

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 1st May, 2013
Judgment pronounced on: 15th May, 2013

+ W.P. (C) No. 1853/2013 & CM No. 4250/2013

CONSORTIUM OF M/S SIEMENS AKTIENGESELLSCHAFT AND
SIEMENS LTD. Petitioner

Through: Mr. Dushyant Dave, Sr. Adv. with
Mr. C. Mukund, Ms. Firdouse Qutb
Wani, Mr. Anirudh, Ms. Ekta Bhasin &
Mr. Ravi Kumar, Advs.
versus

DELHI METRO RAIL CORPORATION LTD AND ANR ...
.. Respondents

Through: Mr. Maninder Singh, Sr. Adv. with
Mr. B.L. Wali, Adv. for R-1 along with
Mr. H.S. Anand, Director (Rolling
Stock), Mr. Sachit Pande, Chief General
Manager (Rolling Stock – Project) &
Mr. A.S. Rao, Law Officer of R-1 in
person. Dr. A.M. Singhvi & Mr. Dhruv
Mehta, Sr. Advs. with Mr. Arunav
Patnaik, Adv. for R-2.

+ W.P.(C) 2615/2013 & CM No. 4949/2013

ALSTOM TRANSPORT INDIA LTD. & ORS. Petitioners

Through: Mr. Ciccu Mokhopadhyay, Sr. Adv. with
Mr. Rishi Agrawala, Mr. Faraz Maqbool
& Ms. Priyanka Saigal, Advs.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Ravinder Agarwal, CGSC with

Mr. Amit Yadav, Adv.
Mr. Maninder Singh, Sr. Adv. with
Mr. B.L. Wali, Adv. for R-2 along with
Mr. H.S. Anand, Director (Rolling
Stock), Mr. Sachit Pande, Chief General
Manager (Rolling Stock – Project) &
Mr. A.S. Rao, Law Officer of R-2 in
person.
Dr. A.M. Singhvi & Mr. Dhruv Mehta,
Sr. Adv. with Mr. Arunav Patnaik, Adv.
for R-3.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. Both writ petitions have been filed challenging the non-award of contract to the respective Petitioners for the Design, Manufacture, Supply, Testing, Commissioning and Training of 486 number Standard Gauge Cars Electrical Multiple Units meant for 81 trains of six cars each. The writ Petitions were taken up simultaneously. W.P. (C) NO. 1853/2013 was argued as the lead matter, thus the factual matrix has been extracted from the lead matter.
2. The factual matrix leading to the present petition is as under:
The Respondent No. 1 Delhi Metro Rail Corporation sought to implement Phase-III of the Mass Rapid Transport System for Delhi and its extension, covering the corridors of Mukundpur - Rajori Garden – Dhaula Kuan – Maujpur - Gokulpuri and Janakpuri (West) – Munirka – Kalkaji – Kalindi Kunj – Botanical Garden (Noida).

3. With the objective of keeping up with the increase of traffic demand in Delhi by extending the Mass Rapid Transporting System (MRTS) the Hon'ble President of India entered into a loan agreement for the Respondent No. 1 Delhi Metro Rail Corporation with Japan International Cooperation Agency (JICA) on 29.03.2012.

4. The loan agreement stipulated the following conditions for the bidding procedure:-

A. *The Borrower shall, before opening price proposals:-*

- (i) submit to JICA, for JICA's review and concurrence, the analysis of technical proposal, together with a request for review of Analysis of technical proposals.*
- (ii) submit to JICA, for JICA's reference, such relevant documents as JICA may reasonably request.*

When JICA has no objection, JICA shall inform the Borrower accordingly by means of a Notice regarding Analysis of Technical proposals.

B. *Before sending a notice of award to the successful bidder:-*

- (i) the Borrower shall submit to JICA, for JICA's review and concurrence, the analysis of bids and proposal for award, together with a Request for Review of Analysis of Bids and Proposal for award.*
- (ii) the Borrower shall submit to JICA, for JICA's reference, such other documents related to the*

award, such as tender documents, as JICA may reasonably request.

When JICA has no objection to the said documents, JICA shall inform the Borrower accordingly by means of a Notice regarding Analysis of Bids and Proposal for Award.

5. The Respondent No. 1 after receiving the approval from Japan International Cooperation Agency (JICA) on 2.3.2012 for No Objection to the notice regarding tender documents, invited tender “RS 10” on 03.03.2012 for procurement of Design, Manufacture, Supply, Testing, Commissioning and Training of 486 number Standard Gauge Cars Electrical Multiple Units (81 trains) through International Competitive Bidding (Open Tender) as per Japan International Cooperation Agency JICA procurement guidelines.
6. The notice inviting tenders was issued by the Respondent No. 1 on 03.03.2012 and 18 tenders are stated to have been purchased by various parties for applying against the tender. The due date for submission of tenders was extended from time to time at the request of the bidders and the tenders were finally submitted on due date i.e. 18.09.2012.
7. During early May, 2012, one of the bidders suggested adopting energy consumption values for evaluation. Since the original tender specifications did not include parameters of energy consumption values for evaluation, the Respondent No. 1 issued specific instructions to all bidders on 18.05.2012 to follow the tender conditions.

