Governance of Public Procurement in India: A Legal Analysis of the Procurement Policy, Scope of Judicial Review, and Approach of the Constitutional Courts towards Interpretation of Tender Documents

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Abstract

Public procurement is one of the most vital aspects of governance in any country. In India, public procurement has to be made in compliance with the norms of the Constitution; as also in conformity with the statutory law, public policy, rules, regulations, authorised guidelines and manuals. If there is any violation of the principles of public law in the matter of award of contract by the public authority, then, such a decision will be subject to the judicial review of the writ court. At the same time, it is also correspondingly essential to confer the necessary leeway and pliability to the executive authorities so that they can discharge their constitutional and statutory duties towards the society and people efficiently and in a timely manner. Accordingly, the law envisages a fine balance to be struck between the "much-needed flexibility" and the "indispensable accountability" in the matter of public procurement. This, however, raises legal questions regarding the extent of the much-needed flexibility and the scope of judicial review in public procurement. Putting it differently, the legal inquiry to be made is in what matters of public procurement the court in the exercise of its writ jurisdiction, entertains a writ petition and also how the court interprets the tender documents for resolving the disputes so as to uphold the principles of probity and accountability in such matters. This paper, therefore, aims to address the following three specific research questions: (i) What is the law and policy governing public procurement in India? (ii) What is the current position of law

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regarding the scope of judicial review in public procurement? (iii) What are the principles and rules of interpretation of tender documents?

Keywords: *governance, interpretation of contracts, interpretation of tender documents, judicial review, public procurement.*

I. Introduction

Public procurement signifies the overall process of acquisition by purchase, lease, licence or otherwise of goods, works, or services, or any combination thereof by a public entity, whether directly or through an agency with which a contract for procurement services is entered into.[2] It also includes, within its ambit, award of infrastructure projects to private developers on the basis of public private partnership (PPP). A public entity means a public authority, i.e. "State" under article 12 of the Constitution of India. Under article 12, the expression "State" includes the Government of India, the Parliament of India, the Government of each of the States, the Legislature of each of the States, and all local or other authorities within the territory of India or under the control of the Government of India. The wide interpretation given by the court of the expression "other authorities" has expanded the concept of public authority. This approach has consequently enlarged the bodies/entities against which fundamental rights can be enforced. The moment a body/entity is declared a state under article 12, that entity concerned becomes subject to the discipline of Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) of the Constitution, administrative law, and writ jurisdiction of the Supreme Court and the High Courts. The expression "other authorities" includes all entities that are agencies or instrumentalities of the State. While deciding whether an entity is a State or not, on the cumulative facts as established, the court examines whether the body is "financially, functionally, and administratively dominated by or under the control of the government" and also that such control must be particular to the body/entity in question and must be pervasive.[3] A "State" under article 12 is a much broader concept than "government," as "State" includes "government" within its fold, whereas "government" includes only the Government of India or

[2] See, The Public Procurement Bill, 2012.

[3] *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, 2002 5 SCC 111.

the Government of a State or of a Union Territory. When the Government of India or the Government of a State enters into a contract for some public procurement in the exercise of its executive power, then it is called a "government contract", and such a contract must satisfy all the requirements of a government contract as stipulated in article 299 of the Constitution.[4] However, the essentials of article 299 are not applicable in general to contracts entered into by "State" under article 12 (other than Government of India/State/Union Territory entering into contracts in the exercise of its executive power). In this paper, "public procurement" has been used in a broad sense of procurement by the State under article 12 of the Indian Constitution, which obviously includes procurement by the Government of India/State/Union Territory.

Procurement (whether by a public or private entity) is essentially made on the basis of a contract (procurement contract), which is entered into between the procuring entity and the supplier/seller/contractor with regard to the subject matter of procurement. As procurement is fundamentally a business/commercial activity, commercial considerations determine decisions pertaining to such activities. The elements of commercial considerations are common, whether the procurement is made by a public authority or a private entity. These elements are:[5] (a) price; (b) requisite specifications of the subject matter of procurement (goods/works/services); (c) ability (including financial soundness) of the tenderer/bidder to deliver the goods/services or to do the work of the requisite standard and quality (as per the specifications); (d) past experience of the tenderer (including successful completion of similar work earlier); (e) time to be taken to deliver the goods or services or to do the work; and (f) the ability of the tenderer to take follow up action, rectify defects or to deliver post-contract services.

Despite some similarities between public procurement and private procurement in terms of "commercial considerations," there exists, *inter alia*, a significant difference between the two, primarily because of the presence of the elements of public law or public interest in every public procurement. As a public authority, the public procurement entity has to observe the elements of public law or public

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[4] Article 299(1) of the Constitution lays down the formalities/essentials of a government contract.

[5] *Raunaq International Ltd. v. IVR Construction Ltd.*, (1999) 1 SCC 492, 494-495.

interest, which, in any public procurement, are as follows:[6] (a) public money is expended for such procurement; (b) the goods/services/works (construction of roads, public buildings, power plants, etc.) to be procured are to be used for a public purpose/public utilities; (c) timely fulfillment of the contract so that the goods/services/works become available to the public expeditiously; and (d) the quality, as poor quality of goods/services/works can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects, leading to an impedance to industrial development or hardship to the public, as well as substantial cost escalation owing to the delay.

The foregoing elements of public interest in public procurement manifest the significance of public procurement, and it would not be an exaggeration to state that one of the parameters to assess good governance in modern times is to evaluate the efficacy of public procurement, i.e. the efficacy of the law and adjudicating processes of public procurement. The *first section* of this paper introduces the theme of this paper. The *second section* provides an overview of the law, policy, and practice relating to public procurement. The *third section* analyses the considered policies adopted by India towards infusing the elements of transparency, integrity, and public accountability in relation to public procurement. The *fourth section* examines the scope of judicial review and the approach of the constitutional courts towards the interpretation of tender documents. Finally, the *last section* concludes the discussion. Unless otherwise stated, in this paper, “constitution” refers to the Constitution of India, and “article” refers to an article of the Constitution of India.

II. Law, Policy and Practice relating to Public Procurement

As public money is expended, such procurement must be made in strict adherence to the principles of integrity, conscientiousness, transparency, and non-discrimination. At present, there is no specific statute enacted by the Parliament of India on the subject of public procurement.[7] Although there is no

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[6] *Id.* at 495.

