

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

Date of decision: 24th FEBRUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 15245/2022 & CM APPLs. 47219/2022 & 50691/2022**

RAHEE INFRATECH LIMITED

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
& Mr. Rajshekhar Rao, Sr. Advocate
with Mr. Tine Abraham, Ms. Shivani
Rawat, Mr. Shourya Bari and Mr.
Mohit Agarwal, Advocates

versus

DELHI METRO RAIL CORPORATION LIMITED & ORS

..... Respondents

Through: Mr. Tarun Johri, Mr. Ankur Gupta,
Mr. Vishwjeet Tyagi, Advocates for
R-1

Mr. Amrita Prakash, Mr. Vishal
Ashwani Mehta, Advocates for R-2 to
R-4

Mr. Udit Seth, Ms. Priya Kanwat,
Advocates for R-6

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. Aggrieved by the rejection of its bid, the Petitioner has approached this Court by filing the instant Writ Petition for quashing the impugned communications dated 01.11.2022 whereby the Petitioner was informed that its bid for the tender floated by Respondent No. 1 for installation, testing &

commissioning of ballastless tracks including supply of fastening system, buffer stop and others for Line No.7 Extension (Maujpur-Majlis Park) (CH.0.0M to CH.12098.52M) of the Delhi Mass Rapid Transport System Project, Phase-IV(**“Project”**), has been rejected. Vide Email dated 01.11.2022, the Respondent No. 1 had informed the Petitioner that its bid has been rejected during technical evaluation, as the Petitioner is technically non-compliant. A summary of evaluation of technical bids dated 01.11.2022 was also circulated by Respondent DMRC, informing that the evaluation of technical bids has been completed and the price bids of those bidders whose bids have been considered substantially responsive to the requirements of the bidding document shall be opened.

2. The facts in brief, leading to the instant writ petition are as follows:-

- i. Respondent No.1/DMRC had floated a Tender for the purpose of installation, testing & commissioning of ballastless tracks including supply of fastening system, buffer stop and others for Line No.7 Extension (Maujpur-Majlis Park) (CH.0.0M to CH.12098.52M) of the Delhi Mass Rapid Transport System Project, Phase-IV.
- ii. The Petitioner herein, a public limited company incorporated under the Companies Act, 1956, operating in the field of rail tracks and bridges, participated in the afore stated Tender.
- iii. It is stated that the Petitioner submitted its bid for the Tender on 13.07.2022 through an online bidding process and under its Technical Bid, the Petitioner proposed supply of a fastening system, namely, Pandrol Double Resilient Baseplate 21166 Assembly (VIPA DRS) – 2 Hole for 60E1 Rail (**“PDRBA**

21166”). According to the Petitioner, the same is a re-engineered version of its mother system, i.e., Pandrol Double Resilient Baseplate assembly Drawing No. 13145 (**“PDRBA 13145”**).

- iv. It is stated that PDRBA 13145 was approved by the Ministry of Railways on 07.10.2011 in terms of the requirements specified in Performance Criteria of Fastening System for Ballastless Track dated 21.05.2010, issued by the Ministry of Railways.
- v. It is stated that PDRBA 13145 too was a modified version of an earlier version (PDRBA 13145's mother system) that had been used in several metros for more than 15 years.
- vi. It is stated that on the basis of changes in specifications brought about *vide* Procedure for Safety Certification and Technical Clearance of Metro Systems (**“Safety Certification Procedure 2015”**) issued by the Ministry of Railways/ Research Designs and Standards Organization (**“RDSO”**) and feedback received from Respondent No.1 with respect to the factors of economy and compatibility in relation to track installation, the Petitioner proceeded to modify PDRBA 13145 and developed a re-engineered version, i.e., PDRBA 21166. It is stated that this re-engineered version of its mother system provided benefits such as lesser assembling and disassembling time due to fewer components, and concrete saving.
- vii. On 09.07.2020, Respondent No.5 herein, i.e., Pandrol Rahee Technologies Private Limited (**“Pandrol Rahee”**), sent a communication to Respondent No.1 requesting for an approval to introduce PDRBA 21166, citing several benefits it affords to

fastening systems. A request was made by Pandrol Rahee for submission of the relevant technical documents to the Ministry of Railways and RDSO, for approval of PDRBA 21166.

