

Educomp Solutions Ltd. and ors. Vs. State of Assam and ors.

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Court : Guwahati

Decided On : May-17-2006

Judge : B. Sudershan Reddy, C.J. and B.P. Katakey, J.

Acts : [Constitution of India](#) - Articles 14 and 226

Appeal No. : WP(C) No. 1496 of 2006 and W.A. No. 102 of 2006

Appellant : Educomp Solutions Ltd. and ors.

Respondent : State of Assam and ors.

Advocate for Def. : H. Roy, S.K. Medhi, K.L. Gupta, R.K. Anand, A.K. Bhattacharyya, P. Banerjee, B.K. Singh, A.K. Chavonous and S. Dutta, Advs.

Advocate for Pet/Ap. : Soli J. Sorabji, Suman Shaym, Gargi Hazarika, Anupam Sharma and Rakesh Ojha, Advs.

Disposition : Petition allowed

Prior history : B.S. Reddy, C.J. FACTUAL MATRIX: 1. The Assam. Electronics Development Corporation Ltd. (AMTRON) had issued a Notice Inviting Tender (NIT) dated 23.11.2005 inviting bids for execution of the contractual work in the 4th Phase of Rajiv Gandhi Computer Literacy Programme (RGCLP) in three hundred schools in the State of Assam. As per the tender notice the interested tenders were required to submit their bids two parts, i.e. (a) Technical Bid, and (b) Commercial Bid, in separate sealed envelopes for

Judgement :

B.S. Reddy, C.J.

FACTUAL MATRIX:

1. The Assam. Electronics Development Corporation Ltd. (AMTRON) had issued a Notice Inviting Tender (NIT) dated 23.11.2005 inviting bids for execution of the contractual work in the 4th Phase of Rajiv Gandhi Computer Literacy Programme (RGCLP) in three hundred schools in the State of Assam. As per the tender notice the interested tenders were required to submit their bids two parts, i.e. (a) Technical Bid, and (b) Commercial Bid, in separate sealed envelopes for the supply of hardware, software, courseware and connected accessories and provision of computer education service in government high schools on BOT (Build Own Operate and Transfer) basis. The date; mi g time of submission of tender was fixed on 19.12.2005 at 2 PM and the date and time for opening of technical bid was fixed at 3 PM on the same day. It was further indicated in the notice that the date and time for opening of commercial bid would be intimated separately to such of those bidders who qualify in the technical bid.

2. The bidder can be a Company/Corporation or Consortium or any of the above who have capability in fulfilment of the criteria and the conditions mentioned in the NIT and the detailed tender documents and required to submit documentary evidence in support of such fulfilment while submitting the bid. As per the tender notice there are a as many as seven technical criteria required to be fulfilled by the bidders which are as follows : -

1. The bidder should be providing computer education in the State of Assam for the last 5 (five) years.
2. The bidder should have a minimum of 10 (ten) Education Centres/ b Education Service Providers in the State of Assam.
3. The bidder should have an average turn over of at least Rs. 15 (fifteen) crore per year from Computer Education only in the last three years.

4. The bidder must bid for all the schools specified in the school list.
 5. The bidder should have executed similar school computer education project with any State Governments) in India, for at least 100 (one hundred) government schools for a single State Government for a minimum period of 3 (three) years.
 6. The bidder will submit a letter from a financial institution that is d willing to fund this project or should have sufficient reserves as per the audited financial statement. ,
 7. The bidder should have expertise in developing Multimedia Educational Software and should have experience in providing Computer Based/Web Based training for High Schools on Microsoft and Linux platforms.
3. That, subsequent to the issuance of tender notice dated 23.11.2005 the AMTRON had carried out certain amendments to the tender documents and the same were notified by notification issued on 14.12.2005. In terms of paragraphs (f), (g) and (h) of Clause 13 of the General Terms and Conditions, AMTRON reserved right to itself to evaluate technical bids and short list technically qualified bidders. The short listed bidders alone are to be informed of the date of opening of the commercial bids. The commercial bids of short listed bidders alone will be opened and evaluated. The evaluation, thereafter of the technically short listed bidders will be carried out considering both the price quoted and the technical capability of the short listed bidders. Thereafter short listed bidders to be listed in descending Order of score on a scale of 100, based on the evaluation results. AMTRON reserved the right to itself to award the contract to the bidder with the highest, score or to negotiate with one or more bidders in descending Order of score.

Be it noted, the criteria/parameters for evaluation of the bid on the basis of score on a scale of 100 was not indicated in the tender documents. There is no mention about the methodology to be followed and details of respective heads, if any, for awarding of marks.

4. That, a pre-bid meeting was held on 14.12.2005 in which the representatives of the petitioners and as well as respondent No. 4 were present in which the representatives of the petitioners claim to have requested the authorities to clarify/notify as to the criteria on the basis of which the evaluation of the bids would be done, since no such criterion was mentioned in the tender documents. The case set up by the petitioners is that in spite of such specific request made by the petitioners the authorities did not disclose any such criterion evolved by them for evaluation of the bids.