[7] There was, however, an attempt made in the year 2012 when the Public Procurement Bill was introduced in the Lok Sabha (May 14, 2012) by the Minister of Finance, and it was referred to the Standing Committee on Finance. However, the said legislative attempt did not fructify into a statute. The Bill can be accessed at https://sps.iitd.ac.in/PDF/PPB.pdf (December 19, 2024, 02:55 PM).

specific central statute on public procurement, there is a compilation of rules and orders of the Government of India, known as the General Financial Rules (GFR), to be followed while dealing with matters involving public finances by all Ministries/Departments/Organisations under the Government of India and specified bodies, except as otherwise provided for in the GFR.[8] In addition, the Ministries/Departments/Organisations under the Government of India have to observe the Delegation of Financial Powers Rules, 2024,[9] and also all the circulars and notices issued by the Central Vigilance Commission (CVC) from time to time.[10] Furthermore, there are a few manuals that serve as standard reference documents for public officials involved in public procurement across all Ministries/Departments/attached and subordinate bodies/central public sector enterprises/organisations under the Government of India. The important manuals dealing with public procurement are the Manual for Procurement of Goods (second edition, 2024); the Manual for Procurement of Works (updated up to June 2022); and the Manual for Procurement of Consultancy and Other Services (updated up to June 2022). A Central Government Ministry can also frame its

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[8] The General Financial Rules (GFR) are in the nature of executive instructions, which were issued for the first time in 1947 bringing together at one place all existing orders and instructions pertaining to financial matters. These Rules were subsequently revised and issued as the GFR, 1963; then, as the GFR, 2005; and thereafter, as GFR, 2017. It is, therefore, the GFR, 2017 which is currently in force. (December 19, 2024, 02:57 PM) https://cdnbbsr.s3waas.gov.in/s316026d60ff9b54410b3435b403afd226/uploads/2024/05/2024050711180015660.pdf .

[9] The Delegation of Financial Powers Rules, 2024 promotes quicker and more efficient decision-making without loss of control in financial matters, (December 19, 2024, 02:57 PM) https://doe.gov.in/files/circulars_document/Delegation_of_Financial_Powers_Rules_2024_Booklet.pdf .

[10] The CVC is an apex governmental body in India that is responsible for promoting integrity, transparency, and accountability in the country’s public administration. The mandate of the Commission, as laid down in the CVC Act, 2003, is to combat corruption and ensure integrity in administration and public services, (December 19, 2024, 02:58 PM) https://cvc.gov.in/functions.html .

own procurement procedure. For instance, the Ministry of Defence has enacted its own defence acquisition procedure.[11]

While there is no specific public procurement law at the central government level, nevertheless, a few states such as Assam,[12] Karnataka,[13] Punjab,[14] Rajasthan, and[15] Tamil Nadu[16] have legislated their own state-specific statute on public procurement. Thus, if a public procurement is to be made in these States by the ministries or departments or state government entities, agencies, or instrumentalities of these States, then the respective state-specific statute has to be followed along with the circulars and notices issued by the CVC, procurement manuals and other guidelines, if any. It further goes without saying that in addition to the GFR, the Delegation of Financial Powers Rules, 2024, the circulars and notices issued by the CVC, procurement manuals, or state-specific statutes (wherever relevant) all public procurements are to be made in consistent with Part III principles of the Constitution and the general law governing procurement, for instance, the Indian Contract Act, 1872; the Sale of Goods Act, 1930; the Specific Relief Act, 1963; and so on. Moreover, recognising the special

[11] After being promulgated publicly for the first time in the year 2002, the first Defence Procurement Procedure (DPP) got revised periodically in order to provide impetus to the growing domestic industry and to achieve enhanced self-reliance in defence manufacturing. The current version is the Defence Acquisition Procedure 2020 (DAP 2020), which came into effect from October 01, 2020, and it has been aligned with the vision of "Atmanirbhar Bharat" and aimed at empowering the Indian domestic industry through "Make in India" initiative with the ultimate goal of turning India into a global manufacturing hub.

See, the Defence Acquisition Procedure 2020, (November 26, 2024, 11:18 AM), https://www.ddpmod.gov.in/sites/default/files/DAP%202020%20%2011%20Nov%2021_0.pdf; (November 26, 2024, 11:17 AM), https://pib.gov.in/PressReleasePage.aspx?PRID=1659746 .

[12] The Assam Public Procurement Act, 2017. In exercise of the powers conferred by section 55 of the Assam Public Procurement Act, 2017, on September 02, 2020, Assam also notified the Assam Public Procurement Rules, 2020.

[13] The Karnataka Transparency in Public Procurements Act, 1999.

[14] The Punjab Transparency in Public Procurement Act, 2019.

[15] The Rajasthan Transparency in Public Procurement Act, 2012.

[16] The Tamil Nadu Transparency in Tenders Act, 1998.

need for public-private partnership (PPP) in the field of infrastructure development, several state governments in India have enacted specific statutes for rapid development of physical and social infrastructure in their respective State(s).[17] The general object of these infrastructure development-oriented statutes is to provide for a framework for participation by persons/entities other than the state government and government agencies in designing, financing, constructing, operating, and maintaining infrastructure projects and to establish a Board/Authority for that purpose.

III. Infusion of the Elements of Transparency, Integrity, and Public Accountability in Public Procurement

A few of the most imperative facets of any kind of public procurement process are: exhibiting and practising transparency, accountability, impartiality, fair play in action, and increasing competition among the prospective vendors/contractors. The following are the important modes of public procurement (for the procurement of goods), to be resorted to, by a public authority:

(1) Government e-Marketplace (GeM)

(2) Purchase of goods without quotation

(3) Purchase of goods on the recommendation of the purchase committee

(4) Purchase of goods through the competitive bidding/tender system

  (a) Open tender or advertised tender enquiry

  (b) Limited tender or limited tender enquiry

  (c) Single tender or single tender enquiry

(5) Electronic reverse auctions[18]

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[17] A few examples of such State specific infrastructure development-oriented statutes are: the Gujarat Infrastructure Development Act, 1999; the Andhra Pradesh Infrastructure Development Enabling Act, 2001; the Punjab Infrastructure (Development & Regulation) Act, 2002; the Bihar Infrastructure Development Enabling Act, 2006; the Tamil Nadu Infrastructure Development Act, 2012; the Maharashtra Infrastructure Development Enabling Authority Act, 2018, and so forth.

[18] Rule 167 of the GFR defines “Electronic Reverse Auction”.

