SCOPE OF JUDICIAL REVIEW IN THE MATTERS OF AWARD OF CONTRACT BY PUBLIC AUTHORITIES

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ABSTRACT

“Today in modern democratic world, role of the state has been transformed from the Police state to welfare state and now the state not only protects its citizens but also provides large number of services for the welfare of its citizens and while doing so, state cannot do all the work alone through its departments and officials, therefore it has to enter into contracts with the private parties or contractors which may be an individual or an organization to get the project work done. Wherever state or its agencies or instrumentalities or its public bodies or authorities are one of the parties in a contract, it has to observe the legal and constitutional provisions mandates, consequently such authorities cannot act in an arbitrary manner while awarding the contract and they are bound to comply proper procedural fairness, legality and constitutionality. But what would be the role of judiciary if such requirements are not complied by the state or its authorities? What would be the scope of judicial review if a party is aggrieved by the decision of public authority in awarding the contract? To answer these questions, Hence this paper.”

Keywords: Judicial Review; Contract; Public Authority; Indian Constitution
INTRODUCTION

Public Authorities has not as much liberty as private party enjoys, while making decision with regard to award of the contract. Every act or decision of public authorities in awarding contract must be informed with reasonability, rationality and procedure propriety. As in the matters of awarding contract by public authorities larger interest of public is involved so as to attract Article 14 of the constitution and are open to judicial review, as greater accountability is expected therefrom. Main difference between the contracts awarded by, the public authorities and private parties, lies in the availability of the option of invoking the public remedy in the form of judicial review of such decision by way of institution of proper writ in a competent court of jurisdiction, if there is no compliance of constitutional and statutory provisions. However after the award of the contract by public authorities after satisfying all the requirements of statutory and constitutional provisions at all the four corners, if any dispute arises with regard to the terms and conditions of the contract than such public authorities are treated at par with the private parties and the only remedy available with the parties to the contract is to invoke the jurisdiction of the competent civil court by way of filing a civil suit for the reason being simple that judicial review is the inherent power of the court of higher jurisdiction and such disputes with regard to the terms and conditions of the contract requires the decision on the question fact which can be proved by way of tendering the evidence which can be better appreciated in the civil courts after a proper procedural trial and higher courts are left with the adjudication of the question of law generally.

Public Authorities are also treated as state, for the purpose of Part III of the constitution of India. Such authorities are generally established by way of passing an Act by the central or state legislature, so as to act as autonomous bodies to serve the purpose for which they are created, for example, Airport Authority of India (AAI). It is because of this reason they are treated at par with the state while awarding contract and must observe all the legal and constitutional mandates including the fundamental rights.

Present research work will try to find out interalia the scope of judicial review in the matters of the award of the contract by public authorities i.e. under what circumstances intervention of higher judiciary is available by way of writs which is a public remedy. Further this paper will paper will also explore the methods of awarding such contract by the public authorities for big projects and
procurements of goods and services along with the existing legislative framework regulating the award of such contract by the public authorities. This paper will also try to suggest few measures as a result of this research work.

PUBLIC AUTHORITIES AND CONCEPT OF THE STATE UNDER ARTICLE 12 OF THE INDIAN CONSTITUTION

Today Government performs a large number of functions because of the prevailing philosophy of a social welfare state. The government acts through natural persons as well as judicial persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure such as companies, corporations or public authorities. Since independence government of India and the state government has created many public authorities as its helping hand to discharge primarily public function in the larger interest by passing an statute or resolutions to this effect or by registering them as companies, societies or co-operative to act as an autonomous authorities. International Airport Authority of India, National Hydro Power Corporation, Oil and Natural Gas Commission and Hindustan Petroleum Corporation Ltd. are few examples of such public Authorities.

The importance of public authorities has been spelt out by the Supreme Court in the R.D. Shetty case as, “the Government which represents the executive authority of the state, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the Government had limited functions, it could operate effectively through natural persons, which were of traditional vintage. But in the tasks of Government multiplied with the advent of the welfare state, it began to e

creasingly felt that the framework civil service was not sufficient to handle the new tasks which were often specialized and of highly technical character. The inadequacy of the civil service to deal with these new problems came to be realized and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm of the Government.”
The power of judicial review exercisable by the higher judiciary is dependent upon the ascertainment of the status of the public authorities i.e. whether the public authority in question falls under the definition of the state under the Article 12 of the constitution of India or not. Therefore it is imperative to ascertain first, that the public authority are state and second, that what type of authorities fall under the definition of the state prescribed by the Article 12. As the judicial review power of the court is a public remedy under the Article 32 and 226 of the constitution envisaged in Supreme court and High Courts respectively and therefore if the public authority in question is ascertained as state than only higher judiciary may exercise its power of judicial review in the matters of awarding contract by such authorities otherwise normal civil suit is the remedy for redressal of the issues involved in such contracts.

