

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.01.2010

+ **WP (C) 7529/2009**

ERA INFRA ENGINEERING LIMITED ... Petitioner

- Versus -

DELHI DEVELOPMENT AUTHORITY & ANR ... Respondents

Advocates who appeared in this case:-

For the Petitioner : Mr Manoj K. Singh

For the Respondents : Mr Rajiv Bansal

CORAM:-

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

I. Reliefs sought

1. The petitioner is praying for the quashing of the letters dated 03.02.2009 and 05.02.2009, whereby, the Delhi Development Authority (DDA) informed the petitioner that its tender had been rejected and that they (DDA) had decided to recall the tender. The petitioner is aggrieved by the fact that despite its price bid being the lowest (L-1) for the project, the same was rejected and, that too, at a belated stage and without assigning any reasons. Alleging mala fides on part of the respondents, the petitioner seeks

a direction from this court that the turnkey project in question be awarded to the petitioner and also that an independent agency be asked to investigate the matter.

II. The facts

2. Before we go into the questions that arise for consideration, an examination of the facts of the case is necessary. On 24.06.2007, the DDA, through a notice published in the Hindustan Times, invited “Expression of Interest” from interested agencies in respect of DDA’s project of constructing 50,000 multi-storeyed houses in the next five years using fast mode of construction “like pre-fab construction technologies on turn-key basis.” It was also indicated that the job shall comprise of planning, designing and construction of houses with specified services and that the technology to be used shall be “fast and cost-effective” and shall “conform to NBC of India and relevant BIS codes.” The ‘Expression of Interest’ was invited from those agencies who wished to participate in designing, tendering process for first lot of 10,000 houses per year for next five years to be constructed primarily in Narela, Rohini, Dwarka or any suitable place in Delhi. Era Infra Engineering Ltd., the petitioner herein, expressed its interest in the turnkey project through its letter of 31.07.2007. Alongwith the said letter, the petitioner also enclosed literature of pre-fab construction technology, namely, ELEMATIC and MIVAN. On 28.08.2007, the DDA shortlisted the petitioner alongwith others and requested them to make a presentation on 01.09.2007, regarding the technology that they were going to

use. The presentation was to cover, *inter alia*, the aspect of “suitability of technology for low cost housing in Seismic Zone – IV”.

3. On 14.01.2008, the DDA informed all the shortlisted contractors, including the petitioner herein, to submit their bids in the following manner:-

“Tender on Turn-key Basis in the prescribed form is invited for the following works by the Executive Engineer, Northern Division No. 12, DDA, Narela, Project Office on 12.03.2008, upto 3:00 PM on behalf of DDA from the contractors who are shortlisted agencies for EWS Houses Turkey Mega Project in three envelopes marked ‘A’, ‘B’ & ‘C’ i.e. envelope ‘A’ containing earnest money of Rs 1.57 crore (out of which not less than Rs 20 Lacs in the shape of demand draft/ call deposit receipt / receipt treasury challan/ Fixed Deposit Receipt of a Scheduled Bank guaranteed by Reserve Bank India, in favour of Sr. A. O. /CAU (North Zone)/DDA and balance in the shape of Bank Guarantee); envelope ‘B’ for Technical Bid and envelope ‘C’ for Financial Bid. The tenders will be received at Ground Floor, Vikas Minar, DDA, I. P. Estate, New Delhi-02 upto 3:00 PM on 12.03.2008. The envelope ‘A’ and ‘B’ (Technical Bid) shall be opened on the same day at 3:30 PM on 12.03.2008 in the Conference Hall at 5th Floor, Vikas Minar in the presence of intending tenderers or their authorized representatives.

The agency may revise their specifications or modify their tendered documents and accordingly they should quote their modified rates in envelope ‘D’ on or before the date fixed for opening of Financial Bid (to be intimated subsequently). Both the envelopes ‘C’ and ‘D’ shall be opened before the bidders, who would be present on the date of opening of Financial Bid.”

4. A corrigendum was issued on 16.01.2008 making certain changes in the schedule. The petitioner purchased the tender documents for Rs 20,000 on 11.02.2008. The tender documents contained the Notice Inviting Tender (NIT) pertaining to construction of 50,000 EWS houses in Dwarka, Rohini and Narela, Delhi (24,460 EWS + 21,900 LIG houses) as a turn-key project.

The estimated cost of the project was Rs 1378 crores and the time for completion was 60 months. The method of submission of tender, *inter alia*, stipulated:-

“The envelope containing Earnest Money and Bids (Technical & Financial Bid) shall be submitted simultaneously on due date. Only Technical Bid shall be opened on the due date whereas Financial Bid shall be kept sealed. Later on, a date shall be fixed for opening of the Financial Bid and bid of only those contractors whose technical bids are found acceptable by the Technical Board comprising EM/DDA as Chairman, CE (QAC), CE (HQ), CE (NZ), CE (Rohini), CE (Design), CE (Elect.), Chief Architect, Director (LS), Director (Hort.), Addl. Commr. (Png.) as Members & SE(P)-III/(NS) as Member Secretary, shall be opened.

Those bidders whose Technical Bids are found acceptable would be asked to submit revised financial bid plus or minus over the previous bid they had already quoted in the envelope ‘C’ i.e. Financial Bid. The contractors may be asked to revise their specifications or modify their tendered documents and accordingly they would be asked to quote their revised rates, if any, in envelope ‘D’. On the date fixed for the opening of the Financial Bid both the envelope ‘C’ and ‘D’ shall be opened before the bidders who would be present on the date of opening of the Financial Bid.”

5. Four pre-bid meetings were held between 11.02.2008 and 13.06.2008, in the office of the Chief Engineer (NZ) wherein the contractors could seek clarifications regarding the NIT. The last date for submission of bids was 21.07.2008. The petitioner submitted its bid on the same date and the technical bids were opened. The fifth and sixth tender meetings were held on 05.08.2008 and 07.08.2008 respectively. On 05.09.2008, the Technical Evaluation Committee held a meeting to discuss the various issues regarding the technology to be used in the turnkey project. After a detailed discussion, it was “unanimously” decided that 75% Prefab Technology would have to be used in the project. The bidders were given an opportunity to revise their

financial bids in view of the above decision. On 15.09.2008, the petitioner submitted its revised financial bid. On the same date, the financial bids were opened and the petitioner was found to be L-1. A comparative chart of the price bids as given in the petition is set out below:-

NAME OF THE PROJECT		Opening Date: 15.09.2008		
		TENDER FOR "CONSTRUCTION OF 50,000 EWS HOUSES IN DWARKA, ROHINI & NARELA, DELHI (24460 EWS – 21,900 LIG HOUSES)		
Sl. No.	Party	Original	Revised (Rs)	Status
1.	Era Infra Engineering Ltd	Rs.15,211,253,631.00	Rs.15,210,262,812.00	L.1
5.	IVRCL	Rs.19,104,366,900.00	Rs.19,104,366,900.00	L.2
3.	B.G. Shirkey	Rs.19,584,329,292.00	Rs,19,290,564,353.00	L.3
2.	Parsvnath Developers	Rs.23,825,761,250.00	Rs.23,825,761,250.00	L.4
4.	ITDC	Rs.36,958,280,000.00	Rs.28,938,968,000.00	L.5

6. On 31.12.2008, the DDA asked the petitioner to extend the validity of rates for the tender job for another 6 months as well as the validity of the bank guarantee, which were duly extended.