(6) Global tender enquiry (GTE)

By way of the afore-stated methods of procurement, described in detail in the GFR, the government has attempted to strike a balance between providing flexibility and ease, on the one hand, and ensuring accountability, transparency, fair play in action, and increasing competition, on the other, in the procurement process. This is important because without reposing trust in the public officials, the overall goal of a welfare state cannot be accomplished. This aspect may be corroborated by referring to a few relevant provisions of the GFR. The Government of India has established the Government e-Marketplace (GeM) for common-use goods and services. Rule 149 of the GFR provides that the procurement of goods and services by central government ministries or departments through GeM portal will be mandatory for goods or services available on GeM. Detailed procedures have been provided for in the GFR for utilising the GeM portal for procurement of goods and services. Rule 154 of the GFR provides that in case a certain item is not available on the GeM portal, purchase of goods upto the value of Rs. 50,000 only on each occasion may be made without inviting quotations or bids on the basis of a certificate to be recorded by the competent authority. Rule 155 of the GFR prescribes that in case a certain item is not available on the GeM portal, then purchase of goods costing above Rs. 50,000 and up to Rs.5,00,000 on each occasion may be made on the recommendations of a duly constituted local purchase committee consisting of three members of an appropriate level as decided by the Head of the Department. Before making any such recommendation, the committee is to survey the market so as to ascertain the reasonableness of rate, quality, and specifications and identify the appropriate supplier. The members of the duly constituted local purchase committee are to jointly record a certificate to that effect. As per Rule 162 of the GFR, the limited tender enquiry method is generally to be adopted when the estimated value of the goods to be procured is up to Rs.50 lakhs. In this case, the bidding document would be sent directly to the registered/empanelled suppliers for the goods in question. The number of supplier firms in a limited tender enquiry must be more than three. Further, an organisation also has to publish its limited tender enquiries on GeM as well as on the Central Public Procurement Portal (CPPP). As per Rule 161 of the GFR, the advertised tender enquiry method has to be used for the procurement of goods of an estimated value of Rs.50 lakhs and above. In this case, the advertisement has to be given on CPPP at www.eprocure.gov.in and also on GeM. Further, the procuring entity should also publish all its advertised tender enquiries on its website.

In order to safeguard accountability, transparency, and to stimulate competition, the GFR provides for e-publishing (Rule 159) and e-procurement (Rule 160). Nevertheless, Rule 159 also specifies that where confidentiality is required in view of national security, then such cases would be exempted from the mandatory e-publishing requirement. With a view to promoting competition, Rule 161(iv)(a) of the GFR gives the freedom to the Ministry or Department to also look for suitable competitive offers from abroad, where the goods of the required quality, specifications, etc., are not available in India. Nonetheless, no Global Tender Enquiry (GTE) is to be generally resorted to for tenders up to Rs.200 crore or such limit as may be prescribed by the Department of Expenditure from time to time; however, in exceptional cases, for tenders below such limit, where the Ministry or Department feels that there are special reasons for a GTE, it may record its detailed justification and seek prior approval for relaxation to the general rule from the competent authority specified by the Department of Expenditure.[19]

Rule 173 of the GFR also lists down a few important measures for ensuring transparency, competition, fairness, and elimination of arbitrariness in the procurement process. Some of these important measures are as under:[20]

(a) The tender document should be free from ambiguities. It should be self-contained and comprehensive, i.e. all essential information, which a bidder needs for sending a responsive bid should be clearly spelt out in the bidding document in simple language. Such information includes, but is not limited to: (i) unambiguous description and specifications of goods including the nature, quantity, time and place(s) of delivery; (ii) the criteria for eligibility and qualifications (minimum experience, past performance, technical capability, manufacturing facilities and financial soundness, etc.) to be met by the bidders; (iii) date, time, place, and procedure for sending the bids; (iv) date, time and place of opening of

[19] See, GFR, Rule 161(iv)(a).
[20] *Id.* Rule 173.

the bid; (v) criteria for evaluation of bids; and (vi) terms of the procurement contract.

(b) Whenever any modification is made in the tender document or any clarification is issued that materially affects the terms contained in the tender document, the procuring entity has to publish/communicate such modification or clarification in the same manner as the publication/communication of the initial tender document was made. The procuring entity may extend the time limit for submission of the bids if, in its opinion, more time is required by bidders to take into account the modification/clarification while submitting their bids.

(c) Where enquiries are made by the bidder regarding rejection of a tender/bid or non-issuance of a tender document to a prospective bidder, the reasons for the same must be revealed.

(d) A reasonable timeframe for the preparation and submission of bids must be provided. The minimum time to be allowed for submission of bids for domestic tendering in general is three weeks from the date of publication of the tender notice or availability of the tender document for sale, whichever is later; and in case of global tendering, the minimum time period should be kept as four weeks for both domestic and foreign bidders.

(e) With the aim of promoting competition and attracting a sufficient number of bidders, the specification of the subject matter should be broad-based to the extent possible.

(f) Bid opening should be done publicly, and authorised representatives of the bidders should be permitted to attend the bid opening.

(g) Wherever necessary, a suitable provision should be kept in the tender document for one or more of the pre-bid conferences for clarifying issues and doubts, if any, about the specifications and other aspects of the procurement or the tender document. The date, time, and place of the pre-bid conference should be indicated in the tender document, and it should be sufficiently ahead of the bid opening date. The outcome (clarifications provided or changes made in the tender document) of such pre-bid conference has to be intimated to all bidders, and be exhibited on the website where the tender was published.

(h) No bidder is to be permitted to alter or modify their bid after the expiry of the deadline for receipt of the bids.

(i) Detailed and unequivocal criteria for determining responsiveness should be stated in the tender document, so as to avoid disputes on this ground.

(j) Criteria for evaluation of bids, as stated in the tender document, must be strictly adhered to for the purpose of evaluating the bids; no new condition should be considered for evaluation of the bids.

(k) The name of the successful bidder, to whom the contract is awarded, is to be mentioned on the CPPP, the website of the ministry/department concerned, as well as on its notice board or bulletin.

(l) In certain situations, the procuring entity is justified in rejecting all the bids. These situations are: (i) where there is no effective competition; (ii) where all the submitted bids are non-responsive to the requirements of the tender document; (iii) where the prices quoted by all the bidders are substantially higher than the updated cost estimate or available budget; and (iv) where no bid meets the minimum technical qualifying score.

(m) Even when only one bid is submitted, the procuring entity may validly go ahead with the procurement process provided the following conditions are satisfied: (i) that the procurement was satisfactorily advertised and sufficient time was given for submission of bids; (ii) that the qualification criteria were not unduly restrictive; and (iii) that the price quoted is reasonable in comparison to the market value. If a limited or open tender results in only one effective offer, then it is to be treated as a single tender contract.