8. The Respondent No. 1 had adopted Communication Based Train Control (CBTC) technology for Train Control and Signaling System of Phase-III Corridors. This technology was adopted for achieving efficient control, lesser headway (Higher frequency) and enhanced operational flexibility in movement of trains on the rail network. The CBTC technology was adopted as it facilitated and supported the operation of trains in Driverless mode.
9. The Signaling department and the Rolling Stock Department of Respondent No. 1 conducted studies for evaluating adoption of Driverless Trains for RS 10 tender. A Committee of three directors of Respondent No. 1 (Director/Rolling Stock, Director/Operations and Contractor/Electrical) was formed to examine the inclusion by Driverless Train Operation feature on the new lines of Phase III project of DMRC. After collecting data from other Metro(s), the committee came to a conclusion that the planned adoption of CBTC technology provided an excellent opportunity to DMRC for introduction of Driverless Train which in the opinion of the Committee would result in accrual of benefits that would include saving manpower, better interface with commuters with enhanced performance on sustainable basis. The recommendations of the committee were approved by the Competent Authority (MD/DMRC) on 31.05.2012 and accordingly on 4.6.2012 the Respondent No. 1 issued the 5th Addendum for adoption of driverless trains.
10. As per the Respondent No. 1 since it incurs approximately 25% of

its total operation and maintenance expenditure only on the traction energy of the trains; with rising electricity cost and huge network extension, the energy saving by adopting all possible means including energy efficient designed trains was the foremost priority of the Respondent No. 1 and as such procurement of energy efficient Rolling Stock has always been a primary objective of DMRC. As per the Expert Committee of DMRC this objective could be met by including the parameters of energy consumption in the tender evaluation. The Communication Based Train Control (CBTC) Technology was not available at the time of Phase-I and Phase-II of the Metro Project. With the adoption of Driverless Trains and the CBTC Technology it became possible for the Respondent No. 1 to ensure that the validation process of the Guaranteed Energy Consumption values became realistic.

11. The Respondent No. 1 having adopted Driverless Trains operation by issue of Addendum No. 5 as mentioned herein above, formulated the technical specifications and the associated formulae for calculation of loading as well as penalty (in case of failure of validation on test bed, in environment chamber and in the field trails during execution of the contract) with respect to GEC values committed by the bidders.
12. The Respondent No. 1 after taking specific approval from JICA for inclusion of loading on the basis of the energy consumption for determination of the inter se position of the bidders in financial evaluation, on 13.07.2012 issued Addendum No. 7 and intimated

to all the bidders the complete details about the GEC values, the formulae for calculation of loading amount, the validation procedure and formula for calculation of penalty. The Addendum No. 7 included amongst other the following details :-

- a) *Committed GEC values for one complete round trip of Line-7 of Phase-III network of DMRC (Mukundpur-Maujpur and back; approximately 110.4 kms) in fully loaded train.*
 - (i) *GEC value 'X' for traction energy without HVAC load (full form of HVAC- 'Heating Ventilation Air Conditioning')*
 - (ii) *GEC value 'Y' for HVAC load of the train.*
- b) *complete Procedure for assessment of GEC values by bidders,*
- c) *the formulae for monetization of differential energy with respect to the baseline GEC value (minimum GEC value quoted by any of the bidders),*
- d) *procedure for validation of the committed GEC values and*
- e) *provision of penalty with formula in the event of failure of validation of the committed GEC values during the contract execution and*
- f) *suitable provisions in the Tender conditions on Determination of Inter-se position (Clause E 5.5.3).*

13. As per the addendum 7, the bidders were required to submit the Guaranteed Energy Consumption values both for the traction energy without HVAC load (full form of HVAC- 'Heating Ventilation Air Conditioning') which was called the 'X' factor

and energy consumed by HVAC which was called 'Y' factor. For the evaluation of the financial bids the cumulative of X and Y factor was to be taken into account. The lowest GEC values in terms of the cumulative of the X and Y factor was to be treated as baseline of GEC values. The financials of the bidders who submitted GEC values higher than the baseline were to be loaded with a fixed multiplier of approximately 3.4 crore per unit quoted over and above the baseline.

14. Subsequent to the issue of Addendum No. 7 on 13.07.2012 up to the date of bid opening i.e. on 18.09.2012, the bidders including the Petitioner raised several queries on GEC related issues which were responded to by the Respondent No. 1. The Petitioner itself raised three queries during this period on various issues which were responded to by the Respondent No. 1.
15. On 18.09.2012 eight bids from different bidders were received by Respondent No. 1. The technical bids of the eight bidders were evaluated by three internal committees of Respondent No. 1 and the analysis of the technical package carried out by the Respondent No. 1 was sent to JICA for their review and concurrence. Ultimately, six bidders were found to be technically qualified.
16. On 9.2.2013, in accordance with the stipulated procedure, the financial analysis of all the technically qualified tenders were opened. The GEC values 'X' (traction energy without HVAC)

and ‘Y’(energy consumed by HVAC) were informed to all the bidders. The full form of HVAC being Heating Ventilation Air Conditioning Equipment. The valuation of the Financial Packages was done by the three internal committees of Respondent No. 1. The final acceptance authority of Tender Committee Recommendations being the Managing Director of the Respondent No. 1.