Definition of the ‘state’ under the Article 12 of the constitution is inclusive one which provides that, “unless the context otherwise requires, the term State includes, the following:-

a) Executive of the Union (Union Government);

b) Executive of the each state (State Government);

c) Legislature of the Union (Parliament of India);

d) Legislature of each of the state (State legislatures);

e) All local Authorities (municipal corporation etc.);

f) Other Authorities, within the territory of India or under the control of the Government of India.”

It is therefore can be said that the term state under the Article 12 has wide connotation and it inter alia includes all local authorities and other authorities in India and which are under the control of the Government of India. The word Authority means a person or body exercising power or command. In the context of Article 12, Authority by and large means, the power to make laws, byelaws, rules etc, which have the force of law and power to enforce those laws.
Initially (1950-1979) a narrow approach was adopted by the Indian Judiciary by applying the ‘ejusdem generis’ rule, according to which ‘authorities of alike nature’ which are mentioned in the definition of state under Article 12 exercising governmental or sovereign functions can only be said ‘other authorities’. As evident from the decision of Supreme Court in Electricity Board, Rajasthan v. Mohan Lal case, wherein it was held that only the authorities created by the constitution or statute are the ‘other authorities’, though it is not necessary that statutory authority should be engaged in performing governmental or sovereign functions. Thus on the same line, Oil and Natural Gas Commission (ONGC), Life Insurance Corporation (LIC), Industrial Finance Corporations, International Airport Authority of India (IAAI), Delhi Development Authority (DDA) etc were held to be the ‘Other Authorities’. Therefore, during the initial phase, the term ‘other authorities’ was not be said to include persons natural or juristic e.g. a University unless it is maintained by the state.

Later on ‘ejusdem generis’ rule was held not applicable in the interpretation of the expression Authorities as it was realized that neither there is any common genus can be traced from the inclusive list of bodies mentioned under the Article 12 nor any of them mentioned therein can be placed in one single category on any rational basis. Therefore, Since 1979, the definition of the state under Article 12, the expression ‘Other Authorities’ has been given a very wide interpretation by the Judiciary so as to include within its ambit interalia statutory bodies, corporations and even non-statutory bodies acting as instrumentality or agency of the Government.

The Supreme Court noted on the rise or emergence of the instrumentalities and agencies of the state as, following: “The genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial policy dated 6th April 1948, where it was stated inter alia that ‘management of state enterprise will as a rule be through the medium of public corporation under the statutory control of the central Government who will assume such powers as may be necessary to ensure this.’ It was in pursuance of the policy envisaged in this and subsequent resolution on Industrial Policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally
through in service personnel, but the instrumentalities or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed.”

In *Ajay Hasia v. Khalid Mujib Sehravardi* case, Supreme Court from its earlier decisions summed up the position and laid down the following relevant test for determining whether or not a body is an instrumentality or agency of the Government;

a) If the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the government.

b) Where the financial assistance of the state is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

c) It may also be a relevant factor whether the corporation enjoys monopoly status which is the state conferred or state protected.

d) Existence of deep and pervasive state control may afford an indication that the corporation is a state agency or instrumentality.

e) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government.

f) Specifically, if a department of the Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of the Government.

The concept of the instrumentality or agency of the Government is, thus, not limited to a corporation created by a statute, and is equally applicable even to a company or society in the light of the tests laid down in the Ajay Hasia Case. stating that, the tests formulated in Ajay Hasia case are not a rigid set of the principles so that if a body falls within any one of them it must, ex-hypothesis, be considered to be a state within the meaning of Article 12 Supreme Court in Pradeep
Kumar Biswas v. Indian Institute of Chemical Biology has laid down the following proposition for determining the ‘other authorities’:

The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a state.

