

IN THE HIGH COURT OF MADHYA  
PRADESH  
AT INDORE  
BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND  
DHARMADHIKARI

&

HON'BLE SHRI JUSTICE PRANAY VERMA

ON THE 6<sup>th</sup> FEBRUARY, 2024

WRIT PETITION No. 26434 of 2023

BETWEEN:-

BALAJI SECURITY SERVICES PVT. LTD. THROUGH ITS AUTHORIZED  
SIGNATORY SHRI SACHIN MODI S/O SHRI HEMENDRA MODI, AGED  
ABOUT 41 YEARS, REGISTERED OFFICE AT 412, NAVNEET PLAZA, 5/2,  
OLD PALASIA, INDORE (MADHYA PRADESH)

.....PETITIONER

*(SHRI SUMIT NEMA SENIOR ADVOCATE WITH SHRI PIYUSH PARASHAR,  
ADVOCATE FOR THE PETITIONER)*

AND

THE STATE OF MADHYA PRADESH ADDITIONAL CHIEF SECRETARY  
DEPARTMENT OF FARMER WELFARE AND AGRICULTURE  
1. DEVELOPMENT ROOM NO. 213, VALLABH BHAWAN 1, BHOPAL  
(MADHYA PRADESH)

MADHYA PRADESH STATE AGRICULTURAL MARKETING BOARD  
2. THROUGH MANGING DIRECTOR 26 KISAN BHAWAN ARERA HILLS  
BHOPAL (MADHYA PRADESH)

M/S RB AASSOCIATES A PARTNERSHIP FIRM, PLOT NO. 30, 4TH  
3. FLOOR MAHARANA PRATAP NGAR ZONE, 2, BHOPAL (MADHYA  
PRADESH)

.....RESPONDENTS

*(SHRI RISHI TIWARI, ADVOCATE WITH SHRI ANSHUMAN JAT, ADVOCATE  
FOR THE RESPONDENT NO.2).*

*(SHRI BRIEN D SILVA ,SENIOR ADVOCATE WITH SHRI SOMESH AWASTHI,  
ADVOCATE FOR THE RESPONDENT NO. 3)*

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Reserved on : 23.11.2023  
Pronounced on : 06.02.2024

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*This petition having been heard and reserved for order coming on for pronouncement this day, **Hon'ble Shri Justice S.A. DHARMADHIKARI** pronounced the following*

**ORDER**

The present petition under Article 226 of the Constitution of India, petitioner is *inter alia* challenging certain provisions included in impugned notice inviting tender (NIT) issued by the respondent no.2 as published on 06.09.2023 bearing Specification No. TS-001 and Tender No. 2023 – MPSAM-3850 for outsourcing of human resources required for various tasks at Mandi Board Divisional Office, Technical Division Office and Mandi Samiti/Committee Campus as well as impugned award of contract and work order dated 06.10.2023 issued by the respondent no.2 in favour of the respondent no. 3 on the ground that the whole process in awarding the contract is unreasonable, arbitrary, discriminatory and biased.

2. Facts in nutshell are that petitioner is a private company and was incorporated on 01.04.1999 under the name and style 'M/s Balaji Detective and Security Services(India) Pvt. Limited. Thereafter, its name was changed to its present name vide Certificate of Incorporation dated 30.10.2015 issued by the Registrar of Companies, Gwalior under the provisions of Companies Act, 2013. The respondent no.2 is a statutory authority created under the provisions of M.P. Krishi Upaj mandi Adhiniyam, 1972(hereinafter referred to as “ Adhiniyam, 1972”) and functions under the respondent no.1. Thus, respondent no.2 is “State”

within the meaning of Article 12 of the Constitution of India and is an instrumentality of State.

3. Pursuant of the publication of NIT issued by the respondent no.2 on 08.09.2023 inviting tender (Annexure P-2) dated 06.09.2023, for outsourcing of human resources required for various tasks at Mandi Board Divisional Office, Technical Division Office and Mandi Samiti/Committee Campus which functions for procurement of agricultural produce at the Local/District Level, the bidders submitted various objections which were responded by way of issuance of a corrigendum dated 25.09.2023.

4. Petitioner herein also submitted bid on 03.09.2023. The respondent no.3 and other bidders including the petitioner participated in the bid process. After submission of bids and after examining the bid submitted by the respondent no.3, it came to the knowledge of petitioner that certain specific/tailor made conditions have been incorporated in the tender specifications to eliminate all the other bidders including petitioner, basically to accommodate the respondent no. 3.

5. It is the case of the petitioner that being a state-authority under Article 12 of the Constitution of India, the respondent no.1 and 2 are legally obliged to adhere to the requirements of the Article 14 of the Constitution and act in a fair and transparent manner without discriminating between the parties. However, respondent no.2 acting in gross violation of Article 14 of the Constitution of India has awarded the contract emanating out of the impugned tender to respondent no.3 . Hence, the present petition is filed.