17. The result of the financial evaluation as carried out by Respondent No. 1 after incorporating correction of errors as per tender conditions is as under:-

S.No.	Tenderer	DMRC Corrected Eqt INR	Loading due to GEC in INR	Evaluated TOTAL INR	Inter-se Rank
1	2	3	4	5	6
1	Siemens Consortium	36,45,69,81,444.43	17,70,37,31,947.20	54,16,07,13,391.63	L-4
2	Bombardier Consortium	42,42,18,23,765.22	12,22,23,84,171.24	54,64,42,07,936.46	L-5
3	Hyundai ROTEM	42,91,54,42,276.92	BASE LINE OFFER	42,91,54,42,276.92	L-1
4	Alstom Consortium	43,73,87,62,372.80	6,91,12,64,587.08	50,65,00,26,959.88	L-3
5	CAF Consortium	46,14,19,07,068.91	4,18,76,13,518.28	50,32,95,20,587.19	L-2
6	Hitachi + BHEL	42,80,19,11,760.50	15,49,07,65,453.80	58,29,26,77,214.30	L-6

18. Some of the unsuccessful bidders including the Petitioner submitted representations qua the recommendations of the Tender Committee. The representations were considered by the Board of Directors in their meeting on 28.02.2013 and the Board of Directors constituted Sub-Committee of Directors comprising of six directors (Four Functional Directors including the MD/DMRC,

one Independent Director and one Nominee Director from Indian Railways) was to take final decision on recommendation of the Tender committee.

19. The Sub-committee examined the issues raised in the representations received from the bidders with respect to the tender conditions and the detailed explanation provided in the tender committee minutes. The special committee of directors, in its meeting held on 5.3.2013, on reviewing the entire procedure agreed with the recommendations of the tender committee for placement of order on the Lowest Evaluated Bidder (Respondent No. 2) against the Tender RS 10’.
20. The Appraisal Committee Report, the Tender Committee report of Directors and the Sub-Committee Report were sent to JICA for ‘review’ of the report on ‘analysis of financial proposals’ and concurrence of the same. The JICA on 28.03.2013 issued an NOC for ‘Analysis of Bids’, proposal for award in favour of Respondent No. 2 and to “go ahead” with contract award in favor of Respondent No. 2.
21. The Respondent No. 1 issued the letter of acceptance on 01st April, 2013 and the letter of acceptance reiterated that the committed values of Guaranteed Energy Consumption shall have to be validated during the execution of the contract and in case of validated GEC ('X' & 'Y') values being higher than the committed values then the payable amounts by way of penalty in accordance

with the tender conditions would be deducted from the contract payable amounts.

22. It is in these circumstances that the Petitioner has filed the present writ petition on 18.03.2013 seeking the award of contract to itself and alternatively seeing a declaration thereby declaring the acceptance of GEC figures as arbitrary illegal and void and for verification exemption by an independent agency for ascertaining the veracity of the GEC figures submitted by the bidders.
23. Mr. Dushyant Dave, Learned Senior Advocate appearing for the Petitioner in the lead matter submitted that the process of evaluation of the technical and financial bids, resulting in the decision of the Respondent No. 1 to award the contract for the aforesaid tender to Respondent No. 2, is arbitrary, unreasonable and violative of Article 14 of the Constitution of India.
24. The Learned Senior Advocate for the Petitioner further submitted that the Respondents had initially stated that the Energy Value Parameters would not be used as a criteria to evaluate the prices and subsequently the said criteria had been introduced which amounted to a malice in law.
25. It was further submitted that though the efforts of the Respondent No. 1 requiring the bidders to guarantee Energy Consumption Values is laudable, however taking the said values for financial evaluation is arbitrary and violated the equality principal of "level playing field".

26. It was submitted that the Respondent No. 1 had not conducted any physical verification or any tests to determine the comparative values and also that there was no mechanism to assess if the values quoted by the various bidders were achievable or not.
27. It was pleaded that there were no sanctions in place to take care of the situation where the supply by the successful bidder did not match the quoted Energy Value and there was no time specified as to when the testing of the supply wagons would be conducted with respect to the quoted values.
28. It was submitted that the Respondent No. 1 had contradicted itself in the counter affidavit in as much as they had stated at one point that the quoted consumption figure of the present fleet of trains could not be compared with the new trains under procurement and on the other hand they had stated that the appraisal committee was satisfied that the quoted values given by the lowest evaluated bidder were achievable in as much as the Respondent No. 1 had been operating trains since more than 10 years and had requisite full data, experience and technical competence to make a realistic assessment of the achievable energy values in the new lines.
29. It was further submitted that the Petitioner's financial bid considering the Guaranteed Energy Consumption Value was lower by Rs. 665 crores than that of the Respondent No. 2 and thus if the tender were to be awarded to the Petitioner there would be a substantial saving of the said amount. He further submitted that if

this amount were to be put in a fixed deposit for a period of 30 years it would result in an income of over Rs. 1900 crores.

30. In contrast of this he submitted that the Respondent No. 1 by introducing the guaranteed energy consumption values in the bid sought to save Rs. 1770 crores over a period of 30 years and thus he submitted that if the tender were to be awarded to the Petitioner, the Government exchequer would still be benefited.
31. Learned Senior Advocate pleaded submitted that when the technical bids were opened the GEC values submitted by the various bidders were not read out but were subsequently communicated after loading them on to the financial bids of the various bidders.
32. Learned Senior Advocate relied upon the judgment of the Hon'ble Supreme Court in *Reliance Energy Ltd. And Anr. Vs. Maharashtra State Road Development Corpn. Ltd. And Ors* (2007) 8 SCC 1 to contend that "Level playing field" is an importance concept while construing Article 19(1)(g) of the Constitution. When Article 19 (1) (g) confers fundamental right to carry on business to a company, it is entitled to invoke the doctrine of "level playing field".
33. He also relied upon the judgment in the case of *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. And Ors* (1997) 1 SCC 53 to contend that the consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender

should be transparent, fair and open.

