

**Reserved on :19.01.2024**  
**Pronounced on :23.01.2024**



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23<sup>RD</sup> DAY OF JANUARY, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.28866 OF 2023 (GM - TEN)

**BETWEEN:**

- 1 . SRI CHINNAPPA REDDY  
S/O MADDIREDDY,  
AGED ABOUT 36 YEARS,  
PROPRIETOR  
M/S. MARUTHI BORE WELLS  
NO.17/2, KANAKAPURA MAIN ROAD,  
SHAKAMBARI NAGAR,  
J P NAGAR 1<sup>ST</sup> STAGE,  
BENGALURU – 560 078.
  
- 2 . SMT. JWALA  
W/O BHARATHARAJ,  
AGED ABOUT 59 YEARS  
PROPRIETOR  
SRINIVASA BORE WELL,  
DHARMA CHAKRA NILAYA,  
BEHIND BDO OFFICE  
SOMAGUDDALU ROAD,  
CHALLAKERE  
CHITRADURGA – 577 522.

- 3 . MANJEGOWDA B.K.,  
S/O LATE KALEGOWDA,  
AGED ABOUT 44 YEARS,  
R/AT BACHAHALLI,  
BUKKANAKERE HOBLI,  
K.R.PETE TALUK  
MANDYA DISTRICT - 571 426.

... PETITIONERS

(BY SRI RAHUL S.REDDY, ADVOCATE)

**AND:**

- 1 . THE STATE OF KARNATAKA  
REPRESENTED BY ITS SECRETARY,  
DEPARTMENT OF  
BACKWARD CLASSES WELFARE  
VIDHANA SOUDHA  
DR. AMBEDKAR VEEDHI,  
BENGALURU - 560 001.
- 2 . THE MANAGING DIRECTOR AND  
EOI ACCEPTING AUTHORITY  
D.DEVARAJ URS BACKWARD  
CLASS DEVELOPMENT CORPORATION,  
NO. 16-D , 4<sup>TH</sup> FLOOR,  
DEVRAJ URS BHAVAN,  
MILLERS TANK BED AREA  
VASANTHANAGAR  
BENGALURU - 560 052.

... RESPONDENTS

(BY SRI SPOOTHY HEGDE, HCGP FOR R-1;  
PROF. RAVIVARMA KUMAR, SR.ADVOCATE FOR  
SRI M.S.DEVARAJU, ADVOCATE FOR C/R-2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE TENDER NOTIFICATION PUBLISHED ON 05.12.2023 IN NO.DE.HI.I.GAM.KA/EM.PYA/C.R-06/2023-24 BY THE R2 VIDE ANNEXURE-B.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 19.01.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

**ORDER**

The petitioners are before this Court calling in question a communication dated 02-11-2023 by the 1<sup>st</sup> respondent/ Department of Backward Classes Welfare to the Managing Director and Expression of Interest Accepting Authority and the tender notification dated 05.12.2023, issued by the second respondent.

2. Facts, adumbrated are as follows:-

The petitioners are the contractors in the business of drilling and carrying out digging of bore-wells under the 1<sup>st</sup> respondent/Department for several years. The 2<sup>nd</sup> respondent notifies/invites Expression of Interest for empanelment of drilling agency for drilling 165 mm dia bore-wells on 'no water no money basis' under the scheme by name 'Ganga Kalyana' for the years

2020-21, 2021-22 and 2022-23 for ten development Corporations coming under the 1<sup>st</sup> respondent/Department. After calling for Expression of Interest, it is the case of the petitioners that eligibility criteria as was notified in the Expression of Interest / tender has undergone a change and the work experience is completely removed. The removal of work experience leads to the very Expression of Interest being contrary to the standard tender documents of the State notified on 06-08-2005 as modified from time to time. It is on this score of work experience itself being taken away for drilling of bore-wells, the petitioners have preferred the subject petition.

3. Heard Sri Rahul S.Reddy, learned counsel appearing for the petitioners, Sri Spoorthy Hegde, learned High Court Government Pleader appearing for respondent No.1 and Prof. Ravivarma Kumar, learned senior counsel appearing for respondent No.2.