6. Learned Sr. counsel for the petitioner has began the arguments raising various grounds which are as under:

CLAUSE 39 – TIE BREAKING MECHANISM

"39. टाड़ ब्रेकिंग

**39.1** टाड़ ब्रेकिंग के मामले में यानी एक से अधिक निविदाकारों के एल-1 होने की स्थिति में निम्नलिखित क्रम में प्रथमिकता का पालन (क्रमिक तरीके से) तब तक किया जाएगा जब तक कि एकल एल-1 निविदाकारों का निर्णय नहीं हो जाता-

1. उच्चतम तकनीकी- वाणिज्यिक स्कोर वाले निविदासकार को अंतिम एल-1 निविदाकार माना जाएगा।

दूसरे उच्चतम तकनीकी-वाणिज्यिक स्कोर वाले निविदाकार को एल-2 निविदासकार माना जाएगा।

इसी प्रकार निविदाकारों के तकनीकी-वाणिज्यिक स्कोर के अपरोही क्रम का उपयोग निविदाकारों पर एल-3, एल-4 और इसी तरह के निर्णय के लिए किया जाएगा। यदि समान अंक के साथ अभी भी एक से अधिक निविदाकार हैं, तो अगले चरण का पालन किया जाएगा।

2. म.प्र. राज्य सरकार के किसी भी विभाग/शासकीय उपक्रम/शासकीय संस्था के कार्यादेश के माध्यम से मध्यप्रदेश के सभी जिलों में मैनपावर उपलब्ध कराने का अनुभव होने वाले निविदाकार को अंतिम एल-1 निविदाकार के रूप में माना जाएगा। यदि अभी भी एक से अधिक निविदाकार हैं, तो अगले चरण का पालन किया जाएगा।

3. म.प्र. राज्य सरकार के किसी भी विभाग/शासकीय उपक्रम/शासकीय संस्था द्वारा विगत कैलेंडर वर्ष 2022 में सबसे अधिक संख्या का मैनपावर उपलब्ध कराने का एकल कार्यादेश दिया गया हो जिसमें मध्यप्रदेश के सभी जिले सम्मिलित हो, ऐसे निविदाकार को अंतिम एल-1 निविदाकार के रूप में माना जाएगा।"

7. While drawing the attention of this Court to Clause 39 of the impugned Tender which provides for a mechanism of how bidders would

be treated in case of an eventuality where a condition of more than one L-1 bidder emerges out, to break a tie between two bidders, the bidder who has been awarded a contract by any Government undertaking/Government organization in the preceding year 2022 with the highest/maximum number of manpower provided through single work order including all the districts of M.P. shall be considered as the final L-1 bidder.

8. It is contended that by force of Clause 39 of the impugned tender, primarily emphasis has been given on two points viz (i) single work order; (ii) preceding Calendar Year 2022. However, it is a long established practice for authority issuing tenders to assess the bidders in case of a tie-breaking situation by scrutinizing the number of manpower deployed in a range of previous “financial years” and not “calendar years” as has been done in the present case under the garb of sub-clause (3) of Clause 39 of the impugned tender.

9. Thus, it is as clear as noon day that tie-breaking mechanism under Clause 39 i.e. preference to a bidder possessing maximum number of manpower deployed/obtained in the Calendar year 2022, that too through a Single work order and award of scores depending upon the number of personnel currently deployed in the departments under M.P. Government including provision of awarding zero marks to companies having such deployment in less than 5 such departments etc. has been specifically designed to eliminate them from bidding process and simultaneously ensuring that respondent no. 3 succeed in the bidding.

#### **10. FINAL SCORESHEET ISSUED BY RESPONDENT NO.2**

Taking this Court to the scoresheet issued by the respondent no.2, learned counsel for the petitioner submitted that based upon the above unreasonable conditions particularly Condition No. 39 included in the

impugned tender, petitioner and respondent no. 3 participated in the tender process and after opening of bid on 04.10.2023, the respondent no.2 awarded its scores to all the bidders which are as under:

S. No.	Conditions	Scores	
		Balaji Security Services Pvt. Ltd.	M/S R.B. Associates
1	सार्वजनिक क्षेत्रों में मानव संसाधन की आउटसोर्सिंग में समग्र अनुभव प्रत्येक कैलेंडर वर्ष के अनुक्रम के लिए एक अंक (केवल कैलेण्डर वर्ष 2018, 2019,2020,2021,2022 को मान्य किया जाएगा) अलुलग्नक XIV अधिकतम अंक-5	P-192 to 279 5	P-131 to 149 & 243 to 467 5
2	भारत में पिछले 3 वित्तीय वर्षों में केंद्रीय/राज्य सरकार/पीएसयू में नियोजित किए गए आउटसोर्स मानव संसाधन की उच्चतम संख्या (केंद्र/राज्य सरकार/पीएसयू में नियोजित प्रत्येक 1000 आउटसोर्स मानव संसाधन हेतु एक अंक) अधिकतक अंक-5	2020-2021 6532 employees to 334 5	+ 2022-2023 + 8319 employees P-254, 257, 275, 276, 278, 288, 289, 290, 405, 406, 407 5
3	भारत में पिछले तीन वित्तीय वर्षों में केंद्र/राज्य सरकार/पीएसयू में आउटसोर्स मानव संसाधन से औसत टर्नओवर अधिकतक अंक-	44.39 Cr. P-110, 111	26.55 Cr. P-207 to 214