34. In support of his above submissions, learned Senior Advocate for the Petitioner relied upon the judgment of a Division Bench of this Hon'ble Court in the case of *M/s Supreme Infrastructure India Ltd. Vs. Rail Vikas Nigam Limited and Anr.* 196 (2013) DLT 357 and also the judgment of *Times Innovative Media Ltd. Vs. Delhi Transport Infrastructure Development Corporation Ltd. & Ors.* W.P. (C) 3973/2012 decided on 02.04.2013.
35. Mr. Ciccu Mokhopadhyay, Sr. Advocate for the petitioner in W.P. (C) 2615/2013 while adopting the submissions made on behalf of the petitioner in the lead matter and elucidated the same issues in the same perspective. In contra to the submissions of the learned Senior Advocate for the Petitioners, in both the matters, Mr. Maninder Singh, learned Senior Advocate for the Respondent No. 1, DMRC submitted that when the tender was initially floated there was no stipulation of guarantee energy consumption value parameters in the said tender and it was only subsequently that one of the bidders suggested adopting Energy consumption for the purposes of evaluation.
36. The Respondent No. 1 constituted a Committee to examine this aspect. It was only after the committee examined the viability of introduction of driverless train operation feature on the new lines of Phase-III project of Respondent No. 1, that the Committee came to a conclusion that adoption of CBTC technology provided

an excellent opportunity of introduction of driverless trains which apart from saving manpower, would also provide better interface with commuters with enhanced performance on sustainable basis. With the introduction of driverless trains and the CBTC Technology it was possible to introduce energy efficient trains which in turn would lead to a substantial savings not only by the Respondent No. 1 but also conservation of the natural resources and energy, it was with this objective that the parameters of energy consumption based evaluation were introduced.

37. Learned Senior Advocate for the Respondent No. 1 submitted that in view of the introduction of changed parameters, the last date of submission of the tenders was extended up to 18.09.2012. In terms of the conditions of the tender, all bidders were required to submit a declaration in Appendix FT-15 whereby they had to acknowledge their complete understanding of all the stipulations/tender conditions of the tender including their complete understanding of the Addendum to the said tender. He submitted that all the conditions in stipulation were accepted by all the bidders who submitted their bids. The Petitioner also had submitted declaration in Appendix FT – 15 acknowledging its complete understanding of all the stipulations/tender conditions.
38. It was submitted that the Petitioner and other bidders had sought for a clarifications with respect to the conditions incorporated in the tender by the 7th Addendum which introduced Value Based Parameters for evaluation of the financial bids. However, none of

the bidders communicated or expressed any doubts or apprehensions which were now sought to be raised by them. He submitted that all the bidders had accepted and adhered to the tender conditions while submitting their respective bids.

39. It was further submitted that Clause 4.1 of ITT clearly provided that further instructions to bidders and addenda to tender document may be issued during the tender period and without prejudice to the general order of proceedings prescribed by clause 1.5 of the GEC, the provisions in any such addenda shall take priority over the invitation to tender and tender documents previously issued. The learned Senior Advocate for Respondent No. 1 submitted that Respondent No. 1 thus had reserved the right to change or modify the tender conditions during the tender period and the addenda to the tender conditions was duly notified to all the bidders. The bidders including the Petitioner had submitted their bids after fully understanding the addenda and acknowledging the factum of their having been understood the tender conditions.

40. It was submitted that the bidders who had bid for this tender were all top international parties with vast experience in this field and each of them had team of experts advising them in all spheres and all the bidders including the Petitioner were well aware of the tender conditions and had submitted their bids after fully understanding the requirements of the tender document and further that they had submitted declaration that they had understood all

the conditions and terms of the tender document.

41. It was further submitted that the Petitioner did not seek to challenge any of the conditions of the tender document on the contrary they had accepted that the Energy Consumption Value Parameters were an accepted norm across the world in similar tenders. However, the only grievance raised by the Petitioners was with the use of Guarantee Energy Consumption Values for evaluation of the financial bids. Learned Senior Advocate for Respondent No. 1 submitted that this submission of the Petitioner was contrary to the stand taken by the Petitioner in its rejoinder filed in the present Writ Petition where the Petitioner had itself stated that they had no objection, nor could they have any objection to the adoption of the GEC (Guaranteed Energy Consumption Parameters) for evaluation of the bids. Alternatively he submitted that the Petitioner having participated in the tender being fully aware of the evaluation parameters cannot be now permitted to challenge the evaluation based on the Guaranteed Energy Consumption parameters.
42. It was pleaded that with the possible introduction of newer technology it became possible for the Respondents to introduce energy efficient trains and the rationale for adopting the criteria for loading the financial offer on the basis of baseline offer with GEC values provided incentive to the bidders to offer the most energy efficient trains at most competitive price. He submitted that commitment of lower GEC values necessitates adoption of

improved technology features of equipment/system design which has a direct bearing on the actual cost of the trains.

43. It was further pleaded that the stand taken by the Petitioner to contend that the Petitioner is L-1 is patently incorrect. He submitted that as per the tender conditions there is not one parameter or one factor as submitted by the Petitioner to contend that he is L-1 but there is combination of various factors which are to be taken into account for determining the correct financial value of the bid. He submitted that for operation of the trains, there are two types of energy consumption valuables which become the determinative factors for determining accumulative energy consumption of the operation of the train. He submitted that energy is used both for running of the train and for HVAC (Heating Ventilation Air Conditioning). As per the tender document the bidders were required to submit the energy consumption values for both the factors i.e. Factor 'X' representing the electricity consumption for the operation of the train without HVAC and factor "Y" for operation of HVAC. As per the tender document it is not the lowest factor "X" or factor "Y" which was taken into account but the lowest of the cumulative of "X" + "Y". From the bids submitted by the various bidders the Respondent No. 2 was not the lowest in either the "X" or the "Y" factor and there were two other bidders each whose bids were lower than the Respondent No. 2 in respect of factor "X" and factor "Y". It is in the cumulative of factor "X" + "Y" that the Respondent No. 2 becomes L-1. The Petitioner is merely taking into account one

factor and not the other factors while projecting himself as L-1. He thus submitted that the method adopted by the Petitioner for projecting himself as L-1 is incorrect and contrary to the tender conditions which stipulate not one but several factors to be taken into account and loading based on Guarantee Energy Consumption values to arrive at the final financial bid of the bidder.