7. Thereafter on 03.02.2009, the petitioner received a letter from the DDA informing it that its tender had been rejected by the competent authority and that a formal application should be made by the petitioner for release of the earnest money. The relevant portion of the letter is reproduced hereunder:-

“Sub: C/o 50,000 EWS Houses in Dwarka, Rohini & Narela - Turnkey Project.

I am to inform you that the tender for the above noted work has been rejected by the competent authority. You are requested to make a formal application for release of Earnest Money.”

8. This communication was followed by a letter dated 05.02.2009, which informed the petitioner that the DDA had decided to recall the tender. The relevant extract of this communication is reproduced hereunder:

“Sub: C/o 50,000 EWS Houses in Dwarka, Rohini & Narela - Turnkey Project.

The tender of above noted work has been rejected by competent authority and it is decided to recall the tender. In this context, a fresh presentation adopting pre-fab technology is to be made at conference hall in VC’s Secretariat, Vikas Sadan, INA, New Delhi on 11.02.09 at 3.30PM.”

9. Aggrieved by the rejection of its bid and recall of the tender itself, the petitioner filed this writ petition. The main question for consideration is whether the DDA could have rejected the petitioner’s tender vide letter dated 03.02.2009 and/or recalled the tender through its letter dated 05.02.2009, after the financial bids had been opened and the petitioner had been found to be L-1, or at all ?

III. The petitioner’s contentions

10. The first contention put forward by the learned counsel for the petitioner was that the DDA could not reject the petitioner’s tender without assigning any reason for the same. Nor could the DDA ask the petitioner to make a fresh presentation regarding the use of pre-fab technology for the project, when the same issue had been already been discussed in detail in a

series of meetings. In the advertisement published in the newspaper on 24.06.2007, itself, it was stated clearly that the 'DDA is planning to construct 50,000 multi-storey houses in the next 5 years using faster modes of construction like 'pre-fab construction' technologies on turnkey basis'. The petitioner, in response to the said advertisement, expressed its interest in the project through its letter dated 31.07.2007, and submitted all the pre-qualification documents along with literature on pre-fab construction technology for consideration. Thereafter, the petitioner and the DDA corresponded in detail with specific reference to the various technologies that had to be used which included the suitability of the same for low cost housing in Seismic Zone-IV. As many as seven meetings regarding the issue of pre-fab technology were held and in the seventh meeting held on 05.09.2008, the Technical Evaluation Committee finally decided that "*the agency, whose tender is accepted, shall invariably provide at least 75% of each category of structural members in pre-fab construction for the RCC of super structure*". The minutes of the meeting are reproduced hereunder:

"Sub: Minutes of the meeting on Technical Evaluation Committee held on 05th September, 2008 in the chamber of Engineer Member, DDA in respect of 50,000 EWS Houses in the meeting taken by Engineer Member.

The list of officers from DDA and representatives of various agencies attended the meeting is enclosed herewith as Annexure-A.

1. It was intimated to all the members of the agencies that an evaluation of various provisions made by them in their technical bid have been gone into by a Committee constituted by EM, which has considered the same on 05th August, 2008 and the minutes of the appraisals are annexed herewith as Annexure-'B'.

All the intending agencies are required to go through these observations and confirm their offer with reference to these observations, which are common to all the participants.

2. It was reiterated in the meeting held on 05th September, 2008 that the basic requirement of DDA is to go for faster mode of construction like pre-fab technology with an objective of construction 90000 (sic) to 1000 (sic) houses per year now. After discussing the salient feature of various technologies in the meeting, it has been held that the agency, whose tender is accepted, shall invariably provide at least 75% of each category of structural members in pre-fab construction for the RCC of super structure.

3. It was, therefore, clarified to all the intending agencies that the above common datum have been decided for evaluation of the financial bid. The intending agencies may, therefore, revise their financial bids, if they so desire to come at par with the aforesaid datum in the light of para 2 & 3 above.

4. The revised financial bid will be received upto 3.00 p.m. on 12th September, 2008 and will be opened along with original financial bids at 3.30p.m. on same date in the conference hall at 5th Floor, Vikas Minar, I.P. Estate, New Delhi-110002.

5. The minutes were announced in the presence of all the agencies and were unanimously accepted by all of them.

These issues with the approval of EM, DDA.”

(Underlining added)

11. It was emphasized by the learned counsel for the petitioner that the DDA could not depart from the conclusion arrived at the above-mentioned meeting, arbitrarily and without any reason.

12. This led to the second contention of the petitioner, that the DDA, while rejecting the tender and informing them of their decision to recall the tender did not assign any reason for the same, nor was the petitioner given an opportunity of being heard with respect to the same. The learned counsel for the petitioner submitted that the actions of the DDA were malafide, arbitrary and discriminatory. It was submitted that from the fact that on

31.12.2008, the DDA asked the petitioner to extend the validity of rates for the tender job for a further period of 6 months as well as to extend the bank guarantee, it was clear that they were ready to award the tender in favour of the petitioner before they suddenly changed their mind. Also, the NIT provided for negotiation and, in case there was any issue which needed to be clarified, the DDA, instead of rejecting and recalling the tender, could have negotiated with the petitioner.

13. The third contention raised by the learned counsel for the petitioner was with respect to Clause 3(d) of the section entitled “PWD-6” of the NIT, which clearly states that the ‘Technical Bid’ of the parties shall first be scrutinized and approved and if the same is not found to be within the parameters of the tender document, the tender shall stand rejected. In other words, the ‘Financial Bid’ of the tenderer will not be opened unless he qualifies in terms of the technical requirements for the project. To make things clearer, the said clause 3(d) is reproduced hereunder:

“(d) Technical Bid of a tenderer, if not found within the specified parameters of this tender document, the Financial Bid i.e. envelope ‘C’ of the said tenderer shall not be opened and his offer for this work shall stand rejected. Decision of the Engineer-in-charge in this respect shall be final and conclusive.”

14. On the strength of this clause, it was submitted that because the petitioner’s financial bid was opened, it clearly implied that its technical bid was within the specified parameters of the tender document. It was further submitted that the petitioner, being L-1 and, therefore, having succeeded in

both the Technical and the Financial Bids, deserved to be awarded the contract and the DDA were duty bound to award the same in favour of the petitioner. The learned counsel for the petitioner contended that the DDA could not arbitrarily reject the tender for unlawful and extraneous reasons.