In light of the provisions provided for in the GFR, the foregoing discussion substantiates how the meticulous executive instructions of the GFR ensure efficiency, transparency, objectivity, impartiality, and accountability in public procurement. Furthermore, no official of a procuring entity or a bidder can act in contravention of the code of integrity.[21]

[21] *Id.* Rule 175 (1).

IV. Scope of Judicial Review and Approach of the Constitutional Courts towards Interpretation of Tender Documents

A. Scope of Judicial Review

It is the constitutional mandate to conform to the principles of equality, fairness, fair play in action, justness, non-discrimination and reasonableness in every action of the State, whether it is like legislative action or executive or administrative action. Accordingly, any action of such an entity can be challenged on the ground of infringement of Part III of the Constitution or for the violation of the principles of natural justice. In *Jagdish Mandal v. State of Orissa*, the Supreme Court held that "judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias, and *mala fides*. Its purpose is to check whether a choice or decision is made 'lawfully' and not to check whether a choice or decision is 'sound'".[22] This principle of judicial review is squarely applicable to contractual matters (including contracts for public procurement) as well. However, the scope of judicial review in a contractual dispute is limited. Where both the parties to a contractual dispute are private entities, the writ jurisdiction of the constitutional court cannot be invoked. Even where one of the parties to the contract is a state, judicial review by the constitutional court is permissible on well-established grounds only. Even in a fit case for judicial review, the power of the court while reviewing a decision is to examine whether or not the decision taken by the executive authority suffered from illegality, irrationality, procedural impropriety or arbitrariness.[23] The doctrine of judicial review does not transform the writ courts into appellate

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[22] (2007) 14 SCC 517, 531 (para 22).

[23] In *Sterling Computers Ltd. v. M/s. M&N Publications Ltd.* (AIR 1996 SC 51, 56), it was held: "While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'." In *B.S.N. Joshi v. Nair Coal Services Ltd.* [2006 (11) SCALE 526], the Supreme Court observed: "It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal... the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record." See also, *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*, (2005) 6 SCC 138.

authorities over administrative/executive authorities. The court should be mindful of its limitations and the hardships (including unnecessary loss to the public exchequer) that needless interference in commercial matters could cause, and it is all the more important to adopt judicial restraint in contracts involving technical issues.[24] The power of the court, while exercising its writ jurisdiction, is not to examine the merit of the decision as to whether the decision of the authority was wise or not. A mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere.[25] In *Tata Cellular v. Union of India*,[26] the Supreme Court accentuated the need to strike a right balance between administrative discretion on the one hand and the need to remedy any unfairness, on the other. The Supreme Court underlined the limitations of the court in contractual disputes in the following words:[27]

> "If the decision relating to the award of contract is bona fide and is in the public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interests at the cost of public interests or to decide contractual disputes."

For the purpose of examining the scope of judicial review in contractual disputes, all contractual disputes may be grouped into two categories: (a) "disputes pertaining to award of contracts" and (b) "post-award contractual disputes", i.e. disputes arising between the parties during the course of implementation of the contract. The category (a) disputes are disputes in relation to an administrative decision, as the award of a contract is an administrative/executive decision. Therefore, such a decision may be challenged on the grounds of a violation of Part III principles. If there is a case clearly made out on the grounds of illegality, irrationality, or procedural impropriety, then the constitutional court is justified

[24] *Silppi Constructions Contractors v. Union of India*, 2019 SCC OnLine SC 1133; *N.G. Projects v. Vinod Jain*, (2022) 6 SCC 127. See also, *Air India Limited v. Cochin International Airport Ltd.*, (2000) 2 SCC 617.

[25] *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited*, (2016) 16 SCC 818.

[26] (1994) 6 SCC 651.

[27] *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517.

in entertaining a writ petition. When a writ petition is filed in the constitutional court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition; to be precise, unless the court is satisfied that there exists a substantial amount of public interest or the transaction is entered into *mala fide*, the court should not intervene under its writ jurisdiction in disputes between two rival tenderers.[28] When a petition is filed as a public interest litigation (PIL) challenging the award of a contract by the State or any public body, the court must satisfy itself that the party which has brought the litigation is litigating *bonafide* for public good, i.e. the court must be careful in weighing conflicting public interests before intervening in such a dispute because intervention by the court may ultimately result in delay in the public procurement.[29]

On the other hand, category (b) disputes arise during the course of implementation of the contract (for instance, disputes relating to interpretation of the contract, disputes relating to payment terms, or delivery schedule, and so on) and, as such, are not generally executive decisions. These disputes are mainly disputes regarding questions of fact, and questions of fact are primarily decided based on an appreciation of evidence, and civil courts (or arbitral tribunals, if the contract has an arbitration clause) are best suited to appreciate evidence and decide questions of fact. Therefore, for category (b) disputes, a writ petition is normally not entertained. However, in exceptional cases where it is a category (b) dispute, but elements of public interest are also involved, and the court is satisfied on the material before it that the allegation needs further examination, then the constitutional court will be justified in entertaining a writ petition (in such exceptional cases).

B. Approach of the Constitutional Courts towards Interpretation of Tender Documents

In a contractual dispute (including contracts for public procurement), the main role of the court is to decide the dispute by interpreting the contract. The exercise of interpreting the contract by the court is objective in nature. In the landmark case of *Investors Compensation Scheme Ltd. v. West Bromwich Building*

[28] *Raunaq International Ltd. v. IVR Construction Ltd.*, (1999) 1 SCC 492.
[29] *Id.*

Society,[30] Lord Hoffmann explained the principles by which contractual documents are construed these days. He stated, "Interpretation is the ascertainment of the meaning that the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract." There are, nevertheless, inherent limitations on the power of the court while interpreting a contractual document. The court cannot rewrite or improve a contract for the parties. It cannot impose its own judgment on the parties to the contract vis-à-vis the suitability of its terms and clauses. In *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*,[31] Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

> "[T]he court does not make a contract for the parties. The court will not even improve the contract that the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract that the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them; it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

The principles and rules of interpretation of contracts are applicable to the interpretation of tender documents also. The scope of judicial review in relation to disputes pertaining to tender matters (including the interpretation of tender documents) has been the subject matter of discussion in various decisions of the

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[30] (1998) 1 All ER 98.

[31] [1973] 1 WLR 601, 609. Cited by the Supreme Court of India in *Nabha Power Ltd. v. Punjab State Power Corporation Ltd.*, (2018) 11 SCC 508.