44. It was submitted that the Petitioner is not correct in submitting that the energy consumption values submitted by the Respondent No. 2 are not achievable. He submitted that in each of the factor “X” and “Y” there are two other bidders who were lower than the Respondent No. 2 and which in turn establishes the fact that the figures quoted by Respondent No. 2 were achievable figures. The values quoted by Respondent No. 2 were achievable values and the expert committee constituted by the Respondent No. 1 had duly examined the values and has come to a conclusion that the said values were achievable.
45. It was further submitted that Petitioner is incorrect in submitting that there are no sanctions in place to check whether the said values quoted by the bidders are in fact achieved or not. He submitted that for each unit of electricity consumption, beyond the baseline, loading of approximately INR 3.4 crores becomes applicable as per the formula for computation. Similarly for each additional unit of electricity consumed by the successful bidder, beyond committed GEC value, a penalty of approximately INR 4 crores per unit become applicable as per the said formula. The

evaluation of the actual value achieved by the trains to be supplied by the successful bidder are put down at two stages. Firstly at the pre-delivery stage of the train where the train to be supplied has to confirm to the GEC Values and secondly at the operational stage. The penalty condition would be operative on the failure to achieve the GEC Values at either or both the stages and even the letter of award dated 01st April, 2013 to the Respondent No. 2 stipulates the said conditions for deduction.

46. It was submitted that the expert committee constituted by the Respondent No. 1, comprising of experts in the field, for examining the various issues both at the stage of pre-issues of addendum to the bid and the evaluation of the financial bids, have come to a conclusion that the entire evaluation process of the bids was strictly in accordance with the relevant conditions of the tender document.
47. It was further submitted that the contention of the Petitioner that if the amount of 665 crores were to be kept in a fixed deposit it would yield enough interest to fund the differential energy costs on account of higher GEC Values is incorrect and misleading. He submitted that the increase in energy tariff over the years would offset the so-called earning of interest income and the loss at the end of 30 years on account of higher energy consumption would be substantial.
48. It was submitted that for the purposes of further fairness and

transparency, when the Petitioner had submitted their representations, raising the issues including the veracity or achievability of GEC Values, the same were considered by the Appraisal Committee, Tender Committee and also a Sub-Committee of Directors constituted by Board of Directors of Respondent No. 1 and the three Committees found the issues raised by the Petitioner as baseless. In support of this contention learned Advocate for the Respondent No. 1 has produced the original records pertaining to the said committees and their evaluations.

49. Dr. A.M. Singhvi, the learned Senior Advocate for the Respondent No. 2 while adopting the submissions of the Learned Senior Advocate for the Respondent No. 1 submitted that the X and Y values submitted by the Petitioner were far higher than the X and Y values quoted by the other tenderers. He submitted that the Guaranteed Energy Consumption value submitted by the Respondent No. 2 were very much achievable. He submitted that all the bidders were international players of repute and had participated in similar tenders world over and were advised by experts in the field and were all well aware of the tender conditions and parameters of GEC value based evaluation. He further submitted that the fact that two other bidders respectively had quoted the GEC values of X and Y factors lower than the Respondent No. 2 itself was an indication that the GEC values quoted by the Respondent No. 2 was achievable. He submitted

that the Petitioner having participated in the tender could not be permitted to challenge either the tender conditions or the award of the tender to the Respondent No. 2 on the GEC value parameters merely because it was unsuccessful.

50. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'.
51. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in 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.
52. The power of judicial review is not to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and

persuade courts to interfere by exercising power of judicial review, should be resisted.

53. Where the process adopted and decision made by the authority is bonafide and not intended to favour someone, the court would not interfere in the decision of the administrative authority in exercise of powers under article 226. It is only where 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' would the court exercise the power and interfere in the decision.
54. There are inherent limitations in exercise of the power of judicial review. The right to refuse the lowest or any other 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. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. 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.
55. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant “the feel of the expert” by its own review. The judicial examination is confined to finding out whether the findings of fact have a reasonable basis on evidence and whether such findings are consistent with the laws of the land.

56. 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”. By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry.
57. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract.

58. The Hon'ble Supreme Court of India, in a series of decisions, considered the scope of judicial review of administrative actions. The scope and the approach to be adopted in the process of such review have been settled by a long line of decisions of the Hon'ble Supreme Court. Since the principle of law is settled and well recognised by now, we may refer to some of the decisions only to recapitulate the relevant tests applicable and approach of the Court in such matters.

59. The Hon'ble Supreme Court of India in *SIEMENS PUBLIC COMMUNICATION NETWORKS PRIVATE LIMITED V. UNION OF INDIA*, (2008) 16 SCC 215, has laid down as under:

20. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.* it was observed as follows: (SCC pp. 147-48, paras 11-15)

“11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in *Tata Cellular v. Union of India* (1994 (6) SCC 651). It was observed that the principles of judicial review would 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 exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other 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. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. 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. ...