The importance of ascertaining that a particular body is authority or not under the Article 12 is that, once a body is characterized as the ‘authority’, certain significant incidents invariably follow:

a) The body becomes the subject to the discipline of the fundamental rights which means that its action and decisions can be challenged with reference to the fundamental rights.

b) The body also becomes the subject to the discipline of administrative law.

c) The body becomes the subject matter of the writ jurisdiction of the Supreme Court under Article 32 and that of the High Court under the Article 226.

Thus, if any of the bodies comprised within the term of the ‘state’ as defined in Article 12 can be challenged before the courts under Article 13 (2) on the ground of violating Fundamental Rights. Hence Public Authorities are state within in the meaning of state under Article 12 and they can also be challenged under Article 13 (2) before the courts on the ground of violation of fundamental rights in awarding the contract.

Thus, the Supreme Court made an inroad by stating that the category of authorities under the ‘other authorities’ under Article 12 would include all authorities which are created by a statute. They are in general for the discharge of public functions. They are amenable to state control. Their acts are capable of Scrutiny by public authority like executive government or the legislature of the state. They have got power to give direction, the disobedience of which is punishable.
AWARDING THE CONTRACT FOR PUBLIC PROCUREMENT BY PUBLIC AUTHORITIES

“Public Authorities being public bodies, has to observe higher accountability in use of resources, efficient use of resources: fair and just dealings with the public: and higher standards of professional conduct of its employees. Competitive bidding i.e. Award of a tender to the best bidder through a publicly notified tender is the most efficient and transparent way of getting in a contract. Therefore Public authorities insist on contract through tender and have very elaborate procedures on tender. Government employees have to follow it as a part of the service rules of the organisations. But in the contract law, even the best bid is only an offer. The party inviting a tender is under no obligation to accept it.” General Financial Rules, 2017 are applicable deals with the Public procurement Procedures. Prior to this, General financial Rules, 2005 was in force to take care of such matters.

Manner and mode of Awarding Contracts by Public Authorities: - where one of the party to the contract is Public authority, such contract becomes little distinctive from the other contract because of the following two reasons :-

1) Prescribe procedures has to be followed by the officials of such authorities while administering or awarding a contract,

2) Fundamental rights require such authorities to give equal treatment of law while maintaining fairness and impartiality.

As these public authorities are created by the state, generally with state funds and resources, they also have to follow an elaborate procedure for awarding the contract and also subjected to the limitation of the Fundamental Rights as the state itself. Reason for treating such public authorities which are the instrumentalities or agency of the state at par with the state itself has been explained by the Supreme Court in the R.D.Shetty case , as under,

“The Corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eyes of the law, they would be distinct and independent legal entities. If Government
acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations.”

It is because of this reason public authorities cannot act arbitrarily. They have to act fair and impartiality has to be observed by such authorities while entering into contract with the private parties so that every person will get equal opportunity to enter into contract with such authorities. Supreme Court in the M/s Erusian Equipment and Chemicals Ltd. v. State of W.B. case, “ The state can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the state is subject to Part III of the constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The state has the right to trade. The state has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. …..A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.” Thus it is right to say that neither party to a contract has right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations.

Award of the contract by Public Authorities for procurement of goods, services and public work:

Thus to keep the procedure of awarding the contract fair, transparent and impartial, public authorities generally adopt the Competitive Bidding (Tendering) method i.e. authorities invite tender for the best bid or offer. Invitation of tender is invitation to treat and it not the offer, it is the other party who makes the offer against the invitation of the tender and the tender issuing authority is free to choose any tender whichever is placing best bid before it after considering other factor also like financial and technical aspects. However in few cases Public Auction is preferred over tendering method, for example, when it is considered necessary to dispose off a state owned property. Chinnappa Reddy J in Sachidanand Pandey v. West Bengal case, observed, “ State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount interest consideration. One of the methods of securing the public interest, when it is considered necessary to dispose off the state owned property, is to sell the property by way of public Auction or by
inviting tenders. Though that is the ordinary rule, it is not an invariable rule. "Generally public authorities enters into contract for procurements of goods and services including public work, by way of inviting the tenders, therefore this paper will limit itself to the tendering procedure (Competitive Bidding) generally. However it is important to mention here that constitution does not provide any particular mode for the award of contract or distribution of resources or grant of largess. But whatever route the public authority or state prefer must be non-arbitrary, reasonable, capricious or non-discriminatory. In Natural resources allocation, re, Supreme court held that there is no constitutional mandate in favour of auction under Article 14. Thus, Judiciary tests the mode of awarding contract by public authorities or by the state on the limited scope of arbitrariness and fairness under Article 14 and thereby limits itself to that extent. As evident from the decision of the Supreme Court in Manohar Lal Sharma case, wherein the Supreme Court held that the allocation of 214 coal blocks made, both under the screening committee route and the government dispensation route, was arbitrary and illegal.