S. No.	Conditions	Scores	
	20( 5.00 Cr. To 15.00Cr.+ 10 Point, 15.00Cr. To 25.00 Cr. + 15 Point & Above 25.00 Cr. + 20 Point)		
		20	20
4	मध्य प्रदेश के विभागों की संख्या जिन में निविदाकार द्वारा वर्तमान में मैनपॉवर सेवाएं प्रदाय की जा रही हो अधिकतम अंक -20(05 to 15 Dept. + 10 Point, 15 to 20 Dept. 15 Point & Above 20 Dept. + 20 point)	(P-337 to 339 Deptt.)  0	(04 P-392 to 404(28 Deptt))  20
		30	50

11. The final scoresheet as released by the respondent no.2 after technical and financial bid being submitted by the petitioner and the respondent no.3 clearly depicts that while the petitioner and respondent no.3 scored identical marks on all other criterion, the respondent no.3 has edged past the petitioner only in the category of current deployment of manpower in departments under Government of Madhya Pradesh, in as much as, the petitioner with deployment of manpower in four departments has been awarded zero marks while the respondent no. 3 with deployment of manpower in 28 departments has been awarded with twenty marks i.e. the maximum possible marks in such category.

12. Learned Sr. counsel while asserting his arguments on the scheme of score based evaluation submitted that the controversial score evaluation

has been carried out in order to accommodate the respondent no.3. It is further submitted that respondent no.2 crafted a tailor made condition of the tender so that respondent no. 3 will get maximum marks in technical evaluation. The publication of NIT is nothing but merely an eye-wash to complete formalities in awarding the contract in favour of respondent no.3. Hence, as per final score sheet, the respondent no.3 has scored over the petitioner on the strength of discriminatory conditions of the impugned tender and has been awarded the contract on 06.10.2023 vide Annexure P-7.

13. Learned Sr. counsel further submitted that on examination the above conditions contained in the impugned tender, especially after comparison of Tender 2020 issued by the same authority, it is loud and clear that respondent no.2 has acted in collusion with respondent no.3 in designing the tender conditions in such a nefarious manner so as to sabotage the interest of petitioner to favour the respondent no.3 by awarding tender which is arbitrary and not expected out of State authorities.

14. Learned Sr. counsel further submits that petitioner is aware that there is a limited scope of judicial review/intervention in matter involving floating of tenders by the state-authorities, as it is considered that the tender issuing authority is the best judge of its requirement. Yet it is also settled law that the Hon'ble Courts are inclined to exercise their jurisdiction in cases wherein decisions of executives are arbitrary, malafide or irrational and infested with favouritism.

15. In support of his contention learned counsel for the petitioner has placed reliance on plethora of judgments which are as under:

➤ **In the case of Raunaq International Tld. Vs. I.V.R. Construction**



**Ltd. & Others** reported in **(1999) 1 SCC 492**, the Apex Court has reiterated the established principle governing the process of judicial review and held that the writ Court would not be justified in interfering with commercial transactions in which the State is one of the parties except where there is substantial public interest involved and in cases where the transaction is malafide.

➤ Also in the case of **Monarch Intrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others** reported in **2000(3) SCR 1159**, it has been clearly stated by the Apex Court that where the policies adopted by the Government has no nexus with the object it seeks to achieve or is malafide or when the process is arbitrary or discriminatory, the power of judicial review can be exercised. Relevant extract of the judgment is reproduced below for convenience:

“10. .... Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situated.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or

unreasonable or such rejection is in public interest for valid and good reasons.”

- **Dutta Associates Pvt. Ltd. s. Indo Merchantiles Pvt. Ltd.** reported in **(1997) 1 SCC 53**
- **Shiv Sagar Tiwari Vs. Union of India** reported in **(1996) 6 SCC 558**
- **Tata Cellular Vs. Union of India** reported in **(1994) 6 SCC 651**
- **Air India Ltd. Vs. Cochin International Airport Ltd. And Ors.** reported in **2000(1)SCR 505.**
- **Jagdish Mandal Vs. State of Orissa and Others** reported in **(2007) 14 SCC 517.**
- **Tejas Construction & Intrastructure Pvt. Ltd. Vs. Municipal Council , Sendhwa & Anr.** reported in **(2012) 6 SCC 464.**
- **Michigan Rubber(India) Ltd. Vs. State of Karnataka** reported in **(2012) 8 SCC 216.**
- **Food Corporation of India Vs. Kamdhenu Cattle Feed Industries** reported in **(1993) 1 SCC 71.**
- **Union of India Vs. Tulsiram Patel** reported in **(1985) 3 SCC 398.**

16. Concluding his arguments, learned Sr. counsel for the petitioner submits that the action of respondent no.2 is in contravention to the Article 19(1)(G) and Article 301 of the Constitution of India, in so much so that constitutional rights of the petitioner to pursue its profession as a manpower provider, as guaranteed under Article 19(1)(g) and 301 of the Constitution have been seriously prejudiced.