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. ...

13. In *Sterling Computers Ltd. v. M&N Publications Ltd.* (1993 (1) SCC 445) it was held as under: (SCC p. 458, paras 18-19)

‘18. 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”. ... By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time ... the courts can certainly examine whether “decision-making process” was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then court cannot act as an appellate authority by

substituting its opinion in respect of selection made for entering into such contract.'

14. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.* (1999 (1) 492) it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.
15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.* (2000 (2) SCC 617) and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

* * * * *

26. In *Jagdish Mandal v. State of Orissa* (2007 (14) SCC 517) the scope of limited power of judicial review in tender and award of contracts was also lucidly stated in para 19 as follows: (SCC pp. 531-32, para 22)

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is

made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in 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 interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of

licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

60. The Hon'ble Supreme Court of India in *HEINZ INDIA (P) LTD. v. STATE OF U.P.*, (2012) 5 SCC 443, has laid down as under :

66. That the court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant “the feel of the expert” by its own review, is also fairly well settled by the decisions of this Court. In all such cases judicial examination is confined to finding out whether the findings of fact have a reasonable basis on evidence and whether such findings are consistent with the laws of the land. (See *Union of India v. S.B. Vohra* (2004 (2) SCC 150), *Shri Sitaram Sugar Co. Ltd. v. Union of India* (1990 (3) SCC 223) and *Thansingh Nathmal v. Supdt. of Taxes* (AIR 1964 SC 1419))

61. The Hon'ble Supreme Court of India in *MICHIGAN RUBBER (INDIA) LTD. v. STATE OF KARNATAKA*, (2012) 8 SCC 216, has laid down as under :

10. This Court, in a series of decisions, considered similar conditions incorporated in the tender documents and also the scope and judicial review of administrative actions. The scope and the approach to be adopted in the process of such review have been settled by a long line of decisions of this Court. Since the principle of law is settled and well recognised by now, we may refer to some of the decisions only to recapitulate the relevant tests applicable and approach of this Court in such matters.

11. In *Tata Cellular v. Union of India* (1994 (6) SCC 651) this Court emphasised the need to find a right balance between administrative discretion to decide the matters on the one hand, and the need to remedy any unfairness on the other, and observed: (SCC pp. 687-88, para 94)

“(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 decision 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* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.
- (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 or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury principle* (*Associated Provincial Picture Houses Ltd. V. Wednesbury Corpn. 1948(1) KB 223*) of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(emphasis in original)

* * * * *

- 13. In *Union of India v. International Trading Co.*(2003 (5) SCC 437) this Court, in similar circumstances, held as under: (SCC pp. 445 & 447, paras 15-16 & 22-23)

"15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-

arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

* * * * *

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

- (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
- (b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;
- (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

- (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
- (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

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

- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”? and
- (ii) Whether the public interest is affected?

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

- 62. Keeping in mind the principles governing the scope of judicial scrutiny of matters involving tenders in exercise of powers under Article 226 of the Constitution of India, we have examined the records of the case and also the records produced by the Respondent No. 1.
- 63. Having considered the rival submissions and having gone through the record, we are of the view that there is no merit in this petition and the same deserves to be dismissed.
- 64. The submission of the Learned Senior Advocate for the Petitioner that the Respondent No. 1 could not have changed the tender

conditions does not have any merit. With the advancement in technology, the Respondents were well within their rights to take advantage of the advancement in technology. They had every right to adopt a technology that would be not only manpower efficient but also energy efficient.

65. Before deciding to introduce a newer technology, various technical departments of the Respondent No. 1 had conducted studies for adoption of the newer technology for the present tender. The Respondent No. 1 had also constituted a Committee to examine this aspect. It was only after the committee had examined the viability of introduction of driverless train operation feature on the new lines of Phase-III project of Respondent No. 1, and the Committee came to a conclusion that adoption of CBTC technology provided an excellent opportunity of introduction of driverless trains which apart from saving manpower, would also provide better interface with commuters with enhanced performance on sustainable basis did the Respondent No. 1 decide to change the tender conditions.
66. The rationale given by the Respondents of adopting the criteria for loading the financial offer on the basis of baseline offer with GEC values that it provided incentive to the bidders to offer the most energy efficient trains at most competitive price and that the commitment of lower GEC values necessitated adoption of improved technology features of equipment/system design had a direct bearing on the actual cost of the trains and which in turn

would have introduced improved and more efficient technology for the Respondent No. 1 in our considered opinion is reasonable and bonafide.

67. Another important aspect was that with the introduction of driverless trains and the CBTC Technology it was possible to introduce energy efficient trains which in turn would lead to a substantial savings not only by the Respondent No. 1 but also conservation of the natural resources and energy, it was with this objective that the parameters of energy consumption based evaluation were introduced.
68. Subsequent to the issue of Addendum No. 7 on 13.07.2012 the Petitioner had raised several queries on GEC related issues which were responded to by the Respondent No. 1, however the Petitioner never communicated or expressed any doubts or apprehensions. The Petitioner had thus accepted and adhered to the tender conditions while submitting its bids. Having accepted the tender conditions and the Guaranteed Energy Consumption based evaluation by submitting its bid, the Petitioner is now estopped from challenging the tender conditions or the manner of financial bids evaluation.
69. The Petitioner has not challenged any of the conditions of the tender document on the contrary it has accepted that the Energy Consumption Value Parameters were an accepted norm across the world in similar tenders. Even before is the Learned Senior

Advocate for the Petitioner submitted that the introduction of GEC parameters were laudable, however, the only grievance raised by the Petitioners was with the use of Guarantee Energy Consumption Values for evaluation of the financial bids. Once the Petitioner has submitted its bid being fully aware that the evaluation of the financial bids would be done on the basis of the GEC values and the financial bids would be loaded with the differential, the Petitioner is now estopped from challenging the loading of the financial bids by using the GEC values submitted by the Petitioner.