- viii. The said communication was responded to by the DMRC on 21.09.2020. Therein it stated that Pandrol Rahee may submit its proposal for approval of PDRBA 21166 as a modification to the existing approved PDRBA 13145 for further submission to RDSO for consideration, under Para 4.6 of Annexure C-2 (Performance Criteria of Fastening System for Ballastless Track on Metro Railways) of Safety Certification Procedure 2015 (**“2015 Performance Criteria”**). Thus, on 26.09.2020, Pandrol Rahee re-submitted the proposal to DMRC along with relevant enclosures in terms of Para 4.6 of the 2015 Performance Criteria for approval of PDRBA 21166, as the re-engineered version of PDRBA 13145.
- ix. Subsequently, on 23.12.2020, DMRC wrote to RDSO requesting its approval for PDRBA 21166. In the said letter, it had mentioned various benefits which were accorded to the fastening system due to re-engineering and had requested for approval of the same, for adoption in ballastless track of Metro Rail System.
- x. On 01.03.2021, RDSO had written to the Ministry of Railways that the Track Design Directorate has examined the request put forth by DMRC inclusive of all the Annexures for approval of PDRBA 21166 as the re-engineered system of PDRBA 13145, and the Directorate has advised that the proposal of DMRC may be approved in terms of Clause 4.6 of Annexure C-2 of 2015

Performance Criteria and requested the Railway Board to accord approval, as requested by DMRC.

- xi. On 15.03.2021, the Railway Board (Ministry of Railways), through its Director had written to DMRC according provisional approval of re-engineered design of PDRBA 13145 i.e., PDRBA 21166, subject to certain conditions. These being -
- (1) Visual inspection report of all components of the fastening system installed on the curve should be sent to RDSO at intervals of 6 months
 - (2) RDSO team will inspect this fastening system after 2 years from the date of installation for evaluation of final conclusion and
 - (3) DMRC shall submit the performance performa in compliance with Clause 1.2 of 2015 Performance Criteria.
- It has also been pointed out by the Petitioner that on 19.07.2022, the Ministry of Railways, referring to the (Ministry of Housing and Urban Affairs) MoHUA O.M. No. K-14011/ 03/ 2022 MRTS-Coord., dated 07.06.2022, had stated that the PDRBA 21166 was examined in consultation with RDSO and that the DMRC may use the above fastening system subject to the conditions laid down in aforesaid letter dated 15.03.2021, and submit the performance to Ministry of Railways in the Proforma in compliance with Clause 1.2 of the 2015 Performance Criteria. It was further stated that PDRBA 21166 can be used by other metros as per requirement, after obtaining clearance from Ministry of Railways on submission of various salient features of fastening system in the form of Annexure C-2 i.e., of 2015 Performance Criteria.

- xii. On 27.07.2022, the MoHUA had also written to all metro rail corporations requesting them to take note of the decision of the Ministry of Railways regarding PDRBA 21166 and referred to the Ministry of Railways' letter dated 15.03.2021 regarding approval of PDRBA 21166 and O.M. dated 19.07.2022 of the Ministry of Railways whereby it was clarified that the fastening system can also be used by other metros as per requirement, subsequent to obtaining clearance from Ministry of Railways on submission of various salient features of fastening system in the form of 2015 Performance Criteria.
- xiii. In the meantime, on 13.05.2022, DMRC floated the Tender for the Project and the Petitioner had submitted its bid on 13.07.2022. Prior to the same, a set of pre-bid queries were also raised by the Petitioner with respect to the bid specifications.
- xiv. It is stated that Respondent No.1 opened its technical bid on 14.07.2022. On 24.08.2022, first set of queries were raised by DMRC to the Petitioner which *inter alia* requested the Petitioner to establish its eligibility and qualifications. On 02.09.2022, the Petitioner in consultation with Pandrol Rahee, responded to the same.
- xv. On 15.09.2022, a second set of queries to the Petitioner which pertains to the nature of approval regarding PDRBA 21166, the requirement under the tender for PDRBA 21166's 'proven track record', and certificates furnished by the Petitioner were raised. It is stated that the same were responded by the Petitioner on 23.09.2022 stating that PDRBA 21166 is not a new system but a value / re-engineered version of its proven mother system, i.e.,

13145, which also was a value/ re-engineered version of an earlier system. It was stated that in light of the approvals granted by the Ministry of Railways and RDSO, PDRBA 21166 could be used in all metros. Thereafter, on 01.11.2022, DMRC proceeded to issue the impugned communications rejecting Petitioner's technical bid.

xvi. Aggrieved by the said impugned communications rejecting Petitioner's technical bid, the Petitioner has approached this Court by filing the instant writ petition.