Objective of Public Procurement policy for awarding contract of goods, services and public work - Formulating a sound public procurement policy by the public authorities for the procurements of goods, services and public work by way award of contract has the following advantages:

1) Promotion of efficiency.
2) To avoid mismanagement and waste of public funds.
3) Vigorous competition among suppliers helps governments realize these objectives.
4) Conversely, when competition is curtailed - for example when suppliers engage in bid rigging - taxpayers’ money is wasted as governments pay more than a fair price.

Methods of Awarding Contract for Public Procurement for goods, services and public work by Public Authorities: - Besides the competitive bidding method or tendering method, Public Authorities also award contract for procurements of goods and services through other methods also which inter alia includes the following methods:
1) Procurement without quotation

2) Procurement by purchase committee (request for quotations)

3) Competitive bidding/tendering method (open/limited/single)

4) Procurement of goods directly under the rate contract

5) Electronic reverse auctions.

Advantage of Awarding Contract by Competitive Bidding process or Tendering :- The award of contract for the execution of a public work on the basis of competitive bidding has many advantages for the State:

1) It offers fair opportunity to compete the contract;

2) The authority concerned may select the best person for the job on competitive price without compromising the quality of work; and

3) It eliminates favouritism and discrimination in awarding the contract.

Objectives of tender system :-

1) To ensure transparency, fairness and equitable treatment of suppliers/contractors.

2) To foster and encourage effective participation by tenderers in the process of tenders.

3) To promote and infuse healthy competition among the prospective suppliers/contractors in public procurements.

4) To procure the best at the at the most competitive price in a fair, just and transparent manner.

5) To eliminate irregularities and corrupt practices, and favouritism and discrimination in awarding the contract.
Prerequisites and Basics of the Tendering Process

1) Provisioning

2) Estimates (reasonableness of prices)

3) Pre-qualification criteria

4) Purchase preference

5) Bid document

6) General Conditions of Contract and Special Conditions of Contract

7) Policy about departmental issue of materials, insurance, freight payments, etc

8) Earnest money deposit

9) Postponement of tender opening

10) Receipt of tenders

11) Safe custody and monitoring of bank guarantees

12) Opening of tenders

13) Evaluation criteria

14) Price negotiation

Tendering Cycle (Steps in Tendering Procedure) :-

1) Expression of interest (EoI) or request for qualification (RfQ) (prequalification).

2) Evaluation and shortlisting of bidders eligible to take part in the bidding process.

3) Request for proposal (RfP) or invitation to tender.
4) Pre-bid conference.

5) Submission of bids.

6) Technical evaluation followed by short-listing of technically acceptable bids.

7) Opening of financial bids of bidders whose bids are found technically acceptable, and their financial evaluation.

8) Selection of the lowest technically acceptable bid.

9) Issuance of the letter of acceptance (LoA)/signing of self-contained contract.

Essentials of a Tender: - A tender is an offer. It is something which invites and is communicated to notify acceptance. Supreme Court of India in the Tata Cellular case, broadly laid down the following requisites of a valid tender:-

1) It must be unconditional.

2) It must be made at the proper place.

3) It must conform to the terms of obligation.

4) It must be made at the proper time and in the proper form.

5) The person by whom the tender is made must be able and willing to perform his obligations.

6) There must be reasonable opportunity for inspection.

7) Tender must be made to the proper person.

8) It must be of full amount.
SCOPE OF JUDICIAL REVIEW IN THE MATTERS OF AWARDING THE CONTRACT BY THE PUBLIC AUTHORITIES

Power of judicial review of the Court with regard to the fundamental rights can be traced under Article 32 and Article 226 of the constitution. Speaking for Article 32, Dr. Bhim Rao Ambedkar once said in Constitutional assembly debate that, “If I was asked to name any particular Article in this constitution as the most important -an Article without which this constitution would be a nullity -I could not refer to any other Article except this one ……It is the very soul of the constitution and the very heart of it.”

Article 32 (1) guarantees the right to move the Supreme Court by “appropriate Proceedings” for the enforcement of the fundamental rights conferred by part III of the constitution. Article 32 (2) confers power on the Supreme Court to issue appropriate direction or orders or writs.

