Signature Certificate (DSC) from one of the authorized Certifying Authorities (CA) “Aspiring bidders who have not obtained the user ID and password for participating in e-tendering in PMGSY may obtain the same from the website; www.pmgstenders.gov.in.*

Digital signature to mandatory to participate in the e-tendering. Bidders already possessing the **valid** digital signature issued from authorized CAs can use the same to this tender.

5. **Submission of Original Documents;** The bidders are required to submit (a) original demand draft towards the cost of bid document (non-refundable), (b) original Earnest Money in approved form and (c) original affidavit regarding correctness of information furnished with bid document as per provisions of Clause 4.3B(a) (ii) of ITB and such other certificates as defined vide Clause 4. 3B(a) (iii) of ITB with Superintending Engineer, Rural Works Circle, Rupa, Arunachal Pradesh on a date not later than three working days after the opening of technical Bid, either by registered post or by hand, failing which the bids will be declared non-responsive.
6. Last Date/Time for receipt of bids through e-tendering; 04/03/2017 (dd/mm/yyyy) up-to 1600 Hours (time)
7. The site for the work is available.
8. Only online submission of bids is permitted, therefore, bids must be submitted online on website www.pmgstenders.gov.in. The technical qualification part of the bids will be opened online at 1030 Hours (time) on 07/03/2017 (date) by the authorized officers i.e. Superintending Engineer, Rural Works Circle, Rupa If the office happens to be closed on the date of opening of the bids as specified, the bids will be opened on the next working day at the same time and value.
9. The bidder is not required to quote his rate for routine maintenance. The rates to be paid for routine maintenance are indicated in the Bill of Quantities. Further, the payment for routine maintenance to the contractor shall be regulated based on his performance of maintenance activities.
10. The bids for the work shall remain valid for acceptance for a period not less than 90 (ninety days) after the deadline date for bid submission.
11. Bidders may bid for any one or more of the works mentioned in the Table above. To qualify for a package of contracts made up of this and other contracts for which bids are invited in the same ITB, the bidder must demonstrate having experience and resources sufficient to meet the aggregate of the qualifying criteria for the individual contracts.
12. Other details can be seen in the bidding documents. The Employees shall not be held liable for any delays due to system failure beyond its control. Even though the system will attempt to notify the bidders or any bid updates, the Employer shall not be liable for any information not received by the bidder. It is the bidders' responsibility to verify the website for the latest information related to the tender.
13. The undersigned has the right to extend or cancel the tender without declaring any reason.
14. The department is not held responsible, if any information is theft by hackers from the e-tendering URL.
15. Any kind of tempering of BOQ by the bidder will cause his bid to be disqualified and rejected.

Executive Engineer/DPIU-III,
Rural Works Division Seppa
Arunachal Pradesh for behalf of HE Governor of
Arunachal Pradesh
Signature and designation”.

**“Section 2
Instructions to Bidders (ITB)**

Only the relevant Clauses are reproduce here;

4. Qualification of the Bidder

4.1.1 Bidder should have valid registration with Employees Provident Fund organisation under EPF and Miscellaneous Provisions Act 1952.

4.2.(e) details of the technical personnel proposed to be employed for the Contract having the qualifications defined in Clause 4.3. B(b)(ii) of ITB for the construction.

4.4.B (ii) An affidavit that the information furnished with the bid documents is correct in all respects; and

The impugned notification

**“GOVERNMENT OF ARUNACHAL PRADESH
OFFICE OF THE SUPERINTENDING ENGINEER :: RURAL WORK CIRCLE
RUPA :: WEST KAMENG DISTRICT**

No. RWC/R/PMGSY-XI/E-PRO/2017-18 Date: 27.03.2017

NOTICE

1. Name of Work:- Road from Mebua-I to Rikgiwa. (Stage-I)
Package No.- AR0306022

The following bidders are found non-responsive vide the following clauses.

- I) Name of Firm:- M/s Geopong Enterprise
1) Clause No. 4.1.1 of ITB
2) Clause No. 4.4.B (a) II of ITB
- II) Name of Firm;- M/s Anupam Nirman Pvt. Ltd.
1) Clause No. 1.3.3 of section 3
2) Clause No. (4.4.B) (b) (i) of Appendix to ITB
3) Clause No. 1.1 of section 3
4) Clause No. 4.4.B (a) ii of ITB.

Sd/-
SE, RWC, Rupa
Chairman”

(iii) From the above given notification dated 27.03.2017 it is clear that purportedly the reasons for declaring the bid of the petitioner non-responsive are for non-fulfilment of the conditions given at Clause No. 4.1.1 and Clause No. 4.4.B (a) II of ITB,

Clause 4. 1.1 reads as follows;

“4.1.1-Bidders should have valid Registration with Employees Provident Fund Organization under EPF and Miscellaneous Provisions Act, 1952”.

For fulfilling this requirement, petitioner has accordingly submitted EPF registration certificate issued by the competent authority under the Act. There is no denial of this fact from the respondents. Other than the above condition/instruction no other condition or instruction is given in the NIT and in the Instruction to Bidders (ITB, in short) or in the Appendix to ITB which requires the bidders to submit any other document(s) in order to prove the validity of the EPF Registration. Therefore, it would be unfair and unreasonable to expect the petitioner to submit any document other than it is given in the instruction. If supporting documents were required it should have been clearly specified and given either in the NIT or in the ITB. Having not done so, the authorities issuing the NIT cannot expect the bidders to submit such documents to support the validity of the registration certificate. We have seen in the judgments cited by the learned counsels that every condition required to be fulfilled by the bidders must be stated and given in clear terms in the NIT or ITB. And if the authorities who issued the NIT failed to do so the bidders cannot be faulted on that count. I am unable to accept the argument forwarded by the learned Senior Addl. Advocate General that the petitioner is a seasoned businessmen, therefore, he is expected to know what documents to be submitted to prove that his EPF registration certificate is still valid for the reason stated above. In fact, there is no provision in the relevant Act for cancellation of registration certificate once it is issued rather there is provision for imposing penalty when payment is defaulted. Therefore, it appears that the authorities/respondents were determined to declare or reject the bid of the petitioner somehow or the other.