3. Learned Senior Advocate for the Petitioner, submits that the impugned email is palpably erroneous because it merely states that the Petitioner's bid is *technically non-compliant* without assigning any reason whatsoever. He submits that the rejection of the Petitioner's bid is arbitrary and the DMRC has unfairly ignored the Petitioner's bid which is in accordance with the terms of the tender. It is submitted that in the absence of any reasons for rejection in the impugned email, the Petitioner has been constrained to challenge the same based on a presumption that the alleged technical non-compliance with the bid relates to issues highlighted by DMRC in its communication dated 15.09.2022. He submits that issues highlighted by the Respondent No.1 were squarely addressed by the Petitioner in its letter dated 23.09.2022, and not contested in any manner whatsoever thereafter.

4. Learned Senior Counsel for the Petitioner submits that the Respondent, without any intimation, on 01.11.2022, proceeded to issue the impugned communications. He states that DMRC disqualified the Petitioner summarily without ascribing any reasons on the said date and proceeded to

open the financial bids without leaving any room for the Petitioner to seek any clarification. It is stated that the Petitioner was left without any recourse to seek reasons for disqualification or seek reconsideration of its technical bid. It is contended that the aforesaid points towards DMRC's non-application of mind, such that no other prudent person or instrumentality of the state could have rejected the technical bid of the Petitioner for being technically non-compliant. He states that Respondent No.1's rejection of the Petitioner's technical bid was done so without assigning any cogent reasons in a simple one-line email in complete breach of the legal principle requiring State action to be supported by valid grounds.

5. Learned Senior Counsel for the Petitioner contends that PDRBA 21166 is a re-engineered/modified version of an earlier Fastening System, PDRBA 13145 which was approved by the Ministry on 07.10.2011, in terms of the requirements specified in the 2010 Performance Criteria. He contends that since its approval, PDRBA 13145 has been used extensively and more than 2 million sets of the same have been supplied to Indian metro projects including DMRC. It has been submitted that the Ministry approved PDRBA 13145 only after being satisfied with its satisfactory performance and that its mother system has been in use in several metros for the past 15 years. It has been submitted that the requirement of 5 years proven track record was dispensed with by the Railways and that was challenged before this Court in Patil Vossloh Rail Systems Pvt. Ltd. v. Union of India & Ors. **W.P. (C) 3351/2011**. It is submitted that the Division Bench of this Court vide Judgement dated 26.09.2012, was pleased to dismiss the said challenge and has upheld the Ministry's satisfaction on the basis of the mother system's proven track record. It was submitted that this Court categorically upheld the position that the condition of 'proven track record' in the 2010 Performance

Criteria includes provenness of mother systems. It is submitted that proven track record of modified system's mother system is sufficient to comply with a requirement of 'proven track record'.

6. Learned Senior Counsel for the Petitioner has contended that the approval granted for use of PDRBA 21166 has been done so, to facilitate its use and adoption in DMRC's rail network, subject to compliance with conditions regarding inspection and monitoring by RDSO since, admittedly, PDRBA 21166 is a re-engineered system of its mother system. He contends that the Ministry has sanctioned the use of PDRBA 21166 in other metros throughout the country. Further, the Ministry's approval and subsequent clarification dated 19.07.2022 must be construed to mean that PDRBA 21166 is ready to be put in use. He further contends that DMRC's rejection of the technical bid on the purported ground that the approval cannot be construed as approval for use and adoption of PDRBA 21166 in the Project is erroneous and arbitrary, keeping in mind the findings of this Court in the case of Patil Vossloh (supra). He submits that insistence on performance for 3 years is irrational and contrary to the Ministry's intent to facilitate the adoption and use of PDRBA 21166. He further contends that PDRBA 13145 has been deployed globally for the past 15 years and supplied to various Indian metros since 2012. As such, there is no dispute that PDRBA 13145 is a proven system within the meaning of Clause 6.3 (A) (iii) of Particular Specifications and, therefore, has a proven track record in India and abroad.

7. Learned Senior Counsel for the Petitioner contends that in terms of the decision in the case of Patil Vossloh (supra), a modified and value-engineered system does not render it doubtful, rather, it builds on and enhances the technical capability and viability. The re-engineered system doesn't require for its credentials to be examined *denovo* and must be

examined on the basis of proven track record of mother system. He states that in light of the Judgement in the case of Patil Vossloh (supra), it would be wholly inequitable if, in similar facts, the present rejection is allowed to stand and would result in differential treatment. He submits that Clause 6.3 (A)(v) of Part 2 of the Tender Document cannot be construed to be read restrictively to mean that a modified system needs to prove a track record independent of the mother system and that the same is against settled law and public interest, laying an impossible burden on a bidder. He further submits that Respondent No. 1's stand that since the tender requires a modified system to have a proven track record of 3 years, PDRBA 21166 has failed to independently satisfy such requirement despite the proven track record of its mother system PDRBA 13145, is unjustified. He states that given the Judgement of this Court in the case of Patil Vossloh (supra) and the Ministry's position, it is not open for Respondent No. 1 to insist that PDRBA 21166 should independently satisfy the proven track record criterion set out in the tender document for the Project.