Article 32 gives extraordinary jurisdiction to the Supreme Court to issue discretion or orders or writs for the enforcement of the fundamental rights. Likewise, under article 226, every High Court has the power to issue directions, order or write for the enforcement of fundamental rights and for any other purpose. Judicial review is a public remedy against the state hence available only when the matter in question relates to breach of public law and it is not available in case if a matter in question falls purely in domain of private laws i.e. where both the parties to the contract is private parties, private laws like Contract Act etc would be applicable and not the judicial review under Article 32 and Article 226 can be invoked.

where one of the parties to a contract is the government or public authority then such contract has two thing has to be kept in mind, firstly, public authority must have minimum liberty and leeway to act efficiently and secondly, it represent the public interest in large thus it has to observe some minimum standards of fairness in its action so that larger public interest could be protected.

Scope of judicial review in the matters of the awarding the contract by the public authorities has been explained by the Supreme court in the Tata Cellular Case, hereinafter as, “it cannot be denied that the principles of judicial review would certainly apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However it must be clearly
stated that there are inherent limitations in exercises of that power of judicial review. Government is the guardian of the finances of the state. The right to refuse the lower bid or any other bid under invitation of tender is always available to the government. But the principles laid down in Article 14 of the constitution have to be kept in view while accepting or refusing a tender.” However, mere refusal by the authority to one party when it is trying to get best bidding or quotation cannot be said to be violative of Article 14 of the constitution and thus arbitrary, as the right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. Generally, writ of Mandamus is applied by the private contracting parties against the public authorities requiring it to do or abstain from doing some specific act which is in the nature of a public duty. However where a matter is purely contractual, writ jurisdiction of court cannot be invoked, subject of few exceptions that is also in the larger interest of the public. However as per Professor, De Smith, “to be enforceable, by mandamus, a public duty does not necessarily have to be one imposed by charter, common law, custom or even contract.

Scope of Judicial review in Pre-Contractual matters and Post Contractual matters:- The scope of judicial review can be analyzed from two angles i.e. at the time of awarding the contract and after the award of contract. Public authorities are bound to observe the principle of equality, fairness and non-arbitrariness at the time of award of the contract as the public authorities are bound with the constitutional limitations and public remedy by way of filing writ petition is available if there is a breach of public law on well-established grounds of (i) legality (ii) Irrationality and (iii) Procedural impropriety. However after the award of the contract when public authority has entered into contract with the private party, the rights and obligations of the parties inter se are no more longer governed by the constitutional provisions but by the contract itself i.e. parties to the contract are bound by the terms of the contract only, unless some statute steps in and confers some special statutory power or obligation on the state in the contractual field which is apart from the contract.

Thus, disputes relating to ‘Post-award of contract’ matters such as interpretation and implementation of contract, discharge of contractual obligations by way of performance, frustration, breach, agreement and novation, claims of contractual remedies, and the like matters fall primarily within the domain of private law and are, therefore, generally not amenable to writ
jurisdiction. However, in few exceptional cases even in ‘post award of contract’ matters, writ jurisdiction of the court can be invoked where element of public interest is involved. To answer the question as to what elements are considered as public interest, Supreme Court in Raunaq International Ltd. v. IVR Construction Ltd., has enumerated few elements, presence of which may be considered as the presence of ‘public interest’ in the following cases:-

1) Where Public money would be expanded for the purposes of the contract.

2) Where the goods or services which are being commissioned would be used for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities.

3) Where there is a direct interest of public is involved in timely completion of contract work so that the services would become available expeditiously to the public.

4) Where the public at large is also interested in the quality of the work undertaken or goods supplied by the tenderer, where poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting the mistakes or in rectifying defects or even at times in re-doing the entire work, thus involving larger outlays or public money and delaying the availability of services, facilities or goods.

However in few cases where one of the party is either government or public authority, involvement of public interest may be presumed also as supreme Court observed in Sridekha Vidyarthi case, in the following words, “Even assuming that it is necessary to import the concept of presence of some public element in a state action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the state or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We therefore find it difficult and unrealistic, to exclude the state actions in contractual matters, after the contract has been made, from the purview of Judicial review to test its validity on the anvil of Article 14.”