17. Under such circumstances, it is prayed that writ in the nature of certiorari be issued to quash the impugned Tender floated by the respondent no.2 and the consequential award of contract in favour of respondent no.3 be also quashed.

18. Learned counsel for the respondent no.2 rebutting the arguments advanced by learned Sr. counsel has raised preliminary objection as to the maintainability of the petition on the ground of suppression of material facts. It is submitted that petitioner has concealed the fact that it never raised any objection in the pre-bid meeting or otherwise to the conditions of the NIT. However, all the conditions which petitioner is objecting were disclosed in the NIT and if petitioner was aggrieved by any of the said conditions, he should have raised objections then and there only. It is only after completion of entire process i.e. even after more than one month of the publication of NIT when petitioner was unsuccessful in getting the contract, he has filed the instant petition raising many objections regarding conditions to be tailor made, discriminatory etc.

19. It is further submitted that it is well settled in law that contractual matters are not amenable to writ jurisdiction. The employer is the best person to understand the requirement of a project and is entitled to incorporate conditions for ensuring successful completion of work. Hence, merely bald allegations without any proof have been made in the petition.

20. Learned counsel referring to the objection as regards tie-breaking conditions contended that impugned tender does not contain any new tie breaking conditions which would evoke any suspicion on the same being infested with malafide. It is also submitted that the previous NIT was also having the same Tie-Breaking clause and petitioner's failure in pre-bid meeting amounting to an estoppel against the petitioner for challenging the

impugned tender at a later stage.

**21.** Learned Sr. counsel for the respondent no.2 and 3 referring to the detailed reply filed by them stated that petitioner had not raised any objection even in the pre-bid meeting held on 18.09.2023 where other bidders were also present and after considering all the objections raised by the bidders, a corrigendum dated 25.09.2023 was issued. However, it is not out of the place to mention here that petitioner has not raised any objection in the context of any of the conditions of impugned tender and contrary to the same, petitioner agreed to all the conditions and at this stage when the L-1 bidder was selected, petitioner has started questioning the veracity of the conditions of impugned tender. Hence, it is nothing, but an after thought which cropped up in the mind of the petitioner after he lost the impugned tender.

**22.** Learned counsel for the respondents no.2 and 3 addressing as regards infringement of constitutional rights of the petitioner submits that it is alleged that impugned tender contains discriminatory conditions and is designed in a malafide manner to suit the respondent no.3 at the outset submits that tender conditions were framed after fair discussion by a duly constituted committee comprising the Additional Director (Administration), Additional Director, HRM, Additional Director(Finance), Superintendent Engineer and Deputy Director (Premises) and after due deliberation, conditions of the tender were finalized.

**23.** Learned Sr. counsel for the respondent no.2 and 3 further contended that after award of contract, the Mandi Board has executed 200 sub-contracts and has also deployed approximately 3000 personnel in various Mandis across the State and has rescinded all earlier contracts/agreements.

It is also submitted that tender of other departments like Panchayat Raj Department, M.P. Madhya Khsetra Vidhyut Company Ltd etc. had similar condition as contained in the impugned tender relating to a specific calendar year and the evaluation of capacity of bidder is done through single work order.

24. In the past i.e. previous tender of 2020 (Tender No. 2020-MPSAM-113324), the respondent no. 2 provided a condition that in case of a Tie-break between bidders after technical and financial evaluation, the selection of L-1 bidder would be done on the basis of choosing the bidder who had supplied the maximum number of manpower in "any 1 of the last 3 Financial Years", to any Government agency not limited to the Government of Madhya Pradesh. This was required to be demonstrated through examination of certificates issued by the concerned authority in respect of the amount of money deposited in the Employees Provident Fund (EPF). The relevant clause of previous Tender of 2020 issued by the Respondent no.2 is reproduced below:

"उपरोक्त मेरिट क्रमंक - 1,2 तथा 3 के सम्मत निविदयें तबनीके रूप से मन्य के जवेणी व उनके वित्तीय ऑफर खेले जवेणे। वित्तीय ऑफर में न्यूनतम दर प्रस्तुत करने वाले निविदार क चयन किय जयेगा। समन दरे प्राप्त होने के स्थिति में तबनीके मूल्यवन्न में सर्वाधिक अंक वाले निविदार क चयन किय जवेगा। यदि तबनीके मूल्यवन्न एवं वित्तीय ऑफर में समन अंक है ते ऐसे निविदार क चयन किय जवेगा जिसेके द्वारा वित्त 03 वर्षों में से किसी 01 वर्ष में सर्वाधिक संख्य में मन्य संसधन उपलब्ध कराय गय है। मन्य संसधन के संख्य क अकलन संस्थ द्वारा विभिन्न संस्थओंमें पदस्थ किय गए कर्मियों क ई.पी.फ के रशि जम करने क प्रमण पत्र के अधर पर मन्य हेगा।"

25. In rejoinder, learned Sr. counsel for the petitioner has submitted that after technical evaluation of all the eligible documents of prospective bidders, the work was to be awarded to L-1, L-2, L-3, Companies as per the Condition No. 37.3 of the NIT, however the respondent no.2 contrary to the aforesaid condition issued single work order of all three groups in favour of respondent no. 3.

26. On the other hand, learned Senior counsel for the respondent no. 3 has submitted that Clause 37.3 has to be read alongwith Clause 9.5 of the NIT which empowers the respondent no. 2/Mandi Board to award single Contract to the lowest bidder and therefore there is no illegality in awarding the Contract to respondent no.3. They lastly submitted that the decision of the competent authority in awarding the contract to respondent no. 3 strictly in terms of impugned NIT is just and proper. It is not open to this Court to sit like a Court of appeal over the decision of Competent authority and prayed for the dismissal of the writ petition.

27. Learned counsel for the respondent no.2 submitted that the reference made by the petitioner to the conditions of tender 2020 is misleading. So far as the allegation that the conditions of impugned tender are unreasonable and are in contrast to the tender of year 2020 is concerned, it is pertinent to mention that the tender floated in the year 2020 was cancelled and never opened thus comparison with the conditions of tender 2020 is misconceived and irrelevant.

28. In support of his contentions, learned counsel for the respondent no.2 has pressed into service, judgments of Apex Court as well as this Court which are as under:

- **S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others** reported in **(2004) 7 SCC 166.**
- **N.G. Projects Limited Vs. Vinod Kumar Jain and**

**Others** reported in **(2022) 6 SCC 127.**

➤ **Central Coalfields Limited and Others Vs. SLL-SML (Joint Ventures Consortium) and Others** reported in **(2016) 8 SCC 622.**

➤ **World Class Services Limited Vs. Madhya Pradesh Paschim Kshetra Vidhyut Vitaran Company Ltd.**[W.P. No. 15239/2020]

➤ **Monarch Infrastructure(P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others** reported in **(2000) 5 SCC 287.**

29. We have heard learned Sr. counsel for the parties at length and perused the record of the case.

30. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, stands and procedures laid down by them and cannot depart from them arbitrarily. Though, that decision making process is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The State and its agencies have the public duty to be fair to all concerned.

31. As held by the Apex Court in the case of Jagdish Mandal(supra) that a Court before interfering in tender or contractual matter in exercise of power of judicial review should pose to itself the two questions:

(I) Whether the process adopted or decision made by the authority is malafide or intended to favour someone.

(II) Whether public interest is affected?

32. Testing on the anvil of these two questions, this Court reached to the conclusion that matter requires exercise of power of judicial review as the practice adopted by the authority while floating tenders in previous years and while floating the impugned tender is questionable in as much as conditions suiting to the bidder whom they want to be chosen as L1 are being introduced in the impugned tender.

33. According to the petitioner, the respondent no. 2 has deliberately and intentionally allowed the respondent no. 3 to score more marks than the petitioner by way of rewarding it for deploying more manpower in the Calendar year through Single work orders which shows that respondent no.2 in collusion with the respondent no. 3 and to safeguard the interest of respondent no.3 had incorporated the aforesaid conditions to eliminate the petitioner.

34. In the present case, there was a tie between the petitioner and respondent no. 3. The respondent no.2 invoked Clause 39 and gave preference to respondent no.3 on the ground that he was possessing maximum number of manpower in the Calendar Year 2022 only through Single work orders in the Departments under M.P. Government and thus respondent no.2 scored 100% marks in technical evaluation due to its agreement with CEDMAP. The petitioner and other bidders failed to fulfill the condition and could not score 100 marks in technical evaluation because the eligibility criteria for them is based on experience gained from different Government or Semi Government Department of any State in India [Condition No. 3.3.3(1)]. However, contract with Government



autonomous company like CEDMAP (Clause 3.3.3) was also treated as different work orders with different Government Departments with a weightage of 20 points.