4. The learned counsel appearing for the petitioners would vehemently contend that the petitioners are the participants in the empanelment process pursuant to Expression of Interest notified on 05-12-2023. After issuance of the tender and the last date for

assessment of technical bid and financial bid, the work done certificate or experience of who can apply for tender for empanelment is itself changed. With this change, the very calling of tender document is contrary to the Rules with specific reference to Rule 27 of the Karnataka Transparency in Public Procurements Rules, 2000 (hereinafter referred to as 'the Rules' for short) and the Standard Tender Documents prescribed by the Government for all tenders that would be notified in the State. He would seek quashment of the entire tender process on the aforesaid score.

5. Per contra, the learned senior counsel Prof. Ravivarma Kumar appearing for respondent No.2 would vehemently refute the submissions to contend that this Court would not interfere at this stage of tender, unless it is found that the entire tender process is arbitrary. It is his submission that what is now being done is only an empanelment of eligible applicants pursuant to Expression of Interest. Once eligibility is considered, it is then, the tender would be awarded to those eligible persons for ten Corporations coming within the ambit of the 1<sup>st</sup> respondent. It is his further submission

that the petitioners have no right to present the subject petition amidst consideration of Expression of Interest.

6. The learned counsel for the petitioner would join issue to contend that since 2<sup>nd</sup> respondent/Corporation has its operations State-wide, certain tenderers have knocked at the doors of Kalaburgi Bench of this Court and Kalaburgi Bench has granted an interim order of stay. Therefore, the learned counsel would submit that the petition be allowed and the process be directed to be redone.

7. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

8. The afore-narrated facts are not in dispute. The only issue that arises for consideration is, whether Expression of Interest projected is contrary to law.

9. The 2<sup>nd</sup> respondent is the Managing Director and Expression of Interest Accepting Authority of the Backward Class Development Corporation coming within the 1<sup>st</sup>

respondent/Department. Ganga Kalyana scheme was notified by the State Government under which several works are undertaken by the 1<sup>st</sup> respondent / Backward Classes Welfare Department. One such exercise was notification of Expression of Interest for empanelment of drilling agency for drilling 165 mm dia bore-wells, on 'no water no money' basis. The Expression of Interest earlier, just preceding the present Expression of Interest, was the one notified for three consecutive years i.e., 2020-21, 2021-22 and 2022-23. Part-II of the said Expression of Interest dealt with qualification / eligibility criteria. Clauses (b) and (c) thereof read as follows:

**"(b) Work done and turn over:**

***The DA should have achieved in any two financial years from the last five years (2016-17, 2017-18, 2018-19, 2019-20, 2020-21) a minimum annual turnover of not less than Rupees Fifty Lakhs related to drilling of bore-wells only. In case of DA from SC/ST the annual turnover should be minimum of ₹25/- lakhs related to drilling of bore-wells only. This turnover statement for last five financial years issued by Chartered Account with UDIN should be uploaded.***

**(c) *The DA must have satisfactorily completed drilling of bore-wells in one year of the last five years, a minimum of 50 number of bore-wells with any Government department/ Government undertaking.***

***In support of this he has to submit the certificate issued by not below the rank of the Executive Engineer of the respective Department/Government undertaking.”***

*(Emphasis added)*

The aforesaid clause (b) mandated that a tenderer should have achieved in any two financial years from the last five years a minimum annual turnover of not less than ₹50 lakhs related to drilling of bore-wells only and in case of Scheduled Castes and Scheduled Tribes, the minimum turnover should be ₹25/- lakhs and that the document should be uploaded while expressing interest. Therefore, any applicant pursuant to Expression of Interest then should have for the last five years from 2017 to 2021 achieved what was indicated therein. Clause (c) mandates that an applicant must have satisfactorily completed drilling of bore-wells in one year of the last five years, a minimum of 50 bore-wells with any Government Department/Government undertaking and a certificate to that effect should be appended. These are the clauses which depict eligibility criteria. It is for an Expression of Interest hitherto issued prior to the present Expression of Interest.



10. The 2<sup>nd</sup> respondent issues the present Expression of Interest for the year 2023-24 under the very Scheme for 10 Corporations on 'no water no money basis'. Here again, the qualification / eligibility criteria is dealt with under Part-II. It reads as follows:

**"1. Eligibility Criteria:**

- (a) *The DA who wish to submit their proposal for empanelment of agencies for drilling of bore-wells should own at least one rig with valid RC book/card (Registration Certificate). The rig should have a capacity of 300 PSIG and above 1100 CFM and in all strata including over burden. The rig should be capable of drilling borewell up to a minimum depth of 1000 feet. The bidder should have a valid Form-7A issued by a competent authority for each rig.*
- (b) **"The DA who are going to be considered for empanelment to drill bore-wells of 2023-24 period should also drill the pending bore-wells pertaining to 2020-21, 2021-22 and 2022-23" at the district wise L-1 rates already approved for this period.**
- (c) *The DA should have a working capital arrangement not less than ₹15 lakhs from a nationalized/ scheduled bank for meeting the fund requirement. In the case of DA belonging to SC/ST category, working capital arrangements should not be less than ₹10 lakhs from a nationalized/scheduled bank for meeting the fund requirement. The supportive document should be uploaded.*
- (d) *Turn over Certificate of last five years, Certified by the Chartered Accountant with UDIN should be uploaded i.e., 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22.*

- (e) *Reports on the financial standing of the DA, such as audited balance sheet and profit and loss statements for the last five years certified by Chartered Accountant with UDIN should be uploaded i.e., 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22.*
- (f) *DA should upload IT returns for the last three financial years (2019-20, 2020-21 and 2021-22).*
- (g) *The DA has to upload all relevant documents as explained in Part-I.*
- (h) *All DA must indicate unconditional acceptance of all terms and conditions of this EOI as per **Appendix 'A'** on DA's letterhead. If the Certificate is signed by a legally authorized signatory, the notarized original authorization letter has to be uploaded, failing which it will be rejected. The Applicants, however, may indicate desired terms and conditions which may be accepted/rejected at the sole discretion of the EA. A Certificate with respect to unconditional acceptance must be uploaded along with Technical proposal as per format attached as Appendix A.*
- (i) *Submission of Technical Proposals by the DA: The DA is required to submit all required information which is complete in all respects.*
- (j) *Even though the DA's meet the above criteria, they are subject to be disqualified if they have:*
  - (a) *Made misleading or false representations in the forms, statements and attachments submitted in proof of the qualification requirements; and/or*
  - (b) *Record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial figures etc; and/or*
  - (c) *Canvassing through whatever means to get his tender approved."*

Clause (d) *supra* indicates that a turnover certificate for the last five years certified by the Chartered Accountant should be uploaded. Five years would mean from 2017 to 2022. A strange clause is added that the allottee should drill bore-wells for the previous period at the rate where the previous bidders were declared to be L-1. The previous three years would mean 2020-21, 2021-22 and 2022-23. The present Expression of Interest is notified on 05-12-2023. The marked difference between the two is taking away of work experience. If the afore-said clauses (b) and (c) of the hitherto issued Expression of Interest is juxtaposed with the clauses of the subject Expression of Interest, what would unmistakably emerge is that, the work experience is completely given a go bye.

11. For procurement works in the State of Karnataka, the Government has issued 'standard tender document' which was initially notified on 06-08-2005 and is modified on 14-10-2008. It is an admitted fact that this is the subsisting standard tender documents for all tenders of procurement. In the said tender documents certain clauses are germane to be noticed. Clauses (1) and (3) thereof read as follows:

"PREAMBLE:

*In Government Order dated :6-8-2005, Standard Tender Documents given in Annexure 1 to 6 appended there with were prescribed to be used in certain identified divisions of PWD and WRD and the corporations under WRD for procurement of works from 1<sup>st</sup> September 2005 for a period of six months initially on an experimental basis, so that any problems encountered in use of these Standard Tender Documents can be suitably addressed before making the Standard Tender Documents mandatory for procurement of works.*

... ..

"Government order No.FD 4 PCL 2008, Bangalore,  
dated:14.10.2008

*Under the circumstances explained in the preamble, the following clauses of the Standard Tender Documents as prescribed in Government Order dated: 6-8-2005 are modified to the extent noted below:*

<i>Sl No</i>	<i>Reference to Standard Tender Documents</i>	<i>Existing Clauses</i>	<i>Modified Clauses</i>
1	Clause 3.2.b. Page 5 KW-1,2/3/4	Work experience: Satisfactorily completed (at least 90% of the contract value), as prime contractor, at least one similar work such as ....of value not less than Rs._____ (usually not Less than 80% estimated Value of Contract)	a) Mandating satisfactory completion as a prime contractor for at least one similar work to an extent of 50% of the cost of the work, for all works costing up to and Rs.100 lakh.  b) Mandating satisfactory