15. In support of the contentions — that judicial review of administrative decisions in respect of tenders was permissible in law; that the DDA should have substantiated its decision with reasons; that the DDA did not have unfettered discretion in the award or rejection of tenders; and, that the DDA had the power to alter/ modify tender conditions in public interest, the learned counsel for the petitioner placed heavy reliance upon the following two decisions:-

- 1) **Reliance Airports Developers P Ltd v. Airports Authority of India and Others: 2006 (V) AD (Delhi) 524**
- 2) **Reliance Airport Developers (P) Ltd v. Airports Authority of India and Others: 2006 (10) SCC 1**

IV. Respondent's (DDA's) contentions

16. The DDA, through its counter affidavit and during the course of the arguments, pointedly raised the issue that the technology proposed to be used by the petitioner was never within the specified parameters of the tender document. In fact, none of the bidders had offered a technology that was completely in consonance with the requirements of the tender. It was contended that a scrutiny of the technical bids revealed that there were deficiencies in all the bids, though of varying degree. This led to the DDA

indulging in numerous meetings with the bidders in order to rectify the defects. Finally, in the meeting on 05.09.2008, a unanimous view, that the agency, whose tender is accepted, shall invariably provide at least 75% of each category of structural members in pre-fab construction for the RCC of superstructure, was arrived at. If the DDA had wanted to favour any particular concern or if the intention was to reject the petitioner's bid arbitrarily, unlawfully or with *mala fides*, then it would not have taken pains to hold such meetings to keep the petitioner and the other bidders in the tender process. In short, it was submitted that the petitioner's contention that its technology was in consonance with the requirements of the tender documents was not true as it was the variance in the technology offered by it and the other bidders, in the first place, that prompted all the meetings that followed.

17. The learned counsel for the DDA further submitted that the contention of the petitioner that merely by being L-1 in the tender process, a right to be awarded the work accrued in its favour, was completely unsustainable. It was submitted by him that no actual binding contract came into existence at that stage in the tender process and numerous other factors had to be considered before a final decision on awarding the tender could be made. Thus the DDA was not at all duty bound to accept the petitioner's tender and had not acted beyond its capacity in rejecting and recalling the same.

18. It was also contended that while the petitioner relied strongly on the said clause 3(d) of the NIT, which stated that if the technical bid was

unsatisfactory, the tender would be rejected and the financial bids would not be opened, the petitioner failed to appreciate the letter dated 19.06.2008, by the Chief Engineer, where, in paragraph 15, it had been clarified that any major deviation in the technology presented by the bidders from that of the tender document, would not be accepted. The relevant extract of the same letter is reproduced hereunder:

“15. It is clarified that the agencies were short listed based on the applications received in view of the Expression of Interest invited by DDA and also detailed presentation made by them for the technology subsequently. Any major deviation in the technology presented by them will not be accepted.”

19. The next contention raised by the learned counsel for the DDA was that due to the discrepancy in the technologies offered by the bidders and the requirement of the tender document, and also due to the fact that there had been a substantial amount of discussion on the same, the DDA, upon the representation of one of the tenderers before the Lieutenant Governor of Delhi for relooking in to the processing of the tenders, referred the matter to the Central Vigilance Commission for their advice. In this regard, the notes of the CVO dated 11.11.2008, 23.12.2008 and 05.01.2009 are relevant. Since these notes are significant, the same are reproduced hereunder in their entirety:-

CVO's Note dated 11.11.2008:

“As desired by VC, DDA I examined the tender process and my observation is that there have been irregularities in handling the tender. The requirements regarding use of pre-fab technology has been changed from time to time. Following are the procedural lapses.

1. The idea was to go in for expeditious construction of houses and it was possibly thought that use of Pre-fab technology would be helpful in that regard. Though the notice inviting tenders mentioned that “the works shall be executed on turn key basis from the concept to commissioning, services including pre-cast component, design, method of erections in accordance with the layout plans and architecture/ structural design to be approved by DDA”, the NIT did not mention anything more than that regarding use of pre-fab technology. The minimum acceptance specifications regarding use of pre-fab technology dealt at item 3.1 (P-231) of the tender document was that the RCC in column, beams, slabs and walls could be pre-cast/ as well as cast-in-situ. Thus, the tender document did not specify that pre-cast technology must be used.
2. It was in the pre-bid conference held on 11.02.2008 that the Technical Committee under the Chief Engineer (NZ) clarified to the prospective bidders that tenders have been invited for construction using pre-fab technology based on the presentation made by the agencies in continuation of the expression of interest (EOI). This was a deviation from the original tender document. The firms who specialize in pre-fab construction could complain that since DDA was not insistent on pre-fab construction in the NIT, they did not file EOI (expression of interest) with the apprehension that they could not have competed in cost with those who opt for conventional in-situ construction and hence could not get the opportunity.
3. Subsequently, technical bids were received and scrutinized by the Technical Committee on 05.08.2008. The scrutiny document had pointed out the deficiencies against the technical bids. One of the deficiencies pointed out in case of M/s Era Infra Engineering Ltd. was that technology proposed for the construction was at variance with proposal submitted in expression of interest and subsequent presentation and therefore not acceptable. A meeting of the Technical Committee was held on 06.09.2008 with the representatives of the agencies. In this meeting, it was decided to do away with the detailed scrutiny of technical bid. Relevant extract from the minutes of the meeting is reproduced below:

“A meeting of Technical Committee was held in the Conference Room on 05.08.2008 with the representatives of the agencies. There was general consensus among the

agencies that detailed scrutiny of technical bid may be dispensed with in view to save time as they were ready to carry out necessary modifications in line with tender provision and subsequent clarifications.”

Dispensing with the scrutiny of technical bid is a serious lapse. Without proper evaluation of technical bid DDA does not get the opportunity to ensure the technical specifications and uniformity in that regard before evaluating the financial bids.

4. Another deficiency in the process is that, in this meeting, the use of pre-cast technology was relaxed to the extent of 75%. The Technical Committee in its meeting held on 05.09.2008 decided as follows:

“After discussing the features of various technologies in the meeting, it has been decided that the agency, whose tender is accepted, would invariably provide at least 75% of each category of structural members in pre-fab construction for the RCC of superstructure”.

This decision dilutes the earlier decision to completely use pre-fab technology. That apart, since there was no technical evaluation done after this meeting, DDA has not been able to assess whether any of the bids really met this evaluation criterion of 75% or not. Further, since financial bid has already been opened, rejecting any of the bids on this ground at this stage will not be proper. It appears that the department is not serious about the requirement of 75% use of pre-fab technology at this stage. In that case, whatever extent of pre-fab technology the contractor uses will have to be accepted by DDA as fait accompli.