5. That, the technical bids submitted by the petitioners as well as the 4th respondent were opened on 19.12.2005 in the presence of the representatives of the concerned parties. Both the bids were found technically valid and eligible and accordingly parties were informed to the effect that the commercial bids submitted would be opened on 31.12.2005 and they were accordingly requested to be present so as to participate in the process. The commercial bids submitted by the bidders were accordingly opened by the 2nd respondent in the presence of the representatives of bidders and it had emerged that the price quoted by the petitioners consortium was substantially lower than that of the price quoted by the 4th respondent. The petitioners had quoted an amount of Rs. 9.07 lakh per school as against the amount of Rs. 14.15 lakh per school quoted by the 4th respondent. Admittedly, the rate quoted by the 4th respondent for the entire tender was much higher than the one quoted by the petitioner by a huge margin. However, there is some dispute as to the actual amount of margin. According to the petitioners the margin is of Rs. 15 crore but according to the respondents it is only Rs. 11 crore and odd.

6. The case set up by the petitioners is that the petitioners as consortium bidders have evidently emerged as a lowest bidder thereby entitling to award of Letter of Intent in their favour. However, notwithstanding the same the respondent authorities were maintaining a complete silence in the matter. The representatives of the petitioners alleged that they had personally visited the office of the respondent No. 2 on more than one occasion requesting for further information as regards finalisation of the tender in question. No information was forthcoming from the respondents.

7. The petitioners in their writ petition allege that they had come to learn from reliable source that with the sole objective of depriving the petitioners' consortium of their legitimate expectation of bagging the contract even after opening of the commercial bids, the authorities in collusion with respondent No. 4 were making attempts 'to work out new bid evaluation criteria so as to suit the respondent No. 4 by taking advantage of paragraphs (f) and (h) of Clause 13 of the General Terms and Conditions of the tender documents. By adopting such hidden criteria/parameters the respondent Nos. 2 and 3 were attempting to award higher marks in favour of respondent No. 4 even though no such criteria had ever been announced by the respondent authorities before opening of the bids'. The petitioner No. 1 had issued a letter, dated 16.1.2006 addressed to the 2nd respondent with a request to clarify the procedure and methodology sought to be adopted for awarding marks and evaluation of the bids. There has been no response from the authorities.

8. The case set up by the petitioners is that there was total lack of transparency in the methodology adopted by the authorities in evaluating the bids, hence, they were completely at dark as to the so called criteria adopted by the authorities in awarding marks to the respective bidders. The petitioners by letter dated 10.2.2006 once again requested the authorities to clarify the issue pertaining to evaluation criteria for selection of the bidders since no such criteria had either been mentioned in the tender document nor the same had been indicated during the pre-bid meeting held on 14.12.2005.

9. The 3rd respondent in response to the letter dated 10.2.2006 issued letter dated 25.2.2006 stating that the petitioners' consortium was not the L-1 bidder and the claim made by them was false and misleading. It was further mentioned that L-1 bidder would be arrived after adding marks awarded for both technical and commercial bids in terms of amended paragraphs (f) and (h) of Clause 13 of the General Terms and Conditions. That, the scoring methodology was purely objective and transparent and hence there was no scope for any subjective marking in evaluation process at any stage of evaluation.

10. Thereafter the petitioners came to know that the Letter of Intent has been issued in favour of the 4th respondent.

11. The petitioners contend that the authorities have acted in an absolutely arbitrary, unfair, illegal and discriminatory manner in issuing the Letter of Intent in favour of the 4th respondent by rejecting the bid submitted by the petitioners' consortium despite the same being technically valid and lowest bid. The authorities have applied certain hidden/undisclosed criteria in evaluating the bids in a most surreptitious manner so as to award the contract to the 4th respondent for extraneous consideration by giving a complete go-bye to the principles of fairness, transparency and accountability in the matter of awarding contract.

12. The AMTRON in its affidavit-in-opposition denied all the material allegations and averments made In the writ petition. It is, inter alia, stated that it was- within the knowledge of the writ petitioners that as per Clause 13(g) of the General Terms and Conditions, the short listed bidders were to be listed in a descending Order of score on a scale of 100 based on the evaluation results of the technical bid and the commercial bid. The score of respondent No. 4 in terms of the criterion decided prior to receipt of tender, was found to be more than that of the writ petitioners. It is the respondent No. 4 whose bid scored the highest score in the instant case and, therefore, there is no infirmity at all in issuing Letter of Intent and allotting the contract in the name of respondent No. 4.

13. That, a pre-bid meeting was held on 14.12.2005 wherein the details of evaluation methodology of the technical bid was specifically discussed in which the representatives of the petitioners had also taken part along with other bidders. It is claimed that all clarifications sought were given in the said pre-bid meeting dated 14.12.2005 and obviously after being satisfied and being posted with all the requisite information, the bid was submitted by the writ petitioners thereafter. It is asserted that technical evaluation criteria was specifically discussed and all clarifications given where the members of the petitioners' consortium were personally present. It is further stated that Clause 13(f) to 13(h) of the tender documents clearly mention the procedure to be adopted in evaluation. Shorn of all details it is asserted by the respondents in their counter affidavit that the

methodology adopted in evaluating the bid was very much within the knowledge of the petitioners and all further clarifications as desired were made in the pre-bid meeting dated 14.12.2005, the proceedings of which was minuted.