Supreme Court.[32] But it is also to be remembered that while interpreting tender documents, the court has to observe more limitations than it does while interpreting any other contractual documents. Reaffirming the principles laid down in *Ramana Dayaram Shetty v. International Airport Authority of India*,[33] the Supreme Court in *G.J. Fernandez v. State of Karnataka,*[34] reiterated that the tender inviting authority has the right to punctiliously and rigidly enforce the terms of the tender, and if a party approaches the court for an order restraining the tender inviting authority (the employer) from strictly enforcing the terms of the tender, the court would decline to do so. In the said case, the Court also endorsed that the tender inviting authority could deviate from the terms and conditions of the tender, as long as a level playing field is maintained, and also such deviation must not result in any arbitrariness or discrimination.

One of the fundamental principles evolved by the Supreme Court of India in the matter of the interpretation of tender documents is that the authority authoring and floating the tender document is the best judge as to how the documents have to be interpreted; and if two interpretations are possible, then the interpretation of the author should be accepted. In such cases, the courts will only interfere to prevent arbitrariness, irrationality, bias, *malafides* or perversity.[35] In *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited*,[36] the Supreme Court held that "[i]t 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."[37] The Court also held that "it is well settled that unless arbitrariness or *mala fide* on the part of the tendering authority is alleged, the

[32] (2022) 5 SCC 362.
[33] (1979) 3 SCC 489.
[34] (1990) 2 SCC 488.
[35] *Silppi Constructions Contractors v. Union of India*, 2019 SCC OnLine SC 1133. In *Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners and Transport Contractors*, (2020 SCC OnLine SC 1035), the Supreme Court again restated that the tender inviting authority (who authored the tender document) is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings.
[36] (2016) 16 SCC 818.
[37] *Id.* at 825 (para 15).

expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court."[38] The tender inviting authority should be allowed to carry out the purpose for which the tender is floated. Tender documents are often drafted by experts with the necessary expertise and skills, and therefore, their interpretation should not be thrust aside unless there is manifest arbitrariness, discrimination, or perversity. In *Montecarlo Ltd. v. National Thermal Power Corporation Ltd*., the Supreme Court stated as follows:[39]

> "Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or the procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose, and there has to be allowance of free play in the joints."

In *Michigan Rubber (India) Ltd. v. State of Karnataka*,[40] the Karnataka State Road Transport Corporation (KSRTC) floated a tender for the supply of tyres, tubes and flaps specifying certain pre-qualification criteria. The appellant company filed a writ petition in the High Court of Karnataka challenging the said pre-qualification criteria. Subsequent to the filing of the said writ petition and before the opening of the bids, the KSRTC amended the tender conditions as were incorporated in the earlier tender document, replacing Conditions No. 2(a) and 2(b) with Conditions No. 4(a) and 4(b). In Condition No. 4(a), the classification of the vehicles was maintained, but the names of the manufacturers

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[38] *Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners and Transport Contractors*, 2020 SCC OnLine SC 1035.
[39] (2016) 15 SCC 272, 288 (para 26).
[40] (2012) 8 SCC 216.

were deleted. It was the grievance of the appellant company that the pre-qualification criteria[41] were incorporated to exclude the appellant company and other similarly situated companies from the tender process on wholly extraneous grounds, which was unsustainable in law; therefore, the decision of the KSRTC in restricting their participation in the tender to Original Equipment Manufacturer (OEM) suppliers was totally unfair and discriminatory. The Single Judge of the High Court dismissed the writ petition. On appeal, the Division Bench also dismissed the same. When the matter reached the Supreme Court in appeal, the Court found that in order to have the best of the equipment for the vehicles, which would ply on road carrying passengers, the KSRTC thought it fit that the criteria for applying for tender for procuring tyres should be of a high standard and deemed it fit that only those manufacturers who satisfied the eligibility criteria should be permitted to participate in the tender. It was brought to the notice of the Court that the two impugned conditions were incorporated in the tender document pursuant to a decision of the Contract Management Group (CMG) of the KSRTC[42], which is an institutional mechanism for the purpose of devising a proper method in the matter, *inter alia*, of procurement of materials for the KSRTC. Agreeing with the reasoning of the High Court, on examination of all the relevant facts, the Supreme Court was satisfied that the impugned conditions could not be classified as arbitrary, discriminatory, or *mala fide*.

In *Jagdish Mandal v. State of Orissa*,[43] the following guidelines/test provided by the Supreme Court before interfering in tender or contractual matters are noteworthy:[44]

> "[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;

[41] As specified in Conditions No. 2(a) and 2(b) [amended Conditions No. 4(a) and 4(b)] of the tender document.
[42] The said Group comprised high level officials representing different departments of KSRTC.
[43] (2007) 14 SCC 517.
[44] *Id.* at 531 (para 22).

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';
>
> (ii) Whether public interest is affected.
>
> If the answers are in the negative, there should be no interference under Article 226."

Agmatel India Pvt. Ltd. v. Resoursys Telecom[45] is a significant judgment on interpretation of tender documents. In this case, on February 12, 2021, a notice inviting tender (NIT) was issued by Navodaya Vidyalaya Samiti (NVS) on the GeM portal for the supply of tablets for school children. The relevant terms and conditions pertaining to "Experience" and "Past Performance" of the bidders in the NIT may be extracted as follows:

> "1. Experience Criteria: … the Bidder or its OEM {themselves or through reseller(s)} should have regularly manufactured and supplied the same or similar category products to any Central / State Govt Organization / PSU / Public Listed Company for the number of Financial years as indicated above in the bid document before the bid opening date.
>
> 4. Past Performance: The Bidder or its OEM (themselves or through reseller(s)) should have supplied the **same or similar Category Products for 80% of bid quantity**[46]**, in at least one of the last three Financial years before the bid opening date to any Central/State Govt Organization / PSU / Public Listed Company**.
>
> ...
>
> 14. Experience Criteria: The Bidder or its OEM {themselves or through reseller(s)} should have regularly, manufactured and supplied **same or**

[45] (2022) 5 SCC 362.

[46] This quantity requirement of 80% was reduced to 60% by way of a corrigendum issued by the tender inviting authority.