5. Decision to use 75% pre-cast technology **for each category** of structural members is also not a sound decision and is not likely to be followed. For example, the lowest bidder M/s Era Infra Engineering Ltd. has finally offered to use in-situ casting for columns and beams and pre-fab construction of slabs. This is a deviation from the decision of the Technical Committee inasmuch as the columns and beams will not have any pre-fab construction at all.
6. On the whole, it appears that though use of pre-fab technology was a pre-requisite at one stage, there is

practically no control on this in the final stage of the tender decision.

7. The tender process has been vitiated due to frequent changes in the specifications so far as use of pre-fab technology is concerned. As the situation stands today, the contract requires 'use of pre-fab technology to the extent of 75% for each category of structural members'. As explained in Para-5 above it will be difficult to enforce this requirement. This is likely to be a cause of dispute during the process of execution of the work. DDA should make up its mind as to the extent to which pre-fab technology should be used. Will it be mandatory to use pre-fab blocks for all categories of structural members and, if so, to what extent? Alternatively, it could specify that certain members (e.g. columns and beams) would be cast in-situ and certain members such as slabs would be pre-cast. Detailed requirements should form part of NIT, and these basic requirements should not be changed at any subsequent stage. The entire process should be transparent right from the beginning in order to prevent complaints and litigations in future. Technical Evaluation should mandatorily be done in order to screen out bids that are technically non-responsive and their price bids should not be opened.
8. Since this is large contract, and first of its kind in DDA, advice of Central Vigilance Commission in the matter may be sought.

Sd/-
(U. N. Behera)
CVO, DDA
11.11.2008

VC, DDA

As proposed
Sd/- VC, DDA
11/11/2008"

CVO's Note dated 23.12.2008:

"The matter had been referred to the Central Vigilance Commission for their advice. C.V.C, in their advice, vide No. 008/W&H/153/294121 dated 22.12.2008 (Page 75-74/C) has observed that:

- (i) The bidders were pre-qualified to submit technical and financial bids without ascertaining whether they had genuine experience of

successfully completing works, using the proposed pre-fab technology;

- (ii) The technology proposed for construction by the bidder, who has emerged as L-1, is at variance with the proposal submitted by the said bidder in his expression of interest and subsequent presentation;
- (iii) The process of evaluation of technical bids had been dispensed with without any cogent explanation;
- (iv) The specifications, methodology and technology of pre-fab construction is not specified in the tender documents; and
- (v) Adequate seismic provisions for construction of pre-fabricated multi-storied residential dwellings, as required for Zone-IV, were not incorporated in the tender documents.

C.V.C has advised DDA to take necessary corrective measures before proceedings further in the matter in view of the above significant infirmities. They further advised that DDA must ensure total transparency in the process and should not extend undue benefit to the 'L-1 bidder' by modifying specifications, methodology, technology, etc., after the receipt of financial bids.

The engineering wing may kindly be asked to act as per the advice of C.V.C. Vice Chairman may like to apprise Hon'ble L.G. of the C.V.C advice.

Sd/-
(U. N. Behera)
CHIEF VIGILANCE OFFICER
23.12.2008"

CVO's Note dated 05.01.2009:

“Observation of V.C. on the margin pre-stage.

The matter was discussed with V.C. regarding the future course of action. The Central Vigilance Commission has pointed out serious deficiencies in processing of the tenders. The irregularities pointed out have been dealt in the note pre-page. These deficiencies cannot be rectified at this stage. It may be advisable to cancel this tender and start the whole process afresh with unambiguous specification of the work, pre-qualification of the bidders, proper technical evaluation of

the bids, etc. The observations made by the Commission may be meticulously observed at different stages of the process¹.

Sd/-
(U. N. Behera)
CHIEF VIGILANCE OFFICER
05.01.2009

Hon'ble L.G

‘X’² approved as per CVC/CVO advice
Sd/-
Lt Governor
9.1.09”

20. The learned counsel for the DDA contended that it was these recommendations of the CVC that led to its taking the decision of rejecting the petitioner's tender and recalling the same. Also, merely because these reasons were not spelt out in the letters to the petitioner, dated 03.02.2009 and 05.02.2009, was not sufficient to allege arbitrariness or malafides on part of the DDA. It was contended that reasons need not be given unless they are required to be, by law, and can also be obtained upon further communication.

21. Finally, the DDA being a government agency was obliged to act in the interest of the public and, in this case, settling for or compromising on a technology that was not best suited for the turnkey project would amount to compromising the interest of the general public in favour of one bidder i.e. the petitioner.

¹ Underlined portion is marked 'X' in the original file

² See above footnote

22. The learned counsel for the DDA relied on the following decisions:-

- 1) **Reliance Airport Developers (P) Ltd v. Airports Authority of India and Others: 2006 (10) SCC 1;**
- 2) **B.S.N. Joshi and Sons Ltd v. Nair Coal Services Ltd and Others: 2006 (11) SCC 548;**
- 3) **Asia Foundation and Construction Ltd v. Trafalgar House Construction (I) Ltd and Others: 1997 (1) SCC 738;**
- 4) **Ghanshyam Das Aggarwal v. Delhi Development Authority: 1996 (37) DRJ (DB);**
- 5) **Priya Enterprises and Anr v. Commissioner of Police and Another: 102 (2003) DLT 529.**

V. The petitioner's submissions by way of rejoinder

23. In rejoinder, the learned counsel for the petitioner submitted that the DDA's action in rejecting the petitioner's bid and of recalling the tender itself was contrary to public interest. The learned counsel for the petitioner submitted that the said action has resulted in a huge amount of public money and time being lost. He submitted that the tender process started on 28.06.2007 with the invitation for "Expression of Interest" and the same culminated in the rejection letter of 03.02.2009. This process consumed 19 months. According to him, the re-tendering process would involve a further 19 months in the minimum. Obviously, this would result in loss of time which would run counter to the very object of constructing the said houses using a fast mode of construction by emphasizing use of pre-fab technology.

On the other hand, if the tender had been awarded to the petitioner, the project would have been well underway.