14. The Letter of Intent was duly issued in favour of respondent No. 4 as the score of the respondent No. 4 was higher than that of the writ petitioners' consortium. The break up of scores for both the technical evaluation and commercial evaluation of the two bidders are :

Party	Technical Bid	Commercial Bid	Total
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Consortium	38.91	40.00	78.91
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NUT Ltd.	60.00	25.64	85,64
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15. Respecting various allegations and averments made in the writ petition the answering respondents submit that the subject programme is not a basic material supply programme, rather it is a technology, skill and management sensitive programme where supply of equipment and other material and provision of services are to be ensured simultaneously through objective assessment of bids so as to achieve the ultimate objective, i.e., to result in students whose computer skills are at par with their counterparts elsewhere - a step towards the greater mission of a IT savvy State. Technical competence, technology, quality built a over experience, resources are paramount in such mission. 'As such the importance of these 'built in criteria' must be given adequate importance in the final evaluation process rather than merely qualify the bidders in the tender on the basis of the said criteria.'

16. In the writ petition and the affidavit filed in opposition certain wild allegations are made against each other and we do not propose to refer to those allegations inasmuch as they are not germane to decide the issues that arise for our consideration, more so since those allegations did not form basis for the rejection of petitioners' bid.

17. The 4th respondent has also filed detailed affidavit in opposition c asserting that the technical bid offered by it is much superior to that of the writ petitioners'

consortium. The averments made in the affidavit are more or less in tune with the averments made in the counter affidavit filed by the 2nd respondent. The decision making process is sought to be justified by the 4th respondent. According to it the procedure followed for evaluating the tenders is fair and transparent. There have been no hidden criteria as alleged by the petitioners inasmuch as the 2nd respondent followed transparent and accountable procedure in evaluating the bids offered by the authorities.

18. However, it is stated in the additional affidavit filed by the 4th respondent that in pursuant to contract and purchase Order it had placed the Order for computers, printers and peripherals and those works involve huge investment. It is asserted as on 11.4.2006 the respondent No. 4 has committed an expenditure of about Rs. 10 crore in the abovementioned works and in the circumstances the court should not interfere in the matter to set aside the Letter of Intent and award of contract in its favour.

SUBMISSIONS:

19. Shri Soli J. Sorabji, learned senior counsel appearing on behalf of the petitioners levelled serious criticism against the decision making process and the final decision awarding the contract in favour of the 4th respondent. It was contended that the authorities have acted contrary to settled law. The procedure, methodology and the factors which the tendering authority proposes to adopt and take into account while considering the acceptance or rejection of tender, must be clearly notified and stated in the NIT itself. The authorities ought to have notified in the tender notice itself the procedure which they proposed to adopt for evaluating the tenders. Such process which does not notify the procedure and disclose the factors or criteria to be taken into account in the matter of acceptance or rejection of tender cannot be considered and treated as transparent, fair and open. It was further submitted that the so called formula of 60 : 40 which has been relied upon and taken into account in the decision making process was not specified in the tender documents nor disclosed or made available to the prospective bidders at any stage ; the formula was a tailor made design to benefit the respondent No. 4 which has admittedly scored lower marks on the commercial

bids. The basis of scoring methodology adopted, as stated , in the letter dated 25.2.2006 of respondent No. 2, was not notified, nor specified in the tender document. Moreover, it has not yet been disclosed as to what are the individual heads of the scoring methodology and what was the allocation or weightage of marks with regard to each head.

20. The learned senior counsel further contended that marks allotted on the basis of undisclosed heads of scoring methodology and on the basis of 60 : 40 formula resulted in respondent No. 4 getting 85.64 marks and the petitioners getting 78.91 marks. Undisclosed 'hidden inbuilt criterion' adopted by the respondents is anathema to the fundamentals of transparency and accountability and, thus, violative of Article 14 of the Constitution.

21. The learned senior counsel proceeded to submit that price is certainly a highly relevant factor, though it is not the only deciding factor in awarding of the contract and particularly in the present case, where the burden to the public exchequer is around Rs. 15 crore. There was no application of mind to this vital aspect of the matter which ought to have been a major consideration in view of narrow margin of marks between both the parties. It was further submitted that although the Clause 13(g) of tender document had mentioned that technically short listed bidders would be listed in descending Order of scoring on a scale of 100 based on the evaluation result, yet, the methodology and basis of scoring or for that matter the criteria/award of marks for evaluation of the technical and commercial bids is not indicated anywhere nor disclosed to the petitioners at any point of time during or after the evaluation process. The respondents could not have applied 'built in criteria' in the final evaluation process without disclosing details of such alleged specification of any built in criteria' even in the amended tender document. There cannot be any hidden and undisclosed 'built in criterion' and acceptance of it by the Constitutional Courts may lead to dangerous consequences.

22. Shri H. Roy, learned senior counsel appearing for the AMTRON while emphatically disputing with the submissions made on behalf of the petitioners submitted that on 14.12.2005 itself the criterion and methodology to be adopted and applied for awarding the marks has been clearly briefed in the pre-bid meeting

in which the petitioners as well as the 4th respondent were present. The ignorance of the petitioners now pleaded is clearly an afterthought. The petitioners are indulging in speculative litigation. It was also submitted that there is no hidden criterion evolved and applied to evaluate the bids as contended by the petitioners. Petitioners knew about it and only after accepting the methodology they have presented their bids without raising any objection whatsoever. The learned senior counsel further submitted that this Court cannot interfere with the decision of the Expert Committee which has decided the criterion to be adopted for selecting the bidders by substituting its own opinion in the matter for that of the Expert Committee in the matter of evaluation of tenders. It was further submitted that in this dispute between two rival tenderers even if any legal point is made out the court should not interfere ignoring public interest parameters. Submission was, there is no overwhelming public interest involved requiring interference of this Court.