The list provided in Raunaq International case is although elaborated one but not exhaustive, presence of any one elements enumerated in Raunaq International case indicates the presence of public interest in a given case and in such situation court can entertain writ and exercise judicial
review power to save the public interest even in post-award of contract matters, otherwise generally judiciary restraint itself from interfering in post-award of contract matters as unnecessary interference by the judiciary may lead interest of public at large affected adversely and may be misused to serve the interest of third party, therefore Supreme court laid down Judicial restraint principles in contractual matters awarded by the public authorities or state in Tata Cellular Case

Supreme Court of India after an extensive review of literature, cases and trends on judicial review, formulated the following principles of judicial restraint in contractual matters where one of the party is state or public authorities, in Tata Cellular Case, as :-

1) The modern trend points to judicial restraint in administrative action.

2) The court does not sit as a court of appeal but merely reviews the manner in which the decisions was made.

3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4) The terms of the invitation to tender can not be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by a person of negotiations through several tiers. More often than not, such decisions are made qualitatively by the experts.

5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of …principle of reasonableness…..but must be free from arbitrariness not affected by bias or actuated by malafides.

6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
Thus, it can be said that, Supreme Court of India in *R.D.Shetty* Case has opened up the possibility judicial review in contractual matters and the Tata Cellular Case, has put the review process under perspective. The Courts are not to take up a review of every case of the tender process which is brought to them nor they are the substitute of government decision in tendering with their own.

**CONCLUSION AND SUGGESTIONS**

It can be thus concluded that, every action of government or public authority must be informed with reason in order to qualify as non-arbitrary. Equally it is also true that in the matters, where the instrumentality of the state enters into the contract, it may not be necessary to give reasons but fairness must be there to the parties concerned. But Fairness and equality under Article 14 of the constitution, at least demands this much from an instrumentality of the state dealing with the right of the state not to treat the contract as subsiding.

Thus, if a governmental policy or action in contractual matters does not comply with the test of reasonableness, it would be unconstitutional. However Court has been consistently exercised caution while interfering with the policy decision of the public authorities or government. In *DDA v. Jt. Action Committee* case, held that A policy decision is subject to Judicial review on the following grounds:

1) If it is unconstitutional;
2) If it dehors the provision of the Act and the regulations ;
3) If the delegate has acted ultra vires of the delegated powers ; and
4) If the executive policy is contrary to the statutory or a larger policy.

In *Joshi technologies International Inc. v. Union of India*, Court may also refuse to exercise the extraordinary jurisdiction in the following circumstances:

1) Where the impugned action has no public law character attached to it,
2) Where a particular mode of settlement of dispute is provided in the contract, the high court would relegate the parties to the said mode of settlement particularly where settlement of the disputes is to be resorted to through the means of arbitration,

3) Where there are disputed questions of fact of complex nature requiring oral evidence for their determination and

4) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional cases.

It is also well settled position in India that the judicial review power generally exercised only at the contractual matters at the time of awarding of contract i.e. at pre-contractual stage meaning thereby before entering into formal contract in cases where one of the party is Public Authority. However in few exceptional situation where larger public interest is involved, judicial review power may be exercised, otherwise judiciary is subject to restraints principles laid down in Tata Cellular case. However there are few occasions where the Supreme court has opined differently from the established view and was of the view that every action of government is taken in public interest, it is presumed and there is no need of showing that public interest is involved, it may be presumed in the post contractual matters also.

Thus from the ongoing discussion we can see that this debate of of public law and private law elements (and consequent rights and remedies) in contracts with public authorities or government is gaining in this era when many of the contracts for the development of the Nation is carried out by such authorities as one of the party to the contract. Therefore in such cases it is not difficult to find public law element or presence of public interest. It is because of this reason scope of judicial review is expanding eventually and becomes wider day by day and consequently traditional limitations on the scope of judicial review is vanishing at the same rate.

At this stage, we may put forth few suggestions in this regard, which may include the following :-

1) Strengthening the transparency and accountability of the public authorities in awarding the contract.
2) Strengthening the vigilance mechanism, at present central vigilance commission (CVC) is entrusted with this task, power and function of CVC should be redefined so as to prevent of misuse of authority in awarding the contract by the public authorities.

3) Separate commission or board may be constituted for awarding the contracts by the public authorities or Government.

4) Rules and regulations should be prescribed in view of changing circumstances and should be continuously updated in time.

5) Lastly, Public Procurement Bill, 2012 should be enacted which is pending since last 6 to 7 years. as this Bill will help in reducing the litigation by making the contract awarding system more redefined and thereby will reduce the burden of the court.