24. The learned counsel for the petitioner also submitted that the entire tender process has been set at naught by the remarks of one individual, i.e., the CVO which were, in turn, occasioned by one of the tenderers (B.G. Shirke). He submitted, with reference to the CVO's note dated 11.11.2008, that all the points mentioned therein were wrong. In particular, he submitted that the suggestion that the firms who specialized in pre-fab construction may not have participated in the tender process because the NIT and / or the expression of interest did not specifically indicate that pre-cast technology had to be used, was imaginary and was merely a conjecture. According to the learned counsel for the petitioner, this is apparent because the difference in the price bids between the original and the revised was very small. Consequently, according to him, the pre-fab element did not make much of a difference. It was also contended that even companies, which dealt in hundred percent pre-fab construction, responded to the expression of interest and, therefore, the premise of the CVO that many such firms may not have participated was not correct. It was also contended that there was no relaxation in the pre-fab technology. According to the learned counsel, as per the NIT, the pre-fab element was 25% which has been increased to a minimum of 75%. Furthermore, it was submitted that the comment in Point No.5 of the CVO's note dated 11.11.2008 with regard to use of pre-cast technology in each category of structural members was not within the

competence of the CVO and it was for the technical committee to conclude as to whether the decision to use 75% pre-cast technology in each category of structural members was or was not a sound decision. With regard to the allegation that the tender process had been vitiated due to frequent changes in the specifications, insofar as the use of pre-fab technology is concerned, the learned counsel for the petitioner submitted that there were no frequent changes, but only one change and that, too, pursuant to B.G. Shirke's letter and not at the instance of the petitioner.

25. It was also contended by the learned counsel for the petitioner that the CVO's advice and observations were mere recommendations and were not binding on the DDA. In any event, the said observations and advice were only to take necessary 'corrective measures' before proceeding further in the matter. The DDA was advised to ensure total transparency in the process and that no undue benefit should be extended to the "L-1 bidder" by modifying specifications, methodology, technology, etc. after receipt of the financial bid. The learned counsel for the petitioner submitted that these directions did not mean that the DDA was required to reject the petitioner's bid and to recall the tender. All that the DDA was required to do was to take corrective measures and not give any undue benefit to the petitioner. He also submitted that after the receipt of the revised bids, there was no modification or specification, etc. and, therefore, there was no reason for the DDA to have rejected the petitioner's bid and recall the tender.

26. The learned counsel for the petitioner placed reliance on a few more judgments. The same were:-

- 1) ***Aman Hospitality Private Ltd v. The Delhi Development Authority: I (2007) BC 154;***
- 2) ***Brahler ICS India Pvt Ltd v. Union of India and Others: 2002 (III) AD (Delhi) 497;***

VI. Current status of the Project

27. It is also pertinent to point out the current position of the project. After the DDA recalled the subject tender, it invited fresh tenders. The petitioner was also allowed to participate in the same if it wished to do so. The petitioner chose not to participate in the fresh tender process although dates for submission of tender were extended. The fresh tender process is underway.

VII. Case law discussed

28. There is no dispute with the law on the subject. It is the same for the petitioner as well as for the respondents. It is only in the application of the settled principles to a given set of circumstances that differences arise. The cases cited by the parties clearly bring out the law on the subject and the settled principles regarding award and rejection of the tenders. We shall examine the decisions in the order they were placed before us.

29. The two ***Reliance Airports decisions*** (supra), one of a Division Bench of this court and the other of the Supreme Court, were heavily relied upon by

the learned counsel for the petitioner. They were relied upon primarily for the purposes of demonstrating the scope of judicial review in tender matters and also that there was nothing wrong with modification or alteration in the technical requirements provided there was no illegality, irregularity or impropriety. In ***Reliance Airports (Delhi)*** (*supra*), a division bench of this court, after examining the Supreme Court decisions in **Tata Cellular v. Union of India:** (1994) 6 SCC 651, **Air India Ltd. v. Cochin International Airport Ltd.:** (2000) 2 SCC 617 and **Master Marine Services (P) Ltd v. Metcalfe & Hodgkinson (P) ltd. and Ors.:** (2005) 6 SCC 138, observed that:-

“All that need be pointed out is that judicial restraint and the limitations inherent in the exercise of power of judicial review of administrative action must remain present to the mind of Court while examining whether a given case is fit for judicial intervention. It is only if a palpable case of arbitrariness, discrimination or mala fides in the matter of award of contract is established that the Court may interfere subject, of course, to the overriding consideration that such interference would not, in any manner, prejudice public interest.”

The learned counsel for the petitioner, as mentioned above, had also placed heavy reliance on this decision in connection with its finding that even a mid-stream modification of the technical qualifications specified in the Request For Proposal document (RFP) need not be struck down. One of the questions specifically raised in ***Reliance Airports (Delhi)***(*supra*) was:-

“(4) Was the modification of para 5.4 of the RFP and allotment of the contract for Delhi Airport in favour of Respondent No. 3 vitiated by any illegality or procedural irregularity?”

The division bench answered the question in the negative:-

“117. While dealing with Question No. 2, we have already held that the Government and the Airports Authority of India had reserved ample authority to modify the terms of the RFP or to amend the information, terms, procedures and protocols set out therein at any stage. All that we need to add is that apart from para 6.7 of the RPF which specifically reserved to the AAI/GOI the right in its absolute discretion to amend the RFP, para 3.4 of the same in terms reserved to the AAI/GOI the power to determine the structure and timing of the transaction process following the submission of binding offers. This included the evaluation of binding offers and matters incidental thereto. There was, therefore, no illegality arising from lack of power or jurisdiction on the part of the AAI/GOI in making a suitable amendment in the RFP which amendment it considered necessary in public interest. There was similarly no irregularity, procedural or otherwise, in the making of the said modification, especially when it had been made at a stage prior to the opening of the financial bids. The argument that the modification ought to have been preceded by a notice to the tenderers or reasons ought to have been conveyed to the tenderers has already been rejected by us while dealing with Question No. 2. All that we need point out is that the Government had the absolute discretion to determine the terms and conditions subject to which it would invite tenders. No tenderer could possibly find fault with the conditions subject to which such tenders are invited. That is particularly so when the conditions upon modification were uniform in their application and did not prefer one tenderer over the other in an arbitrary or discriminatory fashion. Having accepted the terms of the RFP, the petitioner cannot grudge the exercise of the power of amendment vested in the AAI or the GOI or read into that power limitations which are not otherwise stipulated. The amendment to the RFP was, in our opinion, necessitated by the concern of the Government to initiate the process of modernization of both the airports without any further delay implicit in the initiation of any fresh tender process especially when such process was global in nature. The minutes of the EGoM and the averments made in the counter affidavit filed on behalf of the Government of India sufficiently establish that the power of variation of the RFP was exercised for bona fide reasons and in public interest.”