Price is not the only criterion and in appropriate cases the authorities are entitled to ignore even the lowest offer for good reasons. The 4th respondent being technically far superior, as is evident from the marks scored, the petitioners' contention that it is L-I is totally baseless. That, an attempt was made to submit that the petitioners' consortium produced certain manipulated and fabricated documents and their conduct disentitles them to grant of any relief from this Court in this judicial review proceeding.

23. Shri R.K. Anand, learned senior counsel appearing on behalf of the 4th respondent submitted that this Court in a proceeding under Article 226 of the [Constitution of India](#) cannot satisfactorily resolve disputed questions of facts ; the submission is obviously based on the premise that there is a serious dispute between the parties as regards the disclosure of methodology or criteria adopted for awarding of the marks. The petitioners approached this Court with unclean hands by concealing relevant facts within their knowledge. At any rate, the writ petitioners claim is based on forged documents and in any case they cannot get the contract in their favour and interference by this Court at the instance of such persons whose conduct is not fair is unwarranted. It is also urged that the interference by this Court may result in escalation of the project cost which would

be detrimental to public interest. Public interest parameters are required to be borne in mind by the court while judicially reviewing the decision making process in the matter of awarding of contracts.

24. We have carefully considered the rival submissions and critically examined the records made available for our perusal.

25. Having regard to the pleadings and the submissions made during the course of hearing of this writ petition we consider it apposite to deal with the matter from the following aspects:

1. The principles of judicial review that would be applicable to the exercise of contractual powers by Government bodies ;
2. Whether selection is vitiated by lack of transparency and accountability;
3. Was there any undisclosed/hidden criteria;
4. Whether the lowest bid is a valid criteria to be taken into consideration or not.

SCOPE OF JUDICIAL REVIEW :

26. As early as in the year 1969 Mathew, J, in V. Punnen Thomas v. State of Kerala : AIR1969 Ker81 (FB) observed : The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still d the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

27. It is well settled and universally accepted that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract. It cannot, without adequate reason, exclude any person from dealing with it in an arbitrary manner. The State, if it intends to enter into any contract, it must do so fairly without discrimination and without unfair procedure. All its actions must be transparent so as to ensure accountability.

28. In *Ramanna v. I A. Authority of India* (1979) 3 SCC 48 the Supreme Court held that the power and discretion of the Government in the matter of grant of contracts must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular, case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which itself was not irrational, unreasonable or discriminatory'.

29. In *Tata Cellular v. Union of India* (1994) 6 SCC 651 the Apex Court held that the principles of judicial review would apply in all their force to the exercise of contractual powers by Government bodies in Order to prevent arbitrariness or favouritism. The Apex Court held:

However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

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 justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention ; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which; the application for Judicial review is made,, but the decision making process itself. It is, thus, different from a appeal. When hearing an appeal, the court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the court cannot substitute its own decision. Apart from the fact that the court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the court would interfere. It is not the function of a Judge to act as a super Board, or with the zeal of a pedantic schoolmaster substituting its judgment that of the administrator.

The duty of the court is, thus, to confine itself to the question of legality. Its concern should be:

- (1) Whether a decision-making authority exceeded its powers ?
- (2) committed an error of law,
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached or,
- (5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. 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. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could

have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

(iii) Procedural impropriety.

The court in clear and categorical terms held that the grounds upon which an administrative action is subject to control of judicial review are equally applicable to the exercise of contractual powers by the State and its instrumentalities. To put it shortly, the authorities even in the matter of entering into contract is required to act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism.

30. In *Air India Ltd. v. Cochin International Airport Ltd. and Ors.* (2002) 2 SCC 617 the Apex Court while observing that price need not always be the sole criterion for awarding a contract proceeded to lay down the law and held :

The State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and it cannot depart from them arbitrarily. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned.

It is further held that even if some defect is found in the decision making process the court must exercise its power under Article 226 of the Constitution with great caution and should interfere only in Order to protect the public interest and not merely on the making out of a legal point.

31. In *Raunaq International Ltd. v. TVR Construction Ltd. and Ors.* : AIR 1999 SC393 the Apex Court held :

19. A somewhat different approach may be required in the cases of award of a contract by the Government for the purchase of items for its use. Judicial review would be permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness of the *Wednesbury* variety.

It is further observed that if, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation.

32. In *New Horizons Ltd. and Anr. v. Union of India and Ors.* : (1995)1SCC478 the Supreme Court reiterated the principle, thus :. 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.

33. In *Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd. and Ors.* : (1997)1SCC738 the Apex Court held:. 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.

34. We shall, however, bear in our mind the caution administered in *G.B. Mahajan v. Jalgaon Municipal Council* : AIR 1991 SC1153 wherein Venkatachaliah, J approvingly quoted Prof. Wade that the courts must resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply

an objective standard which leaves to the deciding authority the full range of choices which the Legislature is presumed to have intended. 'Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits'.