70. The Petitioner in its rejoinder filed in the present Writ Petition (@ page 1047, internal page 30 of the Rejoinder) have itself stated that they had no objection, nor could they have any objection to the adoption of the GEC (Guaranteed Energy Consumption Parameters) for evaluation of the bids.

"With regard to incorporation of GEC values, per se, Petitioner had no objection nor could they have had any objection, both on the premise to adopt or not to adopt GEC figures, as parameters for evaluation of bids, is at the discretion of the Respondent No. 1."

71. Furthermore in terms of the conditions of the tender, all bidders were required to submit a declaration in Appendix FT-15 whereby they had to acknowledge their complete understanding of all the stipulations/tender conditions of the tender including their complete understanding of the Addendum to the said tender. The Petitioner submitted declaration in Appendix FT – 15

acknowledging its complete understanding of all the stipulations/tender conditions. Thus the Petitioner is estopped from now challenging the use of GEC values for price bid evaluation.

72. Clause 4.1 of Instructions to Tenderers clearly provides that further instructions to bidders and addenda to tender document may be issued during the tender period and without prejudice to the general order of precedence prescribed by clause 1.5 of the GCC, the provisions in any such addenda shall take priority over the invitation to tender and tender documents previously issued. The Respondent No. 1 thus had reserved the right to change or modify the tender conditions during the tender period and the addenda to the tender conditions was duly notified to all the bidders.
73. We do not find any merit in the submission of the Learned Senior Advocate for the Petitioner that the Petitioner is the lowest bidder or is L – 1. As per the tender conditions there is not one parameter or one factor as submitted by the Petitioner to contend that he is L-1 but there is combination of various factors which are to be taken into account for determining the correct financial value of the bid. For operation of the trains, there are two types of energy consumption valuables which become the determinative factors for determining accumulative energy consumption of the operation of the train. Energy is used both for running of the train and for HVAC (Heating Ventilation Air Conditioning).

74. As per the tender document the bidders were required to submit the energy consumption values for both the factors i.e. Factor 'X' representing the electricity consumption for the operation of the train without HVAC and factor "Y" for operation of HVAC. As per the tender document it is not the lowest factor "X" or factor "Y" which was taken into account but the lowest of the cumulative of "X" + "Y". The financials of the bidders who submitted GEC values higher than the baseline were to be loaded with a fixed multiplier of approximately 3.4 crore per unit quoted over and above the baseline.
75. From the bids submitted by the various bidders it is apparent that the Respondent No. 2 was not the lowest in either the "X" or the "Y" factor and there were two other bidders each whose bids were lower than the Respondent No. 2 in respect of factor "X" and factor "Y". It is in the cumulative of factor "X" + "Y" that the Respondent No. 2 becomes L - 1. The Petitioner is merely taking into account one factor and not the other factors while projecting himself as L-1.
76. The GEC value submitted by the various bidders is as under:

S.No.	Bidder	Other than HVAC ('X')	HVAC ('Y')	Total
1	ALSTOM	1434	595	2029
2	BTC	1621	564	2185
3	CAFC	1159	790	1949
4	HBC	1767	514	2281
5	HRC	1259	567	1826
6	SIEMENS	1560	786	2346

77. The GEC value of the Respondent No. 2 was the lowest and was thus taken as baseline as per the Annexure ITT-8'. The respective loadings of other bidders has been calculated related to Respondent No. 2's GEC value as under:

S.No.	Bidder	GEC (‘X’+ Y’) KWH	GEC for loading	INR
1	ALSTOM	2029	203	6,911,264,587.08
2	BTC	2185	359	12,222,384,171.24
3	CAFC	1949	123	4,187,613,518.28
4	HBC	2281	455	15,490,765,453.80
5	HRC	1826	0 (baseline)	0
6	SIEMENS	2346	520	17,703,731,947.20

78. The result of the financial evaluation as carried out by Respondent No. 1 after incorporating correction of errors as per tender conditions is as under:-

S.No.	Tenderer	DMRC Corrected Eqt INR	Loading due to GEC in INR	Evaluated TOTAL INR	Inter-se Rank
1	2	3	4	5	6
1	Siemens Consortium	36,45,69,81,444.43	17,70,37,31,947.20	54,16,07,13,391.63	L-4
2	Bombardier Consortium	42,42,18,23,765.22	12,22,23,84,171.24	54,64,42,07,936.46	L-5
3	Hyundai ROTEM	42,91,54,42,276.92	BASE LINE OFFER	42,91,54,42,276.92	L-1
4	Alstom Consortium	43,73,87,62,372.80	6,91,12,64,587.08	50,65,00,26,959.88	L-3
5	CAF Consortium	46,14,19,07,068.91	4,18,76,13,518.28	50,32,95,20,587.19	L-2
6	Hitachi + BHEL	42,80,19,11,760.50	15,49,07,65,453.80	58,29,26,77,214.30	L-6

Thus in our considered opinion there is no error in the Respondent No. 1 assessing the Respondent No. 2 as L – 1