It is obvious that this court chose not to interfere with the award of the contract because the RFP itself permitted modifications. The court

specifically held that AAI/GOI had the power of variation of the RFP and that such power, in the facts of that case, had been exercised for bona fide reasons and in public interest. The learned counsel for the petitioner sought to rely on this decision to support his argument that DDA acted well within its powers when it, with the unanimous approval of all the tenderers, altered the technical requirements to a minimum of 75% of pre-cast RCC in each category of the superstructure – columns, beams, walls, slabs. However, we do not see as to how that decision would come to the aid of the petitioner. First of all, in *Reliance Airports (supra)* the challenge was to the award of a contract in favour of another party (other than the petitioner therein), whereas in the present case the challenge is to the rejection of the petitioner's bid and the recall of the tender itself. Secondly, and more importantly, in that case, as is the plea on behalf of DDA in this case, the court exercised judicial restraint and did not interfere with the administrative decision. Thirdly, in the present case, as discussed hereinbelow, we find that the decision to dispense with a detailed technical scrutiny coupled with a non-descript item 3.1 of the tender document which indicated the item of work as RCC in columns, beams, slabs and walls (**pre-cast as well as cast-in-situ**) and the subsequent variation in the technical requirements (but for which the petitioner's technical bid was non-compliant), sounded the death-knell of the subject tender. The report of the CVO and the observations of the CVC did not help the cause of the petitioner, either.

30. The appeal from *Reliance Airports (Delhi) (supra)* was dismissed by the Supreme Court in *Reliance Airports (Supreme Court) (supra)*.

However, the Supreme Court's observations on the power of judicial review in, inter alia, tender matters are instructive:-

“57. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the courts to assert their power to scrutinise the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is “illegality”, the second “irrationality” and the third “procedural impropriety”. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*³ (commonly known as *CCSU case*).”

31. In *B.S.N. Joshi (supra)*, a decision relied upon by the learned counsel for the DDA, the Supreme Court categorically held that a contract need not be awarded to the lowest tenderer. The court held:-

“56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.”

With regard to the scope of judicial review in tender matters, the Supreme Court summarized the principles as under:-

“65. We are not oblivious of the expansive role of the superior courts in judicial review.

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the

³ 1985 AC 374 : (1984) 3 WLR 1174 (HL) : (1984) 3 All ER 935

law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

67. Law operating in the field is no longer *res integra*. The application of law, however, would depend upon the facts and circumstances of each case....

68. The employer concededly is not bound to accept a bid only because it is the lowest.....”

32. In *Asia Foundation & Construction Ltd. (supra)*, the Supreme Court held that the object and purpose of permitting judicial review of the contractual powers of government bodies is to prevent arbitrariness or favouritism and that such power of judicial review is to be exercised in the larger public interest. The court also reiterated the principle that lowest bidder does not, *ipso facto*, have an enforceable right to get the contract.

The relevant observations of the Supreme Court are as follows:-

“10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying Court’s interference in the grant of contract in favour of the appellant..... As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the contract though ordinarily the authorities concerned should accept the lowest bid....”

33. *Ghanshyam Das Aggarwal (supra)* is a case where the petitioners’ bids in a public auction held by the DDA for, *inter alia*, three plots were rejected by the Vice Chairman DDA even though the petitioners therein were the highest bidders. The rejection of the bids was questioned as being unreasonable and arbitrary. It was submitted on behalf of the petitioners therein that when the bids were made in an open auction and they were above the reserve price, there was no reason as to why the bids should not have been accepted. A division bench of this court found on facts that the decision taken by the Competent Authority was an objective one based on a

criterion devised on the material available on record. The court found that the authority had been guided by the consideration of protecting the financial interest of the DDA so as to earn more revenue for it. Dismissing the challenge of the petitioners, the division bench held:-

“The decision cannot be said to be arbitrary or unreasonable. Merely because someone else sitting in the place of the Vice Chairman, DDA could have arrived at a different decision and might have been inclined to accept the bids would not be a ground for interfering in exercise of judicial review jurisdiction of the High Court with the discretionary decision taken by the authority...”

While rendering the said decision, the court also referred to the earlier case of *Dr Hotchandani & Ors v. DDA: CWP 250/1995* decided on 17.10.1995 in which it held as follows:-

"The law is well settled that while exercising our writ jurisdiction, we are not to sit as an appellate authority over the decision of the authority like the Vice Chairman of Delhi Development Authority. **We have only to examine whether the decision taken by the Vice Chairman, DDA is a reasonable decision, a decision which a reasonable man guided by relevant consideration could have taken in the circumstances of the case.** It is pertinent to note that there is no allegation of mala fides made against the Vice Chairman-DDA.

If the Vice Chairman was of the opinion having taken into consideration the relevant data placed before him, that the bids which were below a certain figure, did not reflect the mark trend of prices of land and the DDA was likely to gain on the plots being offered for sale by public auction once again, there is nothing wrong in it. The Vice Chairman has acted in the interest of the DDA. He has tried to save the DDA from the huge financial loss which was likely to result to the DDA in the event of all the bids being accepted. He was, therefore, justified in rejecting the bids relating to five plots including the one made by the petitioner. The terms and conditions of the auction also gave such an authority to the Vice Chairman. **It is true that reasons must exist for rejecting a bid including the highest bid. The reasons do exist though they were not conveyed to the petitioners. It is enough if the reasons exist**

though not communicated (Kumari Shrilekha Vidhyarthi Etc. v. State of U.P. : AIR1991SC537)."

(emphasis supplied)

After taking note of the aforesaid observations in *Dr Hotchandani (supra)*, the division bench, in *Ghanshyam Das (supra)*, held that reasons for rejection must exist though they need not be communicated unless specifically directed by law. The court observed that the existence of reasons was a requirement of natural justice whereas the need to communicate those reasons to the aggrieved party would depend on the specific dictate of some stipulation, condition or provision of law. The court held as under:-

“...Firstly, the Rules and the Terms and Conditions of the Public Auction did not contemplate reasons for rejection of highest bid being communicated to the concerned bidders. **There is a distinction between existence of reasons and assigning of reasons (see: Shrilekha Vidhyarthi: AIR1991SC537). The former is a requirement of natural justice, the later is a dictate of law. Reasons need not be assigned in the sense of being communicated to a party unless required to be so done by any Rule having force of law.** Secondly, the reasons could have been made available if asked for. Thirdly, the reasons for rejection though not communicated and though not asked for by the petitioners before filing the petitions have been made available in the Court in response to the show cause notice issued and it would serve no useful purpose if we may dispose of the petitions merely by directing the respondents-DDA to communicate the reasons to the petitioner. The reasons now having been made known to the petitioners, they have been heard thereon. Whatever they had to say on such reasons they have said and we have also tested the validity of the reasons and have found nothing unreasonable therewith. That is an end of the matter.”

34. In *Priya Enterprises (supra)*, another decision of a division bench of this court, it was observed that “*there is no denial of the legal position that*

even after examining the tenders submitted pursuant to the notice inviting tender, the department may refuse to award the work to any of the tenderers and initiate fresh exercise if valid reasons existed for such a course of action". The court also held that it is at the discretion of the department and the department is the best judge to decide as to whether a bid of any tenderer is to be accepted at all or not. However, there must be fairness in the exercise of such a discretion.