35. We shall also bear in mind that 'it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the over all situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes : that courts .. must grant certain measure of freedom of' play in the joints' to the executive'. [See *Sterling Computers Ltd. v. M.N. Publications* (1903) 1 SCC 445.)

36. this Court in the *Escorts Ltd. and Ors. v. International Tractors Ltd. and Ors.* 2006 (1) GLT'222 after referring to various authoritative pronouncements of the Apex Court summarized the parameters of judicial review in the following manner:

while considering the issue we shall bear in mind that the Courts have entertained applications for judicial review to determine whether a decision to enter into a contract violated any of the substantive principles of public law developed by the Courts to control abuse of power. The principles deducible from the long catena of decisions are that the courts have accepted that the substantive public law principles developed by the courts to control power - such as reasonableness, relevancy, purpose and procedural fairness - may be relevant to the exercise of contractual public authority. That every applicant in a judicial review has acted illegally, irrationally or in a manner which is procedurally unfair. The central tenet of judicial review, however, is that it is just that: review and not appeal. The court is required to consider whether the authority acted ultra vires or made an error of law, or whether it took into account irrelevant considerations or failed to take into account relevant considerations, whether it acted in bad faith or with an improper motive.

The Court' will not act as an appellate body, and will not over turn a decision simply because it disagrees with the decision.

37. A Division Bench of this Court in *Ameya Developers (P.) Ltd. v. The State of Assam* (Writ Appeal No. 6412006) (unreported), in which one of us is a member (The Chief Justice), considered the parameters of judicial review in the matter of awarding contract and held:

this Court will not interfere with the decision making process on hyper technical grounds ignoring cumulative effect of relevant components in the decision making process. The judicial review of commercial decision raises no new constitutional issues. The grounds of judicial review in the matter of awarding contract are no more open textured. What is or is not illegal, irrational, or procedurally unfair has been clearly laid down long ago. Commercial players may have to dust down their notes on judicial review for it is no more a 'strange beast' now entering their midst. The combination of powerful corporate interests and changing rules on standing has lead some to predict that a new, public interest model of judicial review is emerging. Thus, Rawlings argues that not only will judicial review proceedings tip further in the direction of collective legal action,' but that increasingly they will be populated by a compendium of powerful repeat players...concerned to ensure that relevant precedents do not cut across collective interests, and further to use litigation strategically in the development of long-term policy strategies.' [See R. Rawlings, 'Courts and Interests' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, Oxford, 1995), 113]. One may anticipate the powerful commercial actors will increasingly seek judicial review in an attempt affect the operation of economic processes by securing strategically important decisions and interpretation of legal rules and other regulatory instruments. This will require the Courts to engage to an even greater extent with the existing systems of commercial operations, and in places develop a better understanding of them. It is the court's duty to discourage tactical litigation. Our statement and restatement of law is no reason to suppose that the growth in commercial judicial review will stop, and many reasons to suggest that it will continue. It will continue as long as the corporate players and the legal fraternity endowed with forensic skills continue to influence the course of events.

The liberalization of standing rules and the increasing awareness of pressure groups, companies, and their legal advisors, of the potential benefits to be gained from seeking review are all likely to be factors in that expansion.

38. Wednesbury principles of reasonableness to which reference has been made in almost all the decisions referred to hereinabove is contained in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1947] 2 All ER 680. In that case Lord Green, M.R. has held that a decision of a public authority will be liable to be quashed in judicial review proceeding where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have arrived at.

39. The standards of judicial review in terms of Wednesbury is now . considered to be 'traditional' in England in contrast to higher standards under the common law of human rights. Lord Cooke in *R. v. Secretary of State for the Home Department ex parte Daly* [2001] 3 All ER 433 observed:

And I think that the day will come when it will be more widely recognized that the Wednesbury case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial a invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject-matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.

It is further observed that 'this does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell has pointed out; the respective roles of judges and administrators are fundamentally distinct and will remain so.(see [2000] PL 671 at 681). To this extent the general tenor of the observations in *R. (Mahmood) v. Secretary of State for the Home Deptt.* [2001] 1 WLR 840 are correct. And Laws, L.J. (at p. 847 (para 18)) rightly emphasized in Mahmood's case 'that the intensity of review in a public law case will depend on the subject matter in hand'.'

In law context is everything.

40. In *Huang and Ors. v. Secretary of State for the Home Department* [2005] 3 All ER 435 it is observed: 'the depth of judicial review and the deference due to administrative discretion vary with the subject-matter. Can we find a principled approach to give this proposition concrete effect' In *R. (on the application of ProLife Alliance) v. BBC* [2003] All ER 977 Lord Hoffmann said:

My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must, therefore, be decided by the courts'.

We cannot possibly add anything better than what has been stated.