			<p>completion as a prime contractor for at least one similar work to an extent of 80% of the cost of the work, for all works costing more than Rs.100 lakh. The PWG Form 65 will be discontinued. The relevant Paragraphs of the KPWD Code will be amended.</p>
-	-	-	-
3	<p>Clause 3.2(a) Page Page 5 K/W-4</p>	<p><u>Qualification:</u> To qualify for award of this Contract, each Tenderer in its name should have in the last five years i.e.,2000-2001 to 2004-2005 (a) achieved in at least two financial years a Minimum financial turn over (in all classes of civil engineering construction works only) of Rs.____(usually not less than two times the estimated annual payments under this contract)</p>	<p><u>Qualification:</u> To qualify for award of this contract each tenderer in his name should have in the last five years' period (a) achieved in atleast two financial years an average annual financial turnover of Rs.....(usually not less than the estimated cost under this contract for</p>

			<p><i>works costing upto Rs.100 lakh).</i></p> <p><i>However the existing clause remains the same for works costing more than Rs.100 lakh..."</i></p>
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Clause-1 deals with mandating satisfactory completion as a prime contractor for at least one similar work to an extent of 50% of the cost of works for all works costing upto ₹100/- lakhs and mandating satisfactory completion of at least one similar work to an extent of 80% of the cost for all works costing more than ₹100/- lakhs. Therefore, two experience criteria is mandated for works of ₹100 lakhs i.e., 50% of the work at least should be shown to have been completed of a identified task and if it is beyond ₹100/- lakhs it is 80%. This is the work experience. Clause-3 thereof indicates that to qualify for award of contract, the tenderer should have in the last five years achieved in at least two financial years certain annual financial turnover. It is based upon the aforesaid clauses of the standard tender documents every tender of procurement is being notified by the State. This is again not in dispute.

12. Just before the subject Expression of Interest, a communication comes about from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent to drop certain clauses in the ensuing Expression of Interest notification. The clauses that are said to be dropped read as follows:

“ಮೇಲ್ಕಂಡ ವಿಷಯಕ್ಕೆ ಸಂಬಂಧಿಸಿದಂತೆ, ಉಲ್ಲೇಖಿತ ಏಕ ಕಡತ ಪ್ರಸ್ತಾವನೆಯನ್ನು ಪರಿಶೀಲಿಸಲಾಗಿದೆ. ಹಿಂದುಳಿದ ವರ್ಗಗಳ ಕಲ್ಯಾಣ ಇಲಾಖೆಯ ವ್ಯಾಪ್ತಿಯಲ್ಲಿ ಬರುವ ನಿಗಮಗಳಿಂದ 2023-24ನೇ ಸಾಲಿಗೆ ಅನುಷ್ಠಾನಗೊಳಿಸುತ್ತಿರುವ ಗಂಗಾ ಕಲ್ಯಾಣ ಯೋಜನೆಯಡಿ ಕೊಳವೆ ಬಾವಿಗಳನ್ನು ಕೊರೆಯಲು ಹಾಗೂ ಪಂಪ್‌ಸೆಟ್ ಮತ್ತು ಪೂರಕ ಸಾಮಗ್ರಿಗಳನ್ನು ಸರಬರಾಜು ಮಾಡಲು ಎಲ್ಲಾ ನಿಗಮಗಳ ಪರವಾಗಿ ಡಿ.ದೇವರಾಜ ಅರಸು ಹಿಂದುಳಿದ ವರ್ಗಗಳ ಅಭಿವೃದ್ಧಿ ನಿಗಮದಿಂದ ರಾಜ್ಯ ಮಟ್ಟದಲ್ಲಿ ಜಿಲ್ಲಾವಾರು ತಾಂತ್ರಿಕ ಅರ್ಹತೆಗಳನ್ನು (Expression of Interest) ಆಹ್ವಾನಿಸಲು ಈ ಕೆಳಕಂಡ ತಾಂತ್ರಿಕ ಅರ್ಹತೆಗಳ ಪೈಕಿ ಕ್ರಮ ಸಂಖ್ಯೆ: 01 ರಿಂದ 11 ಮತ್ತು 14ನ್ನು ಮುಂದುವರಿಸಲು ಹಾಗೂ ಕ್ರಮ ಸಂಖ್ಯೆ: 12 ಮತ್ತು 13 ನ್ನು ಕೈಬಿಡಲು ಸರ್ಕಾರದ ಅನುಮೋದನೆ ನೀಡಿದೆ ಎಂದು ತಮಗೆ ತಿಳಿಸಲು ನಿರ್ದೇಶಿಸಲ್ಪಟ್ಟಿದ್ದೇನೆ.”