35. *Aman Hospitality (supra)* is a division bench decision of this court which has been placed before us by the learned counsel for the petitioner as that is a case where a bid in a public auction had been rejected and the court set aside the said rejection and directed the DDA to accept the bid of the petitioner therein. Our attention was specifically drawn to the following passage in the said decision:-

“Merely, rejecting bid on the basis of the recommendation of the Finance (Member) without taking into consideration wide disparities and dissimilarities concerning the site, size and location of the hotel plot with that of site of shopping/office complex at Kondli, Gharoli, was a case of irrationality and, therefore, evidently the decision making process suffered from patent arbitrariness.”

It was suggested that as in that case the rejection of the bid merely on the recommendation of the Finance Member was found to be “irrational” and “arbitrary”, so also in the present case, rejection of the petitioner’s bid only on the basis of the notings of the CVO, who, according to the learned counsel of the petitioner, was nobody to decide on technical matters, smacked of arbitrariness. We are unable to see a parallel between the recommendation of the Finance Member in that case and the observations of

the CVO in this case. In any event, it was not only the opinion of the CVO but also the observations of the CVC that led to the Lt Governor approving the proposal to reject the petitioner's bid and to recall the tender. The factual position in the two cases are also entirely different.

36. Although, *Brahler ICS (supra)* is a decision of a single bench of this court and, therefore, not binding on us, it was cited by the learned counsel for the petitioner for its persuasive value. However, on going through the said decision we find that the same was decided on entirely a different set of facts and on application of principles which would not apply to the present case. In *Brahler ICS (supra)*, the challenge was to the action of respondents 1 to 4 ordering fresh "price bids" in respect of supply of Digital Wireless Interpretation System in the Parliament Library Building. The petitioner therein also sought the grant of the said contract on account of its bid being the lowest and its fulfilling all the qualifications prescribed in the Notice Inviting Tender. The question involved in the said case was whether technical deficiencies could be pointed out or resorted to in order to call for fresh "financial bids". The learned single judge was of the view that the pleas of the respondents therein that the bid of the petitioner was technically deficient would have been tenable and entertainable if the respondents were inviting fresh "technical bids". In that case, it was not the fresh "technical bids" which were being invited but it was the fresh "price bids", which could only follow if the respondents had been fully satisfied with the technical bids. In that context, the calling of fresh "financial bids", though

on the ground of technical deficiency/alteration/inadequacy, was found to be arbitrary, unreasonable and unsustainable. It is obvious that *Brahler ICS (supra)* was not a case of recall of the tender but was one where fresh financial bids were being invited on the plea that the technical bid of the petitioner therein was technically deficient. The learned single judge was not called upon to decide the question as to whether the scrapping of the tender was justified⁴; a question which squarely arises in the present case. So, that case is of no help to the petitioner.

37. Finally, we would like to refer to the Supreme Court decision in *Tata Cellular v. Union of India: (1994) 6 SCC 651*, which is now regarded as the starting point for the modern statement of law as regards the scope of judicial review of administrative actions and, particularly, of actions in relation to tenders. The Supreme Court held:-

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.* The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the

⁴ “I am not required to consider the issue whether the scrapping of the tender by the Government is justified as no scrapping of tender has been done by the Government of India in the present case. Accordingly, the aforesaid judgment of Alcatel is not applicable to the present case. The Government is in fact going through the tender and in that view of the matter, it is certainly open to this Court to consider the decision of the Government to ask for fresh financial bids. Once the technical bid is cleared the, petitioner would be greatly prejudiced by the disclosure of its financial bids. The very purpose of confidentiality of a financial bid of a tender is defeated by the procedure sought to be adopted by the respondents 1 to 4.”

best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.”

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“Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) **Illegality:** This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) **Irrationality**, namely, Wednesbury unreasonableness.
- (iii) **Procedural impropriety.**

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.”

(emphasis supplied)

After referring to several decisions, the Supreme Court observed as under:-

“94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

- (5) The Government must have freedom of contract. In other words, a fair⁵ play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

VIII. The legal principles applied to the present case

30. Applying the above principles, it is obvious that the petitioner cannot claim any enforceable right to be awarded the contract merely because it happens to be the lowest bidder. Normally, the lowest bidder or the highest bidder, as the case may be, ought to be awarded the contract. But this is not an absolute rule and the governmental authority can deviate from this and award the contract to someone other than the lowest or highest bidder, as the case may be. But, there must be good and valid reasons for this departure. The government body or authority may decide not to award the contract to the lowest bidder/ highest bidder or to anyone else and may decide to scrap the tender and/or call for fresh tenders. However, once again, there must be good reasons for doing so. In the present case, the petitioner’s lowest bid

⁵ Sic. Free?

has been rejected and the tender has been recalled. The DDA has acted well within its power having done provided there exist reasons, which are clearly discernible from the record, justifying the DDA's decision to reject the petitioner's bid and to call for fresh bids. It is not necessary that the reasons must be communicated to the petitioner at the outset, but it is sufficient, if the reasons exist. It is also clear that if the reasons are palpable and are not so outrageous in the 'Wednesbury' sense, there would be no scope for judicial interference.

31. The policy decision with regard to the subject tender was that a fast mode of construction employing pre-fab technology on a turn-key basis would be used for the DDA's project of constructing 50,000 multi-storeyed houses. The entire emphasis from the very beginning was on the use of pre-fab technology. We find that the CVO in his note dated 11.11.2008 had specifically referred to the tender documents and, in particular, to item 3.1, which dealt with the RCC work. Item 3.1 described the item of work as RCC in columns, beams, slabs and walls (**pre-cast as well as cast-in-situ**). The CVO had pointed out that the tender document itself was defective as it did not specifically indicate that it is only pre-cast technology which must be used. Thus, the tender document itself was contrary to the policy decision taken by the DDA to construct the said houses using pre-cast / pre-fab technology and not permitting casting *in-situ*. We agree with the observations of the CVO as well as the argument raised by the counsel for the DDA that this was a defect in the tender document itself.

32. The next aspect of the matter which also goes against the petitioner's claim is that at the initial stage when the technical evaluation committee had evaluated the technical bids on 05.08.2008, it was found that the petitioner's technology proposal for construction was at variance with the proposal submitted in the expression of interest and subsequent presentation and was, therefore, not acceptable. Attention was invited to paragraph 15 of the clarification issued on 19.06.2008 which reads as under:-

“15. It is clarified that the agencies were short listed based on the applications received in view of the Expression of Interest invited by DDA and also detailed presentation made by them for the technology subsequently. Any major deviation in the technology presented by them will not be accepted.”