**35.** To draw a distinction between the two tenders i.e. the Impugned Tender and Tender 2020, relevant clause of both the tenders are reproduced below:

Clause 3.3.3.(Criterion No. 4) of 2023 Tender provides that scores would be awarded to bidders whose manpower is presently deployed to any department under Government of Madhya Pradesh in the following manner:

Between 0 - 15 Departments	10 Marks
Between 15-20 Departments	15 Marks
More than 20 Departments	20 Marks

Whereas 2020 tender had provided for award of marks on the basis of deployment of manpower in any organization (not limited to Government of Madhya Pradesh) in the last five years as under:

Between 1-10 Organization	3 Marks
Between 11- 20 Organization	5 Marks
Between 21 - 30 Organization	7 Marks
More than 30 Organization	10 Marks

**36.** On account of award of marks on the basis of manpower deployed, the impugned Tender prefers bidders who have presently deployed manpower in departments under the Government of Madhya Pradesh only: while the 2020 Tender provides for such assessment through examining

the number of manpower deployed in any organization in the last five years.

37. The relevant extract of score awarding Clauses in impugned tender and Tender 2020 reads as under:

<p style="text-align: center;"><b><u>UNDER THE</u></b> <b><u>TENDER</u></b> 2020(Clause No. 7.1 - Condition No. 6 on page No. 12</p>	<p style="text-align: center;"><b><u>UNDER THE</u></b> <b><u>IMPUGNED TENDER</u></b> <b><u>2023</u></b> (Clause No. 3.3.3 – Condition No. 4 on page no. 39.</p>	
<p>6. विगत (अ) 01 10 05 वर्षों से 10 में संस्थानों विभिन्न में 03 संस्थाओं अंक में मानव संसाधन (ब) 11 प्रदाय से 20 करने का संस्थानों अनुभव में -05 अंक (स) 21 से 30 संस्थानों में -07 अंक (द) 30 से अधिक संस्थानों में -10 अंक कुल 100 अंक</p>	<p>4. मध्यप्रदेश से के विभागों 15 की संख्या विभाग जिनमें -10 निविदाकार द्वारा 15 से वर्तमान में 20 मैनपॉवर विभाग सेवाएं -15 प्रदाय की अंक जा रही हो। 20 से अधिक</p>	<p>20. आवश्यक दस्तावेज संलग्न करें।</p>

	विभाग	
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**38.** From the above relevant extract, it is crystal clear that impugned Tender unreasonably emphasizes on current manpower deployment only and only under any Department of Government of Madhya Pradesh. Moreover, award zero marks to any bidder whose “current manpower deployment’ is less than 5 such departments. On the contrary, in Tender 2020 provided for marks for bidders whose manpower was deployed in any organization (not only limited to State Government of Madhya Pradesh) in the last 5 years and experience gained therefrom thus, provided for a more wholesome and comprehensive manner of evaluation. Moreover, the Tender 2020 did not penalize any bidder whose manpower was recruited than 5 “Government Department” as has been prescribed in the impugned Tender.

**39.** The impugned Tender arbitrarily provides that the Tie-Breaking clause would call for choosing L-1 on the basis of maximum number of manpower supplied by such bidder not in any financial year or years but specifically in the Calendar Year 2022(January to December, 2022) obtained through one Single Work Order. According to the petitioner, this has been provided because it suits the experience of Respondent no. 3 and to enhance its chance to succeed in the aforesaid tender.

**40.** The respondent no.2 in its reply has stated that Tie-Breaking clause was prevalent in the 2017 Tender issued by them and similar condition has been incorporated in the impugned tender. The petitioner examined the same and para 14 of the rejoinder very categorically states that none of the tenders as relied upon, contain even a passing reference to a specific “Calendar Year” but have instead always referred to financial year which shows that the newly inducted provision of “Calendar Year” in the

impugned tender is a clear deviation in order to favour the respondent no.3.

**41.** As per para 13 of the rejoinder filed by the petitioner, the methodology of award of its score by tender issued by MPMKVCL(Government Company State PSU) provides that highest turnover (from manpower outsourcing) in any of the last financial year. Similarly, in the tender issued by the Department of Panchayat Raj(Government of M.P.) also provide that under single contract .... maximum number of manpower supplied in 1 out of last 8 years. Further, the tender issued by the Panchayat Raj Department is also having Tie-breaking clause for highest single order “awarded by Central or State Government or PUS in last financial year 2022-23”. Similarly, in 2017, the respondent no. 2 i.e. the Mandi Board issued tender which provided the methodology of awarding its scores (technical evaluation) on the basis of manpower supplied in the last three years. This is unlike the impugned tender by the same respondent no.2/Mandi Board which provides supply of manpower number at present in the department especially and only under the Government of Madhya Pradesh.

**42.** From the certificates issued by the local mandis, it is clear that during intervention period, the previous contractor is carrying out the work. Thus, the stand of the respondent no.3 that he has already deployed manpower of 3000 personnel cross the State has no force.