41. We shall bear the stated principles in mind and proceed to discuss the issue within the judicial review parameters.

LACK OF TRANSPARENCY, ACCOUNTABILITY AND HIDDEN CRITERIA

42. The record discloses that only on 5.12.2005 the criteria that may be used for evaluation of the technical and commercial bids was proposed by the Member-Secretary of the Expert Committee. The evaluation was proposed to be a two-stage process, in which in the first stage bids were to be analysed for fulfilment of preconditions of the tender and the minimum parameters set out in the criteria of the tender detailed in Table A; based on the analysis a short list of technically qualified bidders were to be prepared and thereafter in the second stage the short listed bids to be thoroughly evaluated along with possible verification of information provided, so as to assess the comparative strength of the bidders in respect of the criteria of the tender. 'For final evaluation, total marks will be 100 out of which 60 (sixty) will be taken for evaluation of the technical bid (Table A) and

remaining 40 (forty) will be considered for commercial bids (Table B). This proposal mooted for the first time in the form of a note by the Member-Secretary of the Expert Committee and has been placed before the Chairman, Tender Committee who in turn submitted the same to the Managing Director, AMTRON with his own recommendations. The Managing Director approved the same on 8.12.2005. Thereafter in the note to Managing Director it is stated that pre-bid meeting was held on 14.12.2005 where nine parties appeared and 'they were clarified about their queries by post and facts'. But the record does not disclose of any such communication containing clarification. The record further discloses that at one stage the Managing Director has gone to the extent of suggesting that the price bids of such of the bidders who received less than 45% of the total technical marks should not be opened. This is found in the form of noting by the Managing Director as on 30.12.2005 and just a day before the commercial bids were opened.

Admittedly, the tender documents do not speak about 60 : 40 criteria for evaluation of the bids. There is nothing on record to show that even in the pre-bid meeting that was held on 14.12.2005 the 60 :40 formula to be adopted for evaluation of the bids were disclosed. There is no mention of any discussion about the methodology to be followed and the heads under which the marks were to be allotted. It may have to be borne in mind that the eligibility criteria is different, which is notified and about which there is no dispute, from that of the scoring methodology and criteria adopted for awarding of the marks. The complaint in the writ petition relates to non-disclosure of the scoring methodology. The letter dated 14.12.2005 from the 2nd respondent, which is self-explanatory, merely speaks about sending of a compilation of the amendments/additions to and forming an integral part of the tender notice dated 23.11.2005. It does not speak about any information as regards the scoring methodology to be adopted for evaluating the tenders. On 29.12.2005 evaluation of technical bids was done by the Tender Committee in which the 4th respondent got 60 out of 60 marks allotted for technical evaluation and whereas the petitioners got 38.91 marks. On 31.12.2005 commercial bids were opened by the Tender Committee in the presence of both the parties. The representatives of the petitioners recorded their reservation stating 'although the total a point for the technical bid were declared, but we would like to know the

points individually for each weightage'. It is obvious the petitioners were not aware as to the methodology followed for awarding of the marks by the Tender Committee.

43. Thereafter, on 4.1.2006 AMTRON asked both the parties to produce the originals of the documents submitted along with the tenders on or before 9.1.2006. On 24.1.2006 the members of the Committee evaluated and discussed the technical bids submitted by the bidders once again on the basis of the original documents presented by both the parties. The Tender Committee on evaluation of both technical and commercial bids awarded 85.65 marks to the 4th respondent [60 technical + 25.64 commercial] as against 78.91 marks allotted to the petitioners [38.91 technical + 40 commercial].

44. The decision making process and the materials available on record do not disclose the criteria for awarding the marks after its approval by the Managing Director, AMTRON was made known to the petitioners. There has been no response in this regard from the AMTRON in spite of repeated requests from the petitioners. The formula of 60 : 40 itself emanated from Member-Secretary only on 5.12.2005, i.e., after issuing NIT, on 26.11.2006. What made the authorities not to reveal the details of magic formula to the petitioners is left to guesswork. In this process the authorities have exposed themselves to the criticism - not altogether a baseless one - that process followed is not transparent but a hidden one. The silence of the 4th respondent in this regard as if they were in know of things further lends credence to the criticism and strengthens suspicion about decision making process being unfair and arbitrary.

45. The ultimate decision to award the contract obviously is dependent upon scoring of highest marks. Nothing prevented the authorities to intimate the parties providing all the details as regards criteria to be adopted for awarding of marks along with the amendments/additions made to the NIT. Curiously enough, by the letter dated 14.12.2005 the authorities merely intimated about the amendments/additions made to the NIT but not about selection criterion. There is no discernible purpose evident as to why the crucial information was not made available in spite of the petitioners' request to furnish the same.

46. In *Dutta Associates (P.) Ltd. v. Indo Mercantiles (P.) Ltd. and Ors.* : (1997)1SCC53 the Supreme Court in clear and categorical terms held that whatever procedure the government proposes to follow in accepting the tenders must be clearly stated in the tender notice. It is observed : 'We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the a 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.'

The court in emphatic terms declared the law and held that the entire procedure to be followed in the matter of awarding contracts should be b fair and transparent. The procedure followed by the Commissioner and the Government of Assam in accepting the tender of the appellants therein was found to be unfair and 'opposed to the norms which the Government should follow in such matters, viz., openness, transparency and fair-dealing.. fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tenders.'