33. It is obvious that if there were no further consultations, the petitioner's bid was straightaway liable to be rejected. However, there were deficiencies pointed out in respect of each of the tenderers and, therefore, all of them arrived at a 'general consensus' that a detailed scrutiny of the technical bids may be dispensed with in view to save time as they were ready to carry out the necessary modifications in line with the tender provisions and subsequent clarifications. Two things emerge from the above circumstances. The first being that the petitioner's bid was initially liable to be rejected as was the case with the other tenderers. The second aspect is that the petitioner and the other tenderers remained in the tender process only because they had arrived at a 'general consensus', which was surprisingly accepted by the technical committee, that a detailed scrutiny of technical bids be dispensed with in order to save time. We agree with the

observations of the CVO that the dispensing with the scrutiny of technical bids was a serious lapse and that without proper evaluation, DDA would not get an opportunity to ensure that the technical specifications were met.

34. In the meeting of the technical evaluation committee held on 05.09.2008, it was reiterated that the basic requirement of DDA was to go for a faster mode of construction employing pre-fab technology. It was also noted that after discussing the salient features of the various technologies in the meeting it had agreed that the agencies whose tender is accepted shall 'invariably' provide at least 75% of each category of structural members in pre-fab construction for the RCC of the superstructure. This was a change in the technology requirement and that, too, without being specific as to the extent of pre-fab technology. Only a lower limit of 75% was provided. All the agencies had agreed to the said common datum and that the same would be used for evaluation of the financial bids. The intending agencies were permitted to revise their financial bids to incorporate the said datum. It was pointed out in the minutes of the meeting held on 05.09.2008 that the same were 'unanimously' accepted by all the agencies which included the petitioner and the other tenderers. As mentioned above, the tenderers were not initially technically compliant. They agreed amongst themselves to avoid a detailed scrutiny of technical bids in order to save time and a revised datum was agreed upon. The revised datum itself was not very specific with regard to the extent of pre-fab technology to be used in each category of structural members except to the extent that the agency whose tender would

be accepted would invariably provide at least 75% pre-fab construction in respect of each category of structural members.

35. We agree with the learned counsel for the DDA that if there was no 'consensus' amongst the agencies and the technical evaluation committee with regard to the giving up of the detailed scrutiny of technical bids and introduction of a revised datum, the petitioner's bid would have been rejected at that stage itself. It is only because of the said general consensus and revised datum that the petitioner continued in the tender process and submitted its revised financial bid. The sequence of events leading upto the rejection of the petitioner's bid need to be reiterated to get an overall picture. First of all, there was an invitation for "Expression of Interest". The parties who responded gave presentations and thereafter, a short-list was prepared to whom the NIT was issued. Pre-bid meetings were held. Bids were submitted by the parties. The technical bids were evaluated and, as pointed out above, anomalies were detected. The bids of the petitioner as also of the other tenderers were all found to be non-compliant, for one reason or the other. A 'general consensus' was arrived at amongst the tenderers to give up the detailed scrutiny of technical bids and to adopt a common datum without any further technical evaluation. Thereafter, the parties submitted their revised bids. On the opening of the revised financial bids, the matter came up before the CVO who prepared the two notes indicated above. The matter was, in fact, referred to the CVC whose observations have already been mentioned above. After receipt of the observations from the CVC, the

matter was placed before the Vice-Chairman, DDA and then the Lt. Governor. The CVO's note dated 05.01.2009 suggested that it may be advisable to cancel the tender and start the whole process of tendering afresh with an unambiguous specification of the work, pre-qualification of the bidders, proper technical evaluation of the bids, etc. The Lt. Governor approved the said advice and, consequently, DDA rejected the petitioner's bid and cancelled the subject tender.

36. In this backdrop, it may be possible to argue that the CVC had not given any direction for cancellation of the tender and that the DDA could have taken 'corrective measures' and gone ahead with the tender process. However, the course adopted by the DDA of rejecting the petitioner's bid and of recalling the tender was clearly one of the possible courses of action which any reasonable person or authority could have taken. It cannot be classified as one of those decisions which would be so outrageous as to be in total defiance of logic or moral standards so as to be termed as 'Wednesbury unreasonableness' and thereby constituting irrationality. The principles of law discussed above clearly indicate that if a plausible view emerges from the records which substantiate the decision taken by the authorities, then the same ought not to be interfered with in judicial review. We have already indicated above that the course adopted by the DDA in rejecting the petitioner's bid and in recalling the tender was a possible and plausible course of action. Different persons may have acted in a different manner, but that would not enable this court to interfere with the decision taken by

the DDA merely because more than one course of action may have been available. Surely, it cannot be said that when the CVO and, indeed, the CVC had raised more than the proverbial 'eyebrow' and had gone ahead and specifically pointed to the defective tender document, serious lapse in dispensing with the detailed technical scrutiny and adoption of changed datum, albeit agreed upon unanimously, the DDA acted unreasonably or arbitrarily in taking the decision to recall the tender, the consequence of which was to reject the petitioner's bid.

IX. The final aspect: a fallacy

37. The final aspect of the matter which remains to be considered pertains to the contention of the petitioner that the financial bids as per clause 3(d) of PWD-6 of the NIT were to be opened only if the persons were found to be technically qualified and since the financial bid of the petitioner was opened this clearly implies that the petitioner was technically qualified. We are unable to accept this contention for the simple reason that the financial bids were opened in the circumstances which were totally different to what were contemplated under the original bid documents. In the meeting of the technical evaluation committee held on 05.08.2008, all the tenderers had arrived at a general consensus that a detailed scrutiny of the technical bids be dispensed with in order to save time. Thus, having agreed on the dispensing with of a detailed scrutiny, the petitioner cannot rely on the fact that because its financial bid was opened, it was technically qualified!

38. In any event, this argument on behalf of the petitioner is a well recognized propositional fallacy known as ‘affirming the consequent’ and occurs when the antecedent in an indicative conditional is claimed to be true because the consequent is true; *if A, then B; B, therefore A*. An example of such a fallacy is:

1. If it's raining then the streets are wet.
2. The streets are wet.
3. Therefore, it's raining.

The streets maybe wet because they may have been ‘watered’ by tankers or a sewage manhole may have overflowed. There may be many reasons for the streets to be wet, one of them being rain. So, while the streets do get wet when it rains and the streets, as a fact, may be wet, it does not necessarily follow that it is raining. The argument of the learned counsel is also in similar vein. It runs as follows:-

1. If the technical bid is compliant then the price bid is opened.
2. The price bid is opened.
3. Therefore, the technical bid is compliant.

As in the previous example, the conclusion is fallacious. The price bid may have been opened for other reasons, as in this case it was decided to skip the detailed technical scrutiny and change the datum and to consider revised price bids without going in for any fresh technical evaluation. Consequently, the fact that the price bid of the petitioner was opened does not necessarily mean that his technical bid was compliant.

X. Conclusion

39. The result of the foregoing discussion is that the writ petition is liable to be dismissed. It is dismissed. But, we leave the parties to bear their respective costs.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

January 08, 2010
HJ/diya