....

ಕ್ರ. ಸಂ	ಹಾಲಿ ನಿಗದಿಪಡಿಸಿರುವ ತಾಂತ್ರಿಕ ಅರ್ಹತೆ	2023-24ನೇ ಸಾಲಿನ EOI ಡಾಕ್ಯುಮೆಂಟ್‌ನಲ್ಲಿ ಅಳವಡಿಸಲು ಉದ್ದೇಶಿಸಿರುವ ತಾಂತ್ರಿಕ ಅರ್ಹತೆ
-	-	-
11	ನೂತನ ನಿಬಂಧನೆ	2023-24ನೇ ಸಾಲಿಗೆ ಬೋರ್ಡ್ ವೆಲ್ ಕೊರೆಯಲು ಅರ್ಹತೆ ಪಡೆಯುವ ಡ್ರಿಲ್ಲಿಂಗ್ ಏಜೆನ್ಸಿಗಳು 2021-21, 2021-22, ಹಾಗೂ 2022-23ನೇ ಸಾಲಿನ ಬಾಕಿ ಇರುವ ಬೋರ್ಡ್ ವೆಲ್ ಗಳನ್ನು ಸಹ ಕೊರೆಯುವುದು.
12	ಕಳೆದ ಐದು ವರ್ಷಗಳಲ್ಲಿ ಯಾವುದಾದರೂ	ಕೈ ಬಿಡಲಾಗಿದೆ

	ಒಂದು ವರ್ಷ ಕನಿಷ್ಠ 50 ಕೊಳವೆ ಬಾವಿಗಳನ್ನು ಸರ್ಕಾರಿ ಇಲಾಖೆ/ಅರೆ ಸರ್ಕಾರಿ ಸಂಸ್ಥೆಗಳಲ್ಲಿ ಕೊರೆದಿರಬೇಕು. ಈ ಬಗ್ಗೆ ಕಾರ್ಯಪಾಲಕ ಅಭಿಯಂತರರ ಹುದ್ದೆಗಿಂತ ಕಡಿಮೆ ಅಲ್ಲದ ಅಧಿಕಾರಿಯಿಂದ ದೃಢೀಕರಿಸಿ ನೀಡಿದ <i>Workdone Certificate</i> ಸಲ್ಲಿಸಬೇಕು.	
13	ಕಳೆದ ಐದು ವರ್ಷಗಳಲ್ಲಿ ಯಾವುದಾದರೂ ಎರಡು ವರ್ಷ ಕನಿಷ್ಠ ರೂ.50.00 ಲಕ್ಷಗಳ ವಹಿವಾಟು ನಡೆಸಿರಬೇಕು. (ಪ.ಜಾ. ಮತ್ತು ಪ.ಪಂ.ಗಳಿಗೆ ರೂ.25.00 ಲಕ್ಷಗಳು)	ಕೈ ಬಿಡಲಾಗಿದೆ..”

What is directed to be given up is, what is quoted hereinabove from the standard tender documents. The work experience is given up; financial turnover is given up and a new clause is directed to be added to the effect that their financial status for five years of drilling agency should be called for. The demand of work experience from the tenderers has not sprung from the Government order alone. Rule 27 of the Rules reads as follows:

"27. **Pre-qualification Procedure:-** (1) The tender inviting authority shall for reasons to be recorded in writing provide for pre-qualification of tenderers on the basis of:

- (a) **experience and past performance in the execution of similar contracts;**
- (b) **Capabilities of the tenderer with respect to personnel, equipment and construction or manufacturing facilities;**
- (c) **Financial status and capacity.**



*(2) Only the tenders of pre-qualified tenderers shall be considered for evaluation.”*

*(Emphasis supplied)*

Rule 27 (*supra*) mandates certain pre-qualification procedure. A tender inviting authority shall for reasons to be recorded in writing provide for pre-qualification of tenderers certain conditions. Clause (a) to (c) thereof provide for experience and past performance of execution of similar contract; capabilities of the tenderer with respect to personnel, equipment and construction or manufacturing facilities; financial status and capacity. Sub-rule (2) indicates that only the tenders of pre-qualified tenderers shall be considered for evaluation.