47. In *West Bengal Electricity Board v. Patel Engineering Co Ltd.* : [2001]1SCR352 the importance of rule of transparency and fairness has been once again highlighted. The court took the view that in competitive bid which postulated keen competition and high efficiency and where bidders should fulfil pre-qualification alone are invited to bid, adherence to the instructions issued to bidders cannot be given a go-bye branding it as a pedantic approach otherwise it will encourage and provide 'scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of Law and our constitutional value. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies in favour of one bidder would create justifiable doubt in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty, or charity .. such approach should always be avoided .. adherence to ITB or Rules is the best principle to be followed, which is

also 'in the best public interest'. It is, thus, clear that the State agencies are bound to follow only such procedure in the matter of award of contract which ensures fairness, transparency and accountability. Nothing shall be done by the State or its agencies which may create justifiable doubts in the minds of other bidders, that there is a room for manipulation to awarding the contract to a person of choice by the State agency. That, proper care should be taken to avoid all such justifiable doubts by providing, the necessary details as regards the procedure to be adopted for evaluating the tenders and the scoring methodology and the marks earmarked under various heads for evaluation of the technical and commercial bids.

48. The issue that arises for our consideration in this writ petition is required to be viewed from the perspective of transparency and public accountability. It is difficult to under estimate the importance of public accountability to any State agencies. Public accountability is essential element in securing the legitimacy, and public confidence in the exercise of power. Accountability is also vital to ensure that the State and its agencies use their powers even in the matter of awarding contracts faithfully to pursue the public interest and the purposes envisaged in the Constitution and to guard against the danger of private interest of certain powerful groups who 'will take priority. In short, accountability is necessary to ensure that State agencies do not act in their own interest rather than the interests which they are charged with promoting or protecting. There cannot be any doubt that transparency and accountability, in some sense, is a principle of the Indian Constitution. 'In a very general sense a person is accountable if they have to give reasoned justifications for their decisions to some other person or body. This definition stresses accountability after the decision is taken but, for accountability to be meaningful, there has to be some awareness of the basis on which the decision was taken or the process by which it was taken.' [See Regulating Public Utilities : A Constitutional Approach, Cosmo Graham, Hart Publishing.]

49. We are unable to persuade ourselves to accept the contention of the learned senior counsel Shri R.K. Anand that it is not at all necessary for the governmental agencies to notify the selection criteria in detail even at the threshold and the same can be done at any stage. Does it mean the selection criteria can be evolved after opening of the technical bids Would it not give room and leverage to the

decision makers to manipulate the result to suit the convenience of a particular bidder? In our view even if such criteria is not notified at the beginning the same should be made known to all the interested before submission of bids by duly informing them about the proposed criteria to be applied and the methodology in awarding the marks to evaluate the technical and commercial bids. In the case on hand such a course ought to have been adopted at least on 14.12.2005 when the amendments to the NIT were communicated to all the concerned. In fact, the case set up by the AMTRON is as if the methodology, criteria and the formula of 60 : 40 was communicated to all the concerned on 14.12.2005 which plea is not acceptable to us because record does not reveal the same. In the absence of such a communication the contention that the decision makers applied hidden criteria evolved as a tailor made to suit the 4th respondent acquires legitimacy.

We accordingly hold that the procedure adopted by the decision makers is vitiated by the application of hidden criteria, lack of transparency and accountability. Procedural impropriety is writ large on the face of a the record,

WHETHER THE LOWEST BID IS A VALID CRITERIA TO BE TAKEN INTO CONSIDERATION OR NOT ?

50. It is true that in Raunaq International (supra), Air India, Ltd. (supra) and Master Marine Services (P.) Ltd. v. Matcalfe Hodgkinson (P.) Ltd. and Anr. : AIR 2005 SC2299 the Supreme Court held that price need not always be the sole criterion for awarding of contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. That, at the same time the courts may have to bear in mind that the State and its agencies do not have unlimited financial resources at their command, therefore, they altogether cannot ignore the lowest bid offers though it itself may not be the sole criterion for awarding the contract. The margin of difference between commercial bid offered by the petitioners and the 4th respondent runs into few crore. It is one of the factors that should have been taken into consideration by the decision makers particularly in the context of there being no dispute about the validity and eligibility of technical bid offered by the petitioners. It is not a case where the technical bid offered by the petitioners were found to be ineligible. There is no dispute whatsoever that the

petitioners' technical bid on evaluation was found to be eligible along with the technical bid offered by the 4th respondent. It is a matter where applying hidden criteria the State agencies have awarded more numbers of marks to the 4th respondent so far as the technical bid offered by it is concerned for whatsoever reason. Having regard to the huge margin of difference between the price offered by the petitioners and the 4th respondent the State agencies ought to have decided for themselves as to what was required to be done in the circumstances. This crucial factor completely escaped from their consideration. Thus, the decision makers ignored and failed to take relevant factor into consideration while deciding the matter.

WHAT IS THE RELIEF TO BE GRANTED ?

51. The learned senior counsel Shri Soli J Sorabji submitted that in the facts and circumstances of the case the Letter of Intent dated 21.2.2006 and the contract awarded to the 4th respondent dated 23.2.2006 be quashed and set aside with appropriate directions to award the contract to the petitioners. It was alternatively submitted that a fresh tender may be floated and bids be evaluated fairly and in accordance with law without reference to - (a) 60 : 40 formula, (b) the so called 'built in criteria', and (c) without being influenced by what has been stated against the petitioners in the affidavit in opposition of the respondent Nos. 2 and 3.

52. Per contra, Shri H. Roy, and as well as Shri R.K. Anand and Shri A.K. Bhattacharyya, learned senior counsel submitted that the court should not interfere in this case even if some defect is found in the decision making process. The view of the Expert Committee cannot be lightly interfered with by this Court. The learned senior counsel Shri R.K. Anand highlighted the alleged conduct of the petitioners and their approaching the court with unclean hands.