> **similar Category Products** to any Central/ State Govt Organization / PSU / Public Listed Company for 3 years before the bid opening date…"
>
> (Emphasis in bold supplied)

Resoursys Telecom submitted its bid for the product, i.e. "tablet" which was manufactured by an Indian company namely, Lava International Limited, after having necessary approvals from the manufacturer (OEM). The technical bid of Resoursys Telecom was rejected by NVS, stating the reason of rejection as "technical specification mismatch". The reason for rejection given by NVS, *inter alia*, was as follows: "1. Does not qualify past performance … of tender document for any of the FY 2018-19, 22019-20, or 2020-21. Work Orders of smartphones, laptops, Aadhar Kits, Printers, Power-bank, etc., are not considered as the same or similar category products of tablets". In an attempt to assert its fulfilment of the above-referred past performance criterion, Resoursys Telecom relied upon the statements made by its OEM that the supplies were made in the financial year 2019-2020 to Punjab Infotech, Directorate of Welfare of Scheduled Castes-Assam, Directorate of Welfare of Plain Tribes & Backward Classes–Assam, and Directorate of Women and Child Development, Kerala. NVS, on the other hand, reasoned that only smartphones were supplied to Punjab Infotech and to the Directorate of Women and Child Development, Kerala; and the product "smartphone" did not fall within the description of "same or similar category product" vis-à-vis the product required under the NIT in question, i.e. "tablet".

Challenging the decision of NVS, Resoursys Telecom preferred a writ petition on the ground, *inter alia*, that the process was vitiated due to an arbitrary and whimsical decision taken by NVS. The contract in question was awarded to Agmatel (the successful bidder). It is, thus, the requirement concerning "same or similar category products" in the tender conditions that led to the dispute. Resoursys Telecom essentially argued "that a 'Tablet' was an electronic product belonging to the 'same or similar category' as a 'Smart Phone'; and that the decision of the NVS, excluding 'Smart Phones' from 'same or similar Category Products' was unreasonable and against the principles of fair play and logic." The High Court, however, held that the product "smart phone" was definitely a similar category product to "Tablet"; and NVS had been unjustified in giving a restrictive meaning to the terms of NIT; and if at all there was any ambiguity, the tender inviting authority could not be left to the option of interpreting the terms contrary to their plain meaning. The High Court even went on find the elements of similarity between “Smartphones” and “Tablets”. Referring to *Nabha Power Ltd. v. Punjab SPCL*,[47] the High Court observed that NVS could have neither implied any term in the tender nor given a restrictive meaning to the clear language of the tender; and referring to the doctrine of “contra proferentem”,[48] the Court held that if at all there was an ambiguity, it would be construed against the drafter of the tender, and in the absence of ambiguity, the plain meaning of the condition must be complied with.

In appeal, the Supreme Court held that the excessive analysis and the evaluation of all the specifications of the two products, namely, “Smartphones” and “Tablets,” as done by the High Court was unnecessary. The decision of NVS, in view of the Supreme Court, could not be said to be totally baseless, absurd or irrational, or illogical. The apex Court also noted that while supporting its process of reasoning, the High Court referred to such principles of contractual interpretation that were entirely inappropriate and beyond the periphery of the question involved in the case. The decision of the High Court was, accordingly, set aside. The following observation of the Supreme Court is noteworthy:[49]

> “Viewed from any angle, interference by the High Court in this matter does not appear justified, particularly when no case of mala fide or bias is alleged. Every decision of the administrative authority that may not appear plausible to the court cannot, for that reason alone, be called arbitrary or whimsical. The High Court, in the present matter, has obviously proceeded with an assumption that the view as being taken by it, in acceptance of the case of the writ petitioner, was required to be substituted in place of the views of the tender inviting authority. That has been an error of law and cannot sustain itself in view of the consistent binding decisions of this Court…”

[47] (2018) 11 SCC 508.

[48] As referred to in the case of *United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd.*, (2016) 3 SCC 49.

[49] (2022) 5 SCC 362, 391 (para 33).

In *N.G. Projects Limited v. Vinod Kumar Jain,*[50] on June 07, 2019, the Road Construction Department of Jharkhand invited tenders for reconstruction of certain road. Respondent 1 participated in the tender process and also submitted the bid security in the form of a Bank Guarantee (BG). However, the said tender was cancelled on August 20, 2019; and subsequently, a fresh notice inviting tender (NIT) was issued for the said reconstruction work. The evaluation committee declared the respondent's bid as non-responsive on the ground that it submitted a letter along with the amended BG to the effect that such letter formed an integral part of the BG, which was not in the format as prescribed in the Standard Bidding Document. Additionally, apart from some other discrepancies, the BG was valid from July 08, 2019 to March 07, 2020, which was prior to the date on which the second NIT was issued. The appellant (N.G. Projects) was declared the successful bidder and the work contract was issued to it, and it started the work. The respondent filed a writ petition for quashing the decision of the tender evaluation committee holding its bid to be non-responsive. The Single Bench of the Jharkhand High Court set aside the award of contract granted to the appellant. The Division Bench held that the decision of the tender evaluation committee in accepting the technical bid of the successful tenderer/appellant while rejecting the technical bid of the petitioner did not conform to uniform standards as professed by it. When the decision of the High Court was challenged before the Supreme Court, the Supreme Court held that the interference in the contract awarded to the appellant was wholly unwarranted and had caused loss to public interest, as the construction of roads is an essential part of infrastructural development in any state. The Court reasoned that, having been fully aware of the fact that the first tender was no longer in force and that there was specifically a new tender in place, the respondent was required to submit a BG in the format specified as per the Standard Bidding Document. As the respondent opted to use the same BG, which was drawn earlier (with a letter from the bank issuing the BG indicating that there was an amendment with regard to the dates), the relaxation in the format of the BG was rightly denied by the tender inviting authority. The Court noted that "[i]t is patently clear that if the format for a bank guarantee is an essential condition of the contract, the format in which

[50] (2022) 6 SCC 127.

the respondent has opted to submit it is a substantial variation in the terms of the contract".[51]

In *M/s Om Gurusai Construction Company v. M/s V.N. Reddy*,[52] the Supreme Court was seized with the task of interpreting a clause in the tender document. The clause is provided as under:

> "L-I shall submit the demand draft/BG or FDR additional performance security in the office of the Executive Engineer within 2 days of opening of envelope-2. This duration of two days will not be relaxed under any circumstances. Failure to do so will result in forfeiture of EMD and the contractor/Joint Venture (jointly or individually) shall be debarred from participating in any bid of Water Resources Department/VIDC, Nagpur for two years …"

On January 18, 2021, the afore-said tender was floated regarding some land development work. After the opening of the technical bid, Om Gurusai (appellant) and V.N. Reddy (writ petitioner-first respondent) were found eligible. The financial bid was opened on March 12, 2021, and Om Gurusai's bid was found to be the lowest (L1). As per the foregoing clause, Om Gurusai was to furnish the additional performance security within a period of two working days. March 13, 2021, was Saturday (bank holiday), and March 14, 2021, was Sunday, and hence, two working days would expire only on March 16, 3021. However, there was a nationwide employees strike in the nationalised banks on March 15 and 16, 2021. Owing to this, the additional performance security was submitted on March 17, 2021, and the tender inviting authority (after satisfying itself of the existence of the strike) accepted it and issued the work order on May 07, 2021. Being aggrieved by the decision of the tender inviting authority, the first respondent filed a writ petition, challenging the issuance of the work order. In respect of some other work, another bidder had furnished the additional performance security with a demand draft dated March 15, 2021, from a scheduled bank; this was an attempt to prove that it was possible for a bidder to furnish the additional performance security deposit on March 15, 2021. Allowing

[51] *Id.* at 143 (para 18).