13. If Rule 27 and the Government Order are read in tandem, what would unmistakably emerge is experience and past performance in the execution of similar contract cannot be given up in any tender to be floated by the State. If on all the aforesaid the subject Expression of Interest is noticed, the eligibility criteria quoted *supra* clearly gives up the work experience and even the turnover for each year. Therefore, the subject Expression of Interest is undoubtedly contrary to the statute and the Government

Order dated 14.10.2008 depicting a standard tender documents for inviting tender. For all these years, it is again an admitted fact that Expression of Interest or tender was invited strictly in consonance with Rule 27 of the Rules and the standard tender documents. It is for the first time it is being given a go-bye.

14. The learned senior counsel who has submitted that his arguments may be considered to be the objections to the application, would take this Court to the statement of objections filed to the main petition contending that this had to be given up on the score that the earlier tenders had led to cartelization. Only to avoid cartelization and giving opportunity to all the tenderers, the procedure is changed. This submission is unacceptable. If the statute mandates work experience to be a criterion while inviting Expression of Interest, it cannot be given a go-bye for the reason that it would run counter to the statute. If the applicant pursuant to Expression of Interest has no experience at all in the work, what is the work he would perform becomes doubtful as these are projects of public interest and these bore-wells have to remain for years and be helpful to all the people in rural areas. Therefore, if a contractor

does not have any experience at all in drilling bore-wells, it is understandable as to how he would achieve the digging of bore-wells in ten Corporations.

15. The submission of the learned senior counsel that this is only an empanelment and on assessing eligible criteria tenders would be awarded at a later point in time, places the issue neither here nor there. If the eligibility criteria itself is faulty, it is again a mystery as to how the empanelled tenderers would execute the work. Therefore, there is some meaning in the Government notifying the standard tender documents which contained the work experience which is in tune with Rule 27 of the Rules. The Government Order dated 14.10.2008 is a product of deliberations by a Committee and a proposal by the Public Works Department seeking certain modifications. It is an executive order issued under Article 162 of the Constitution of India. It is tinkered with by communications between the Departments. Circulars issued by Government Departments cannot override a Government order notified bringing in standard tender documents. If every Department of the State is following the standard tender documents

in procurement works, a communication cannot override and delete the clause of work experience which the Rule and the Government mandate. Therefore, on this score when the Expression of Interest runs counter to Rule 27 of the Rules and Clauses of the Government Order dated 14-10-2008, the subject Expression of Interest dated 05-12-2023 is rendered unsustainable and unsustainability of it would lead to its obliteration reserving liberty to the State to notify an Expression of Interest strictly in consonance with the Rules and the Government order (*supra*).

16. Submissions are made by the learned senior counsel that this Court should not interfere with the process of tender unless it is found to be arbitrary and seeks to place reliance on the judgment of the Apex Court in the case of **MICHIGAN RUBBER (INDIA) LIMITED v. STATE OF KARNATAKA**<sup>1</sup>. In the said judgment the Apex Court has held as follows:

"....                   ....                   ...."  
**23.** From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence

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<sup>1</sup> (2012) 8 SCC 216

*and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*

*(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;*

*(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;*

***(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and***

*(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.*

**24.** *Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:*

***(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the***

***court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and***

***(ii) Whether the public interest is affected?***

***If the answers to the above questions are in the negative, then there should be no interference under Article 226."***

*(Emphasis supplied)*

The Apex Court holds that the process of tender must be fair and non-arbitrary which is the heartbeat of fair play. If it is not, it would become amenable to judicial review. The Apex Court also holds that certain pre-conditions or qualifications for tender have to be laid down to ensure that the contractor has the capacity and resources to successfully execute the work and if it is not, they should be interfered with under Article 226 of the Constitution of India. The action of the 2<sup>nd</sup> respondent is contrary to the Rules and the Government Order holding the field. Taking away of working experience of a contractor would put the project in jeopardy. It is therefore, the entire process from the stage of issuance of request for proposal should be redone by the 2<sup>nd</sup> respondent.

17. For the aforesaid reasons, I pass the following:

**ORDER**

- (i) Writ petition is allowed.
- (ii) Communication dated 02-11-2023 issued by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent stands quashed.
- (iii) Notification dated 05-12-2023 calling for Expression of Interest also stands quashed.
- (iv) The 2<sup>nd</sup> respondent is reserved liberty to notify fresh Expression of Interest strictly in consonance with the Rules and Government Order dated 14-10-2008 without brooking any delay. While so doing he shall bear in mind the observation made in the course of the order.

**Sd/-  
JUDGE**

nvj  
CT:MJ