**43.** In the technical evaluation condition of tender documents, the eligibility criteria for participating companies is based on the experience gained from the Government or Semi Government Department of any State in India over last three financial years viz 2020-21, 2021-22 and 2022-23. Condition No. 3.3.3(2). The Condition No. 39.1 speaks about

experience of a specific “Calendar Year 2022” only in Tie-breaking condition is discriminatory and violative to Article 14 of the Constitution of India.

**44.** The Apex Court has time and again urged that the need for overwhelming public interest should always be kept in mind to justify judicial intervention in contracts involving the State and its instrumentality and while exercising the power of judicial review in relation to contracts, the Court should consider primarily the question whether there has been any infirmity in the decision making process.

**45.** The law on the subject is settled that the Courts being the custodian of fundamental rights are under an obligation to interfere where there is arbitrariness, irrationality, unreasonableness, malafides and biasness, if any but at the same time, the Courts should exercise the power of judicial review with a lot of restraint, particularly in commercial and contractual matters.

**46.** Ultimately what prevails with the Courts in these matters is that while public interest is of paramount importance, there shall be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated without any discrimination. The Government arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situated.

**47.** The impugned tender arbitrarily provides that the Tie-breaking clause would call for choosing L-1 on the basis of maximum number of manpower supplied by such bidder not in any financial year or years, but specifically in the Calendar Year 2022(January, to December 2022) obtained through only Single work order. No justification has been put forth therein in the impugned tender which nevertheless demonstrate that

there is no nexus between the tender clauses and objects sought to be achieved by it. Such incorporation is apparently made to accommodate the respondent no.3. It is clearly evident from the earlier tenders issued by the respondent no.2 in previous years where they choose the L-1 by checking and examining the EPF certificates instead of calling for Single Work orders obtained by the bidders.

**48.** For the sake of convenience and ready reference, Clause 37.3 and 2.1 of the impugned Tender is reproduced below:

मण्डी बोर्ड/ आंचलिक कार्यालयों/तकनीकी कार्यालयों/मण्डी समितियों में "विविध कार्यों के लिए आवश्यक मानव संसाधन की आउटसोर्सिंग के लिए एजेंसियों के चयन के लिए निविदा प्रक्रिया शुरू की गई है। निविदाकार निम्न सूची में दर्शाये अनुसार निविदा लगाने के लिए स्वतंत्र हैं, हालांकि निविदाकार को म.प्र. राज्य कृषि विपणन बोर्ड के कार्यक्षेत्र अंतर्गत 03 समूहों में से एक के लिए ही कार्य आवंटन के लिए पत्र होगा। आवंटन किसी विशेष क्षेत्र में संभावित निविदा मूल्य के घटते क्रम में किया जाएगा।

2.1 मण्डी बोर्ड/ आंचलिक कार्यालयों/तकनीकी कार्यालयों तथा ग्वालियर/भोपाल संभाग की मण्डी समितियों से संबंधित कार्य एवं उज्जैन/इंदौर संभाग की मण्डी समितियों से संबंधित कार्य तथा जबलपुर/रीवा/सागर संभाग की मण्डी समितियों से संबंधित कार्य के लिए संभावित मानव संसाधन की लागत नीचे सारणीबद्ध है।

सं.क्र. मंडी/कार्यालयों	03 वर्ष के लिए संभावित लागत (करोड रूपए में)
1. उज्जैन/इंदौर संभाग की मण्डी समितियों से संबंधित कार्य	75.92 60.10

<p>2. मण्डी बोर्ड मुख्यालय/आंचलिक कार्यालयों/ तकनीकी कार्यालयों तथा भोपाल संभाग की मण्डी समितियों से संबंधित कार्य</p> <p>3. ग्वालियर/जबलपुर/रीवा /सागर संभाग की मण्डी समितियों से संबंधित कार्य</p>	44.27
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नोट : म.प्र. राज्य कृषि विपणन बोर्ड मानव संसाधन की जानकारी उज्जैन/इंदौर संभाग की मण्डी समितियों से संबंधित कार्य एवं मण्डी बोर्ड मुख्यालय/आंचलिक कार्यालयों/तकनीकी कार्यालयों तथा ग्वालियर/भोपाल संभाग की मण्डी समितियों से संबंधित कार्य एवं जबलपुर/रीवा/सागर की मण्डी समितियों से संबंधित कार्य के लिए विभिन्न अनुभाग शामिल है।

**49.** The stand of the respondent no.2 in awarding Single work orders to all the three groups contrary to Clause 37.3 r/W Clause 2.1 is that Clause 37.3 has to be read alongwith Clause 9.5 of the impugned tender which gives power to the respondent no.3 to issue single work order to all the three groups in favour of the respondent no.3.