[52] 2023 SCC OnLine SC 1051.

the writ petition, the Division Bench of the Bombay High Court (Nagpur Bench) held the following while interpreting the foregoing clause:

(a) that condition prescribed in the said clause was mandatory, as the consequences for non-compliance were also prescribed;

(b) that the clause provided for an essential condition;

(c) that the period prescribed for furnishing the additional performance security was earlier eight days and was consciously reduced to two days with a further condition that the said period would not be relaxed/extended under any circumstances whatsoever; and

(d) that the tender inviting authority had no power under the tender document to relax/extend the time specified in a clause that warranted strict compliance.

Thus, interpreting the clause in a strict literal sense, the High Court held that the tender inviting authority could not have accepted the additional performance security from the appellant on March 17, 2021, as it was the third working day from the opening of the financial bid. Eventually, the matter reached the Supreme Court on appeal. It was an established fact that the bidders were to provide an undertaking in respect of depositing the EMD and performance security through the bank account maintained by them (bidders). As the appellant maintained its account with Bank of Maharashtra (a nationalised bank), it could not use any other account to perform the banking transaction. So, the functioning of scheduled banks on March 15 could not be argued against by the appellant. Setting aside the High Court's judgment, the Supreme Court held that the appellant appropriately complied with the condition of furnishing the additional performance security at the earliest possible time (as March 13 and 14 were holidays, and on March 15-16, nationalised banks could not function owing to strike), that it could possibly comply. Thus, the deposit of the additional performance security on March 17, 2021 was in due compliance of the tender conditions, and that there was no breach of the foregoing clause. The Court relied upon the well-accepted legal principle *Lex non cogit ad impossibilia*[53], which

[53] The Supreme Court relied upon this maxim in cases, such as, *Raj Kumar Dey v. Tarapada Dey*, (1987) 4 SCC 398; *HUDA v. Dr. Babeswar Kanhar*, (2005) 1 SCC 191, to name a few.

means "no one can be compelled to perform an impossible task". The reasons for the decision of the Supreme Court were as follows:

(a) There was no *mala fide* alleged, and the interpretation, as adopted by the tender inviting authority, could not be said to be perverse.

(b) The decision of accepting the additional performance security on March 17, 2021 and the issuance of the work order were neither arbitrary nor irrational.

(c) More so, it was not a decision, which no responsible authority acting reasonably and in accordance with law could have reached.

(d) Lastly, on the basis of the facts, no case of prejudice to public interest by the award of the work could be made out.

Thus, it is possible that conditions of a contract/tender document may not be interpreted strictly, even though a clause provides for strict compliance, if literal interpretation compels a person to do an act that is impossible to perform (*lex non cogit ad impossibilia*). In *Jespar I. Slong v. State of Meghalaya*,[54] the Supreme Court held that "the fixation of a value of the tender is entirely within the purview of the executive, and 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". The Supreme Court[55] has developed a rule of interpreting a tender document that the authority who has authored the tender documents is the best person to understand and appreciate its requirements and interpret its documents, and therefore, the courts must defer to this understanding and appreciation of the tender documents by the tender-inviting authority unless there is *mala fide* or unreasonableness in the understanding or appreciation.

SARR Freights Corporation v. CJDARCL Logistics Ltd.[56] is yet another important, recent judgment on the interpretation of tender documents. In this case, on August 30, 2021, an e-tender was floated by M/s. RITES Ltd. (respondent No. 2) for transporting 34 railway coaches to Mozambique (Africa). The appellant was awarded the contract, whereas the bid of respondent No.1 was

[54] (2004) 11 SCC 485, 494 (para 17).
[55] See, *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited*, (2016) 16 SCC 818; *Uflex Limited v. Government of Tamil Nadu*, (2022) 1 SCC 165).
[56] 2023 SCC OnLine SC 1578.

found to be disqualified. Respondent No.1 made a representation to RITES stating that the appellant was ineligible to submit the bid on the grounds of the existing two banning orders preventing them from so doing. On September 15, 2021, respondent No.1 filed a writ petition before the Delhi High Court seeking to assail the tender awarded to the appellant. The relevant clauses of the tender read as under:

> "2. Disqualification on Certain Grounds
>
> Even though the bidders may meet the above qualification criteria, they are subject to being disqualified if they have
>
> …
>
> (d) their business banned or suspended by any Central/State Government Department/Public Undertaking or Enterprise of Central/State Government and such ban is in force."

The appellant replied to RITES informing them that the two banning orders issued against the appellant were sub judice and interim orders (one by the Delhi High Court and the other by the Andhra Pradesh High Court) had been passed in respect of the banning orders.[57] RITES opined that the appellant was not disqualified from tendering, as the banning orders were not "in force" on account of the interim orders and, thus, had been found eligible. However, the High Court held that the stay order would not efface the banning orders and, thus, the appellant would have been disqualified. In appeal before the Supreme Court, interpreting the phrase "and such ban is in force" [clause 2(d)], the Supreme Court held that the "obvious intent was that if that particular ban, having been imposed, but not in force, it would not disqualify a tender". The Supreme Court was convinced that it could not be said that the appellant had suppressed the banning orders or the interim order, as opined by the Delhi High Court. By referring to *Jagdish Mandal v. State of Orissa*,[58] the Supreme Court once again reiterated that "the interpretation of a tendering authority must prevail unless

[57] Vide order dated May 25, 2021, the Delhi High Court stayed the effect and operation of the banning order dated February 09, 2021; and vide order dated July 30, 2021, the appellant was permitted to participate in all other tenders except floated by the FCI.
[58] (2007) 14 SCC 517.

there is any mala fides alleged or proved."[59] Thus, the High Court's judgment was set aside.