8. *Per contra*, Mr. Tarun Johri, learned Counsel for the Respondent No.1, contends that the Petitioner was aware since the publishing of the Project that PDRBA 21166 is not meeting the provenness criteria in terms of the provisions of the tender floated. He contends that prior to opening of the bid, a pre-bid query was raised by Pandrol Rahee, requesting Respondent No. 1 to remove the requirement of "performance record of three years in service", i.e., provenness as highlighted in Clause 6.3 A (iii) and 6.3 C.1 of Employer's Requirements-Particular Specifications, by stating that PDRBA 21166 is a re-engineered version of PDRBA 13145 and that the same stands already proven in India. To this, it was specifically replied to by DMRC that no change in tender conditions would be allowed. He submits that the

aforesaid pre-bid query was also published on the NIC portal for information of all the prospective bidders as per Clause 7 of Instructions to Bidders. It has been stated that despite being aware of the position regarding the provenness requirement and the stand of DMRC in not bringing about changes to the tender conditions, the Petitioner still proceeded to participate in the bidding process with a proposal for use of PDRBA 21166 fastening system, projecting the same to be a re-engineered version of PDRBA 13145. He also submits that the Petitioner vide pre-bid query raised the same issue which was rejected, and after participating in the tender, the Petitioner cannot turn back and challenge the very same condition.

9. Learned Counsel for Respondent No.1 submits that a similar post-bid query was raised by another prospective bidder, M/s Apurvakriti Infrastructure Pvt. Ltd., proposing PDRBA 21166, however, it subsequently chose to use another fastening system 336 as that met the tender conditions. He submits that with regards to the contentions of the Petitioner regarding applicability of the Judgement of this Court in the case of Patil Vossloh (supra), it has been submitted that the same is misplaced as the issue which arose therein centred around an Office Order dated 21.05.2010 issued by the Ministry of Railways wherein the satisfactory performance record of the fastening system was mentioned as minimum 5 years for becoming eligible to supply fastening system to metro railways for laying ballastless track. He contends that in the said case, the Petitioner did not challenge any tender condition and the judicial discussion therein did not revolve around the terms of the tender document and the conditions of performance criteria.

10. Learned Counsel for Respondent No.1 contends that Respondent No.1 has freedom to fix its own tender conditions for ensuring technical and safety satisfaction. He submits that the approval of Ministry of Railways

granted to the Petitioner for PDRBA 21166 is only a provisional one, subject to certain conditions. He further submits that it is the stand of Respondent No.1 that PDRBA 21166 is not even a re-engineered version of PDRBA 13145 and that the same cannot be construed as its mother system since the provisional approval granted vide communication dated 15.03.2021 was done so under Clause 1.2 of Annexure C-2 of Procedure for Safety Certification, 2015, which relates to a new fastening system. He contends that it is evident from the drawings, comparison of parameters and component details of both the fastening systems that almost all parts are different. He submits that due to the aforesaid differences, Ministry of Railways has not considered PDRBA 21166 as a re-engineered version of its mother system.

11. Learned Counsel for Respondent No.1 submits that PDRBA 13145 had a 4 Anchor System whereas PDRBA 21166 has a 2 Anchor System so these two systems have completely different mechanisms of structural strength to transfer loads/stresses. He also submits that the Petitioner had in fact not complied with conditions stipulated in Clause 6.3 (A) (iii) of Employer's Requirement – Particular Specification, wherein the first condition was, the approval of Ministry of Railways and the second was that such modified fastening system should have a proven track record, i.e., satisfactory performance record of minimum three years in service on any two different established railway systems. He further submits that with regards to the contention of the Petitioner that DMRC has engaged PDRBA 21166 in relation to Mumbai Metro Rail Project and has used a fastening system akin to PDRBA 21166 in Dhaka Mass Rapid Transit Development Project Line-6, is erroneous. He further contends that for DMRC Tender MT-8 for Mumbai Metro, a third party inspecting agency of world repute

had been nominated as a technical assessor. M/s Bureau Veritas i.e., the third party inspecting agency *vide* its report had infact submitted that the result of its inspection was ‘unsatisfactory’.

