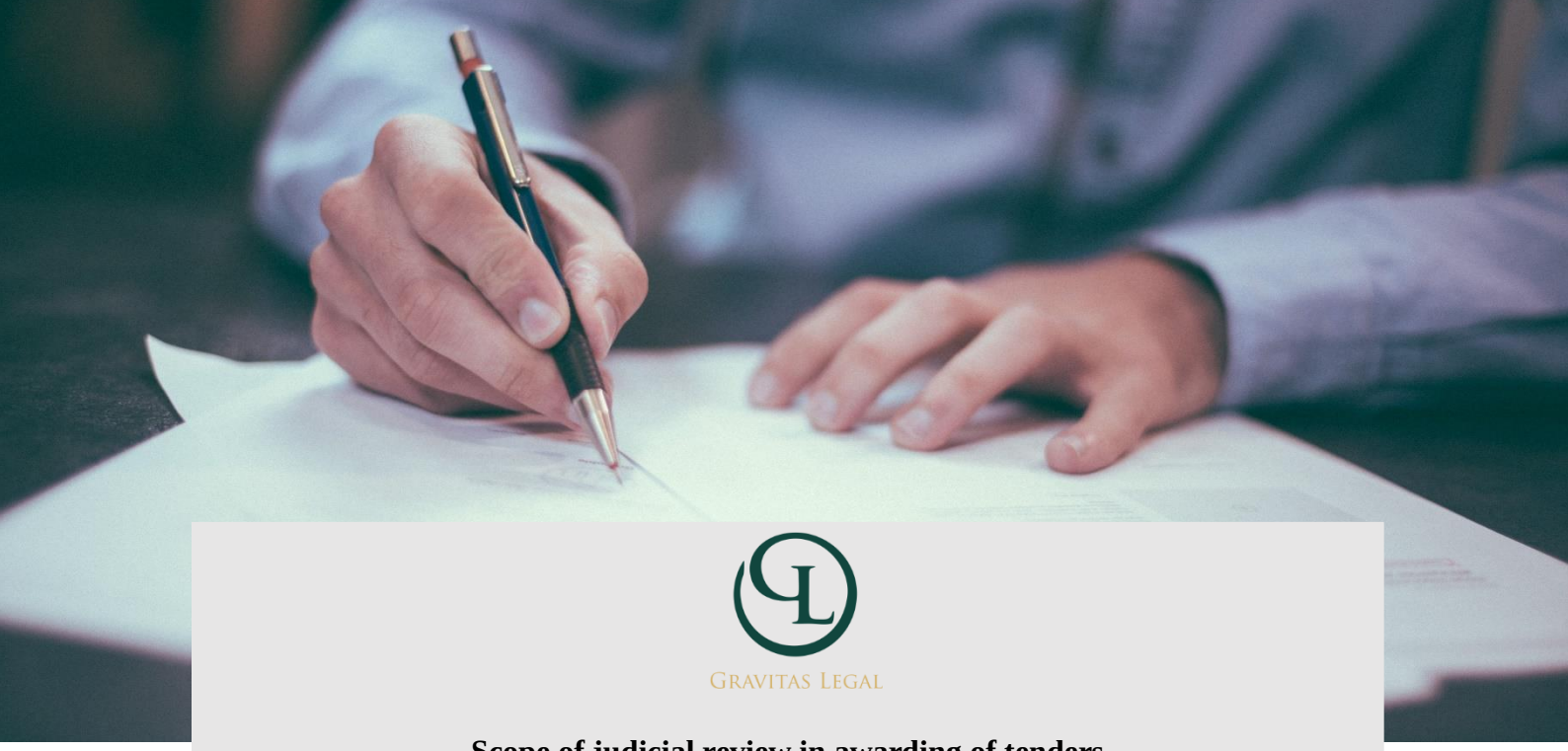

GRAVITAS LEGAL

Scope of judicial review in awarding of tenders

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One of the most common methods for the procurement of goods and services by the public authorities in India is through the tendering process. This is mainly because the public authorities, being instrumentalities of the state, do not enjoy absolute freedom in such procurement and have to maintain a strict level of transparency as expenditure of public money is involved. The Hon'ble Supreme Court in the matter of ***Ram and Shyam Company v. State of Haryana and Ors.***[1] clearly held that:

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

[1] 2005(1)CTC81

While inviting tenders, the public authorities have the autonomy to fix their own conditions and may even enter into negotiations before finally deciding to accept one of the offers made to them. They are also free to grant any relaxation, for bona fide reasons, if the tender conditions permit the same. However, in order to ensure fairness of the procurement procedure by the public authorities in India, the Hon'ble Supreme Court of India in the matter of ***B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.***[2]**,** laid down certain checks and balances which are 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 of 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."*

As a consequence thereof, there has been a sharp rise in scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India and it appears that almost every tender, whether small or big, is now sought to be challenged by way of writ petitions as a matter of routine. Be that as it may, the Hon'ble Supreme Court has repeatedly held that, in these matters, judicial review is equivalent to judicial restraint. What is reviewed is not the decision itself but the manner in which it was made. The writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority. This has clearly been held in the celebrated case of ***Tata Cellular v. Union of India***[3] which stated as under:

"94. The principles deducible from the above are:

i. *The modern trend points to judicial restraint in administrative action.*
ii. *The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*

[2] (2006) 11 SCC 548

[3] (1994) 6 SCC 651

iii. *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.*

iv. *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.*

v. *The Government must have freedom of contract. In other words, a fair 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.*

vi. *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

In ***Michigan Rubber (India) Ltd. v. State of Karnataka***[4], the Hon'ble Supreme Court held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

In ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.***[5], it was held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of *mala fides*, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision. The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

Further, the Hon'ble Supreme Court in the recent judgment in ***Silppi Constructions Contractors v. Union of India***[6], held as follows:

"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be

[4] (2012) 8 SCC 216
[5] (2016) 16 SCC 818
[6] 2019(11)SCALE592

exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer."

Thus, the Hon'ble Supreme Court has consistently opined that judicial intervention in the decisions of the public authorities relating to the award of contracts ought to be limited, and contracts entered into between private parties must not be scrutinized by courts via their writ jurisdiction. However, given the involvement of public authorities, the courts do leave room for intervention in terms of how a decision, action or process was arrived at. In order for a challenge to be successful, the challenging party would be required to demonstrate that the said decision, action or process of the public authority was (a) arbitrary, irrational, *mala fide*, whimsical, or contrary to law; (b) done to favour someone; (c) done with an ulterior purpose; (d) a misuse of statutory powers; or (e) adversely affecting public interest. Additionally, the challenging party could also demonstrate that a condition, for which non-compliance is being alleged was an essential or non-essential one.

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