Clause 9.5 of the impugned tender reads as under:

9.5 म.प्र. राज्य कृषि विपणन बोर्ड द्वारा म.प्र. कृषि उपज मंडी अधिनिष्पन्न 1972 से प्रदत्त कर्तव्य और दायित्वों के तहत मंडियों का उचित सेवाएं और सुविधाएं समरूपता से उपलब्ध कराने हेतु एकीकृत रूप से मानव संसाधन प्रदाय के लिए निविदा आमंत्रित की जा रही है।

50. If we consider the arguments of the respondent no.2 that the word "एकीकृत रूप" has been intentionally used which imply that the intent of respondent no.2/Mandi Board has been " to have a single agency for supplying manpower". Per contra, the interpretation of the petitioner is that the phrase/words simply refers to single/unified manner in which the issuing-authority intended to execute the tender and to outsource the manpower supply. The words "एकीकृत रूप" is not equivalent to "एकीकृत निविदाकार". Since the latter of which would mean a single agency/bidder. Thus, the respondent no.2/Mandi Board got entangled in its self-defeating arguments by incorrectly equating single/unified manner with single agency. The language of Clause 37.3 and its intent is express and unequivocal without any scope for ambiguity.

51. On perusal of the same, we are of the view that Clause 37. 3 expressly provides that the successful bidder would be eligible for work only 1 out of 3 groups/divisions falling under the jurisdiction of respondent no.2/Mandi Board which means that the work has to be allotted in the manner prescribed above for all the groups/divisions of the respondent no.2/Mandi Board. The respondent no.2 acted illegally and in contravention to Clause 37.3. in issuing single work order for all the three groups in favour of respondent no.3.

52. The aforesaid clause 37.3 has to be read in conjunction with Clause 2.1 which provides that the work is to be allotted to L-1 bidder in only one out of three divisions under the jurisdiction of the Mandi Board. The respondent no.2 just to give undue favour has granted/awarded the whole work of three divisions to the respondent no. 3 i.e. Single work order of all the three groups (divisions) were issued in violation of Clause 37.3 of the



tender document to respondent no.3.

**53.** So far as the objection raised by the respondent that petitioner has raised the objections at a later stage thereby amount to an estoppel is concerned, learned Sr. counsel submitted that pre-bid meeting is merely to clarify the issues and to answer questions on any matter that may be raised and same is not a quasi-judicial proceedings which could adjudicate the legality of any provision of impugned tender. The legality of any tender condition can be effectively adjudicated before the Court under its writ jurisdiction and not by the same tender-issuing authority and, therefore we reject the objections of the respondents that failure of petitioner in raising objections in the pre-bid meeting amounts to an estoppel against him from challenging the impugned tender at a later stage. Even otherwise, the similar objections were raised by one of the bidder M/S Third Eye Security Pvt. Ltd. Particularly with regard to the Tie-Breaking Clause No.39 which was dismissed by the respondent without assigning any cogent reasons. Thus, it cannot be said that no one has raised any objection about inducting Clause 39 in the impugned Tender.

**54.** So far as the maintainability of petition is concerned, there is no suppression of fact as the objection as regards condition no.39 - Tie-breaking Condition was raised by one of the bidder. However, the same was dismissed without assigning any cogent reason and after opening of bid, the same objection was raised by the petitioner which cannot be termed as suppression of facts.

**55.** Moreso, this Court finds force in the submission made by the learned counsel for petitioner that it is expected out of the State authorities to act in a fair, transparent and non- partisan manner as the held by the Apex Court in the case of Tata Cellular(supra), where having reviewed

the law on award of public contracts, the Apex Court has held that fair play in the joints is necessary concomitant for an administrative body 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 of arbitrariness not affected by bias or actuated by malafides.

**56.** When the State is trading with the public, the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. The Activities of the Government have a public element and, therefore, there should be fairness and equity. Hence, we have to keep the larger public interest in mind in order to decide whether intervention is called for or not and in the present lis, we have arrived at a conclusion that overwhelming public interest requires interference by this Court .

**57.** We are obliged to interfere on the ground of arbitrariness and violation of principle of natural justice confining ourselves to the doctrine of judicial restraint, however, by the application of permissible parameters to set right the decision making process, as by and large, such malafide or intent to accommodate a bidder tantamounts to affect the public interest as other aspiring bidders who have participated in the tender process having certainly equal scores on some criterion lost the tender due to inclusion of some clauses which are suitable only for the respondent no.3 to knock off others.

**58.** In view of the above discussion and in the light of the judgments enunciated above, we find that the condition no.39 being discriminatory is the result of arbitrary action of the respondent no. 2 and is not liable to be

sustained. Accordingly, the petition is allowed and the impugned tender No. 2023\_MPSAM\_305806 dated 06.09.2023 and the consequential award of contract in favour of the respondent no.3 are hereby quashed.

**59.** However, the respondents are at liberty to initiate the retendering process afresh, in accordance with law.

**60.** The writ petition is allowed. No order as to cost.

**(S. A. DHARMADHIKARI)**

**JUDGE**

**(PRANAY VERMA)**

**JUDGE**

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