79. We also find no merit in the submission of the Learned Senior Advocate for the Petitioner that the energy consumption values submitted by the Respondent No. 2 are not achievable. In each of the factor “X” and “Y” there are two other bidders who are lower than the Respondent No. 2 and which in turn establishes the fact that the figures quoted by Respondent No. 2 are achievable figures. The expert committee constituted by the Respondent No. 1 have also examined the values and have come to a conclusion that the said values are achievable. We find no reason to take a different view.
80. We also find no merit in the submission of the Learned Senior Advocate for the Petitioner that there are no sanctions in place to check whether the said values quoted by the bidders are in fact achieved or not. The tender itself stipulates that for each additional unit of electricity consumed by the successful bidder, beyond committed GEC value, a penalty of approximately INR 4 crores per unit become applicable as per the said formula. The evaluation of the actual value achieved by the trains to be supplied by the successful bidder are put down at two stages. Firstly at the pre-delivery stage of the train where the train to be supplied has to confirm to the GEC Values and secondly at the operational stage. The penalty condition would be operative on the failure to achieve the GEC Values at either or both the stages and even the letter of award dated 01st April, 2013 to the Respondent No. 2 stipulates the said conditions for deduction.

81. Post the evaluation of the financial bids the Petitioner had submitted representations qua the recommendations of the Tender Committee. The representations were considered by the Board of Directors in their meeting on 28.02.2013 and the Board of Directors constituted Sub-Committee of Directors comprising of six directors (Four Functional Directors including the MD/DMRC, one Independent Director and one Nominee Director from Indian Railways).
82. The original records of the Tender RS – 10: Financial Package Evaluation have been produced before. On examination of the same we find that the representations received from the bidders with respect to the tender conditions and the evaluation have been duly examined.
83. The record further reveals that the Appraisal Committee Report, the Tender Committee report of Directors and the Sub-Committee Report were sent to JICA for ‘review’ of the report on ‘analysis of financial proposals’ and concurrence of the same. The JICA on 28.03.2013 has issued an NOC for ‘Analysis of Bids’, proposal for award in favour of Respondent No. 2 and to “go ahead” with contract award in favor of Respondent No. 2.
84. The Respondent No. 1 in the letter of acceptance issued on 01st April, 2013 to the Respondent No. 2 reiterated that the committed values of Guaranteed Energy Consumption shall have to be validated during the execution of the contract and in case of

validated GEC ('X' & 'Y') values being higher than the committed values then the payable amounts by way of penalty in accordance with the tender conditions would be deducted from the contract payable amounts.

85. We also find no merit in the submission of the Learned Senior Advocate for the Petitioner that if the amount of 665 crores were to be kept in a fixed deposit it would yield enough interest to fund the differential energy costs on account of higher GEC Values. Firstly the estimations are hypothetical and secondly the purpose behind such infrastructural development projects is not to earn money but to ensure that there is infrastructural development for the nation. The effort is further laudable if in this process there is an endeavour to conserve resources like electricity for the nation which can be then utilised for other useful purposes. The records further reveal that this issue has also been considered by the expert committees of the Respondent No. 1 and found meritless.
86. Another aspect that has had a bearing on the decision by us is that the approval and concurrence of JICA has been taken by the Respondent No. 1 at every stage.
87. The judgments referred to by the Learned Senior Advocate for the Petitioner do not apply in the facts of the present case. No doubt the Hon'ble Supreme Court in *Reliance Energy Ltd. And Anr. Vs. Maharashtra State Road Development Corpn. Ltd. And Ors* (2007) 8 SCC 1 has laid down that "Level playing field" is an

importance concept while construing Article 19(1)(g) of the Constitution. However the Hon'ble Supreme Court has in the said judgment also laid down:

38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This “legal certainty” is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of “level playing field”.

39. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself.....

88. In the facts of the present case we have held hereinabove that there was no vagueness or uncertainty and the bidders were well aware of the tender conditions and had even accepted the same. The same parameters and evaluation conditions were applicable to all bidders and as such the concept of level playing field has not been violated in the facts of the present case.

89. The judgment in the case of *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. And Ors* (1997) 1 SCC 53 is also not applicable in the facts of the present case in as much as we have found hereinabove that the consideration of the tenders received and the procedure followed in the matter of acceptance of the tender was transparent, fair and open.

90. The Judgments of the Division Bench of this Hon'ble Court in the case of *M/s Supreme Infrastructure India Ltd. Vs. Rail Vikas*

Nigam Limited and Anr. 196 (2013) DLT 357 is also not applicable in the facts of the case in as much as that was a case of a writing/typographical error having crept in, in the bid of the Petitioner.

91. The judgment of *Times Innovative Media Ltd. Vs. Delhi Transport Infrastructure Development Corporation Ltd. & Ors.* W.P. (C) 3973/2012 decided on 02.04.2013 is also not applicable in the facts of the present case as the Division Bench in that case was dealing with the contract being awarded on nomination basis.
92. No doubt the rights guaranteed by Article 14 of the Constitution of India are wide and of great magnitude but the basic requirement of Article 14 is fairness in the action by the State, and non-arbitrariness in essence and substance. The actions of the State are amenable to judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to be applied in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness. If there is a discernible principle and the action satisfies the test of reasonableness, there will be no judicial interference in the executive decision.

93. On examining the facts and circumstances of the present case and on going through the records, we are of the considered opinion that none of the criteria as mentioned above have been satisfied justifying Court's interference in the action of the Respondent No.1.
94. The Writ Petitions and the applications are accordingly dismissed, with costs of Rs.10,000/- each for the two sets of respondents.

SANJEEV SACHDEVA, J.

MAY 15, 2013
pkv

SANJAY KISHAN KAUL, J.