Clause 4.4B provides the documents that each bidder must produce but it does not include documents such as, wage register, voucher for EPF deposit, or receipts etc. to prove validity of EPF registration. As such, as stated above, it would not be only unfair but unreasonable to expect the petitioner to submit such documents which were not given in the NIT and ITB.

(iv) Clause 4.4 B (a) (ii) provides that each bidder must produce "an affidavit that the information furnished with the bid documents is correct in all respects". There is no denying the fact that the petitioner had submitted such an affidavit. There is nothing to show in the affidavit submitted by the petitioner that false statement or statements which are not based on truth have been made. Therefore, the second ground on which the bid of the petitioner was declared non-responsive is also found to be unreasonable and absurd.

From the above stated findings and conclusions it would be seen that the bid of the petitioner was declared as non-responsive on grounds or conditions other than that were given in the NIT and ITB, therefore, based on extraneous considerations which is not permissible under the settled law.

To bring in conditions by way of filing affidavit will not help the case of the respondents. Because the law has been settled that what has not been stated in the NIT or ITB cannot be improved by stating the same in the affidavit filed in the course of litigation. Therefore, it would be a waste time and space to discuss what has been stated in the affidavits but which were not mentioned in the NIT and ITB.

Considering the facts and circumstances under which the bid of the petitioner was declared non-responsive and the way how the bid of the respondent No.8 was accepted it appears that the whole process of selection has been maneuvered with malafide intention to favour someone against the others. The selection process seems to be a little murky and also appears to be wanting in transparency.

(v) The notice in Annexure-7 of the writ petition does not indicate the reasons as to why the Evaluation Committee found the bid of the petitioner non-responsive vide Clause 4.1.1 of the ITB. On the other hand in para-11 of the counter affidavit filed on behalf of respondent No. 5, it is stated that;

“11. That with regard to the statement made in Paragraph-9 of the writ petition, the answering deponent begs to state that as per Clause No. 4.1.1 of ITB, the petitioner’s uploaded document of EPF only but as per Clause (C) of appendix to Part-I of GCC the firm has not maintained and uploaded the wages of register of employees under contract labour (Regulation & Abolition) Act, 1970 which is incomplete and ground for non-responsive”.

It is evident from the above quoted paragraph from the counter affidavit that the opposite parties admitted that though, petitioner “Uploaded documents of EPF”, he has not maintained and uploaded “the wages register of Employees under Contract Labour (Regulation & Abolition) Act, 1970”, which is incomplete and ground for declaring the petitioner bid as non-responsive. It is further stated in the said paragraph that the bid of the petitioner was found non-responsive as per Clause 4.4 B (a), which says that even the bid of a qualified bidder is subject to be disqualified, if the bidder has made misleading or false representation in the forms, statements or affidavits submitted in proof of the qualification requirement.

It is found that the said statement in the affidavit of the respondent No. 5 is misleading and contradictory in as much as, as per Annexure-7, the bid of the petitioner was found non-responsive for non fulfilment of Clause 4.1.1 and not because of furnishing misleading/false representation in the forms or in the affidavit. Further, though there is no stipulation in the ITB that wage register or contract labours is a required document in the counter affidavit. It is stated that for non filing of the said document, petitioner's bid became non-responsive. It appears that to justify the action of the Evaluation Committee, the respondents have tried to make out new grounds in the counter affidavit which was not the factors considered by the Evaluation Committee. As such, it is clear that the authorities have been actuated by extraneous considerations while holding that the bid of the petitioner was non-responsive.

(vi) Now coming back to the second ground on which the bid of the petitioner was notified as not responsive as per Annexure-7, it was non-compliance of requirements of Clause 4.4 B (a) (ii) - "An affidavit that the information furnished with the bid document is correct in all respects". It is found from the record (Annexure-6 series, page 61 of the writ petition) that the petitioner has submitted such an affidavit as per the requirement. Hence, on this ground, which is quite frivolous, the bid of the petitioner could not have been declared non-responsive.

In the circumstances stated above, this Court is of the view that the grounds on which the technical bids of the petitioner has been notified to be non-responsive is prompted by extraneous considerations which is not tenable in law. Taking the same into consideration and testing the whole process of selection against the touch stone of the settled principles of law as given in the judgments referred to by the learned counsels, this Court is persuaded to set aside the decision of the Evaluation Committee declaring the bid of the petitioner as non-responsive vide Annexure-7 of the writ petition. Accordingly, the impugned notification is set aside.

It is seen from record that while directing notice to the respondents, by order dated 07.04.2017, this Court directed that the authorities concerned shall not award the work in question to any bidder without leave of the Court and the said interim order has been extended from time to time. Having set aside, the decision of the Evaluation Committee/Board declaring the bid of the petitioner as non-responsive as notified in Annexure-7, this Court directs that the respondent authorities shall

proceed to finalise the tender expeditiously, since the public work may have already suffered due to the litigation.

The writ petition is allowed. Parties to bear their own cost.

JUDGE

talom