DEGREE OF INTENSITY OF REVIEW

53. The question then arises is as to the appropriate degree of intensity of review which would apply to the Body's decision. Should the administrators exercising contractual powers be subjected to a less intense form of review than other administrative Bodies The arguments that judicial restraint in the exercise of the

review function, are at least certain form of restraint may be both practical and principled. The argument in its extreme form if accepted may amount to recognizing Bodies like AMTRON are 'mini legal systems' which should be allowed for formulate and apply their own rules ; the courts should recognize the plurality of such system and not seek to cast the net of legal logic' over them.

That considerable emphasis is often placed on the expertise of the Administrative Bodies. Such focus on the body's expertise is often used in two ways: both the emphasis in practical terms who is best placed to make the best decision, court or administrator, and also to suggest that such expertise confers legitimacy on the administrative decision reducing if not eliminating the need for judicial intervention.

In our considered opinion such an extended argument may damage the very coherence of the principles of judicial, review principles of fairness, rationality or legality which were fashioned and developed to control action of governmental agencies, and indeed the remedies which are available simply cannot be applied to the actions of those who exercise significant power. It is too late in the day to accept any such contention.

54. To put it shortly, the function of the courts is judicial review of administrative decisions, in other words the courts will examine the legality of the decisions, not its wisdom. Put more precisely, the courts will approach a decision to see whether it was illegal, irrational or tainted with procedural impropriety [Lord Diplock's three-fold classification as presented in *Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374. But at the same time we cannot ignore higher constitutional principle that good administration is a basic constitutional concept that cannot be qualified. Further, the commended 'light touch approach the judicial review' could be a mask for abuses of rights that a free society could not accept. To review or not to review is always a dilemma, what intensity of review should apply and how we should assess that intensity is always a complex issue. But there cannot be any dispute that the role of judicial review, is to regulate all forms of power; in exercise of public power, by State should be subject to principles of 'liberty, fair dealing and good administration'. There cannot be any fair dealing when an undisclosed criterion is to be applied for evaluating the technical and

commercial bids. Such procedures, which enable the agencies to apply the hidden criteria, would be anathema to the doctrine of equality enshrined in Article 14 of the [Constitution of India](#). There cannot be any compromise on procedural fairness.

55. In Raunaq International the Apex Court observed :

If the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation.

56. In Air India case similar caution is administered that the power under Article 226 of the Constitution must be exercised with great caution and should exercise it only in furtherance of public interest. Court should always keep large public interest in mind in Order to decide whether its intervention is called for or not. Similar is the view expressed in Master Marine Service case.

57. We have reached to the conclusions so far expressed on an orthodox application of principles derived from the authorities and an orthodox approach to judicial review as commended by the Apex Court.

58. In view of our conclusion that the decision making process lacks transparency and accountability and suffers from procedural impropriety and applying the principles referred to herein above we are obliged to interfere and set aside the decision of the respondent Nos. 2 and 3 in awarding the contract to the 4th respondent.

59. However, we are not inclined to agree with the submissions made by the learned senior counsel Shri Soli Sorabji and issue directions compelling the respondent Nos. 2 and 3 to award the contract to the petitioners. It is needless to reiterate that we cannot exercise any appellate jurisdiction and sit in appeal over the decisions of the State and its agencies. We cannot also issue directions directing the authorities to incorporate or not to incorporate any particular formula or criteria for evaluation and selection and prescribe any methodology therefor.

60. We are not impressed by the submissions made by the learned senior counsel Shri R.K. Anand about the alleged fraud and manipulation of documents by the petitioners. The respondent Nos. 2 and 3 did not reject the bid of the petitioners on

that ground. On the other hand the respondent Nos. 2 and 3 found the bid of the petitioners to be technically qualified and accordingly opened the commercial bid. No one can be heard of saying that even the technical bid of the petitioners ought to have been rejected on the ground of alleged misrepresentation, playing fraud, etc. We do not wish to further dilate on such disputed questions of fact raised, as it is not possible for us to resolve them in this summary, proceeding.

61. We are also not inclined to accept the submissions made by the learned senior counsel appearing on behalf of the 4th respondent that the court should not interfere with the decision since the 4th respondent has already spent considerable amounts in undertaking the project. The submission c is based on the premises as if there has been 'undue delay and laches on the part of the petitioners in approaching this Court. On the facts and in the circumstances we do not find that there has been any delay or laches on the part of the petitioners in approaching the court. The move of the 4th respondent to go ahead in the matter even while the proceedings are pending in the court cannot have any bearing whatsoever on the question of our interference. It is the 4th respondent who has taken such risk for itself and may have to pay for it.

Whoever sows the wind reaps the whirlwind.

62. For the aforesaid reasons we hold that the decision making process in issuing the Letter of Intent (LOI) dated 21.2.2006 and award of contract in favour of the 4th respondent is vitiated and the same is accordingly set aside. It shall be open to the respondent Nos. 2 and 3 to take an appropriate decision in the matter in accordance with law and in the light of the observations made in this order.

63. The writ petition is accordingly allowed without any Order as to costs.

64. No further orders are required to be passed in the writ appeal which arises out of an interlocutory Order passed by the learned Single Judge and the same shall stand disposed of in terms of the Order made in the writ petition.