(a) Principles and Rules of Interpreting Tender Documents

Through several judgments,[60] the Supreme Court has laid down various principles and rules of interpreting tender documents, which may be summarised as under:

(1) The court has to observe more limitations/restraints than what it has to do while interpreting other contractual documents.

(2) Where a decision is taken that is transparently consistent with the language of the tender document or realises the purpose for which the tender was floated, the court should follow the principle of restraint.[61]

(3) The tender invitation authority is the best judge as to how the documents have to be interpreted. In the event of two possible interpretations, the interpretation of the tender inviting/authoring authority should ordinarily be accepted; the court can interfere only to prevent arbitrariness, irrationality, illegality, favouritism, procedural impropriety, bias, *mala fides*, or perversity.[62]

(4) The occasion for interference by the writ court would arise only if the questioned decision fails on the salutary tests, namely,

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[59] *SARR Freights Corporation v. CJDARCL Logistics Ltd.*, 2023 SCC OnLine SC 1578.

[60] Such as, *Jespar I. Slong v. State of Meghalaya*, (2004) 11 SCC 485; *Jagdish Mandal v. State of Orrisa*, (2007) 14 SCC 517; *Maa Binda Express Carrier v. North-East Frontier Railway*, (2014) 3 SCC 760; *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited*, (2016) 16 SCC 818; *Montecarlo Ltd. v. National Thermal Power Corporation Ltd.*, (2016) 15 SCC 272; *Silppi Constructions Contractors v. Union of India*, 2019 SCC OnLine SC 1133; *Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners and Transport Contractors*, (2020 SCC OnLine SC 1035); *Uflex Limited v. Government of Tamil Nadu*, (2022) 1 SCC 165); *Agmatel India Private Limited v. M/s Resoursys Telecom*, (2022) 5 SCC 362; *M/s Om Gurusai Construction Company v. M/s V.N. Reddy*, 2023 SCC OnLine SC 1051.

[61] *Montecarlo Ltd. v. National Thermal Power Corporation Ltd.*, (2016) 15 SCC 272.

[62] *Silppi Constructions Contractors v. Union of India,* 2019 SCC OnLine SC 1133.

irrationality or unreasonableness or bias or procedural impropriety.[63]

(5) The court cannot substitute its preferred interpretation of the tender document with the one adopted by the author of the tender document (the procuring entity), who has to be regarded as the best person to understand its requirements.[64]

(6) In the absence of alleged/apparent arbitrariness or *mala fide*, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be interfered with by a writ court because tenders involving highly complex technical matters require understanding and appreciation of the nature of work and the purpose it is going to serve. Technical bids (bidder's expertise, and technical capability and capacity) in such cases are scrutinised and evaluated by technical experts (and even consultants are appointed for technical and/or financial evaluation).[65]

(7) The "contra proferentem" rule is applied in case of ambiguity; for instance, it is applied in insurance contracts, for such insurance contracts are drafted by the insurer and its ambiguity cannot be allowed to operate against the insured. The reason for the general inapplicability of the "contra proferentem" rule in tender can be gauged from a simple situation: what if two different bidders put forth two different interpretations as to the eligibility conditions in a notice inviting tender, the question would always remain as to which of the two interpretations is to be accepted?[66]

(8) The conditions of a contract/tender document may not be interpreted strictly (even though a clause provides for a strict compliance) if literal interpretation compels a person to do an act which is impossible to perform (*lex non cogit ad impossibilia*). This is a discretion of the tender inviting authority

[63] *Agmatel India Private Limited v. M/s Resoursys Telecom*, (2022) 5 SCC 362.
[64] *Id.*
[65] *Montecarlo Ltd. v. National Thermal Power Corporation Ltd.*, (2016) 15 SCC 272.
[66] *Agmatel India Private Limited v. M/s Resoursys Telecom*, 2022 INSC 126.

which he can exercise judicially in view of the altered circumstances, and that the court would not ordinarily interfere with such exercise provided that there is no *mala fide* or perversity in the exercise of such discretionary powers.[67]

(9) Terms of the tender, subject to which tenders are invited, are beyond the scope of judicial scrutiny, unless it is found that the terms have been tailor-made to benefit any particular tenderer or class of tenderers.[68]

(10) Judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than judicial interpretation of statutes.[69]

V. Conclusion

Through the foregoing discussion, this paper has addressed all the three research questions. With regard to the first research question, it has been ascertained that although at the central level there is no single statute, but the GFR along with the various manuals govern the public procurement. Further, relevant statutes will have to be aptly observed. The executive has been allowed the necessary administrative flexibility and leeway in the best interest of public. With reference to the second and the third research questions, it may be submitted that through a catena of judgments, writ courts (particularly the Supreme Court of India) have crystallised the scope of judicial review in contractual disputes and have also concretised the principles of interpretation of tender documents. On the subject of judicial review of administrative decisions relating to public procurement, it has been established by the Supreme Court that the modern approach of the court is that of "judicial restraint", and that the court would review the decision relating to public procurement only on the established grounds of "illegality", "irrationality" and "procedural impropriety". Further, the court in such a review does not review the decision as a court of appeal; rather, it only reviews the manner in which the decision was taken. The court should be mindful of its limitations and the hardships which unnecessary interference in commercial matters could cause; and it is all the more important to adopt judicial restraint in

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[67] *M/s Om Gurusai Construction Company v. M/s V.N. Reddy*, 2023 SCC OnLine SC 1051.

[68] *Maa Binda Express Carrier v. North-East Frontier Railway*, (2014) 3 SCC 760.

[69] *Bharat Coking Coal Ltd. v. AMR Dev Prabha*, 2020 SCC OnLine SC 335.

contracts involving technical issues.[70] The court is to exercise extra caution in case of mega or infrastructure projects, for any unnecessary stay order or judicial interference may cause delay in the implementation of such projects causing serious inconvenience to the public. In the matter of interpretation of tender documents, one essential principle developed by the Supreme Court is that the owner/tender inviting authority, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its tender documents.[71] In interpreting a tender document, the court cannot embark upon carrying out technical evaluation or engage in making comparison between the bids. That is wholly impermissible, as that would amount to getting into the domain the executive authority without having the required special skills and technical knowledge, besides being beyond the scope of judicial review.

[70] *Silppi Constructions Contractors v. Union of India*, 2019 SCC OnLine SC 1133; *NG Projects v. Vinod Jain*, (2022) 6 SCC 127.
[71] *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited*, (2016) 16 SCC 818.