12. Learned Counsel for Respondent No.1 submits that the findings of the inspection report buttress the stand of Respondent No.1 that PDRBA 21166 is not in fact a re-engineered version of its alleged mother system, i.e., PDRBA 13145. He contends that with regards to the Dhaka Project, DMRC is one of the consortium members of NKDM Association and that DMRC does not have any lead role in execution of the project. He also submits that Dhaka Metro is a foreign project and does not fall under the Procedure for Safety Certification, 2015. He further contends that the technical requirements for the Dhaka and Metro Projects are also not known, however, the provenness criterion with respect to the technical qualification for the instant Project was known to the Petitioner, and it has squarely failed to comply with the same.

13. Learned Counsel for Respondent No.1 contends that the employer has freedom to lay down its technical requirement for a particular project, which the prospective bidders have to comply with. He submits that the Petitioner is seeking striking down of the tender conditions subsequent to having participated in the bidding process, not heeding the responses to the queries sent by the Respondent No. 1, and getting its bid rejected. It is submitted that despite clear intimation regarding PDRBA 21166 being technically non-responsive, prior to rejection, the Petitioner proceeded to participate in the bidding process with the same fastening system. He further submits that the Petitioner is in a way trying to change the goal post by impugning the rejection. After having participated in the tender process, the bidder cannot seek explicit change in tender conditions or seek to place an interpretation on

the conditions which run against the commercial and technical wisdom exercised by DMRC while floating the said tender in the open market. It is submitted that the Tender Documents were issued with the objective that DMRC should receive a fastening system which technically suits its safety, operation and maintenance objectives with respect to metros. He contends that the impugned communications were issued along with a discretion afforded to the Petitioner to seek out any clarifications with regards as to why the Petitioner's bid was declared as technically non-responsive. However, till date, the Petitioner has not approached Respondent No.1 seeking any clarification.

14. Heard learned Counsel for the parties and perused the material on record.

15. The Respondent No.1 called for a tender for installation, testing and commissioning of ballastless tracks including supply of fastening system, buffer stop and others for Line No.7 Extension (Maujpur-Majlis Park) (CH.0.0M to CH.12098.52M) of the Delhi Mass Rapid Transport System Project, Phase-IV.

16. The Petitioner participated in the tender and the tender submitted by the Petitioner has been held to be non-responsive on the ground that the system offered by the Petitioner does not comply with the requirements of the tender. The relevant portion of Paragraph 6.3 of the general specifications of the bid document which provides for the Technical Specifications of Fastening System reads as under:

“6.3 TRACK COMPONENTS

Technical Specifications of Fastening System

A. Essential requirements of Proposed Fastening system

- (i) MOR Approval for the Proposed Fastening system is Mandatory. The Fastening system proposed by the contractor shall comply to the Performance Criteria issued by Ministry of Railways vide their letter No.2009/Proj/MAS/9/2 dated 18.02.2015 and approved by Ministry of Railways given in Annexure C of Particular Specification to Employer's Requirement.*
- (ii) The Proposed Fastening System for ballast less track should comply with performance criteria issued by Ministry of Railways under Annexure C II of Procedure of safety certification & Technical clearance for Metro Systems, December 2015.*
- (iii) The proposed Fastening System should have a Proven Track record. The fastening system should have satisfactory performance record of minimum three years in service in regular revenue operation on ballastless track on any two different established railway systems (except exclusive freight tracks) for a length of at least 5 km in each metro having speed potential of at least 80 kmph & design axle load 16T irrespective of wheel profile and rail section.*
- (iv) The tenderer shall submit the approval of Ministry of Railways along with the compliance of all observations of MOR, if any, while granting such approvals and also to submit the technical details and test reports to substantiate the compliance of performance criteria under Annexure C II of Procedure of safety certification & Technical clearance for Metro*

Systems issued on December 2015 by Ministry of Railways.

- (v) *Any deviation/Modification in Proposed fastening system against Para4.6 of Performance criteria issued by Ministry of Railways under Annexure C II of Procedure of safety certification & Technical clearance for Metro Systems, December 2015 will be considerable only if, system with deviation/modification is approved by Ministry of Railways and Modified system will have Proven Track record as mentioned in A.(iii). In such a case an Assembly Test will be required to be done with the fresh samples and same to be witnessed by DMRC nominated Third Party Inspecting agency/DMRC.*

B. The Technical Proposal to be submitted by tenderer, shall clearly demonstrate the understanding and comprehension of the supply, including Preliminary Scheme/drawings of Fastenings System.

C. Regarding Fastening System for Ballastless track

With respect to the fastening system for ballastless track proposed by the Tenderer, the following minimum information/ certification should be provided by the tenderer.

C.1 Certificate of Provenness of the fastening

In terms of Paragraph 4.1 (ii) of Performance Criteria of Fastening System enclosed at Annexure C of Particular Specification to Employer's Requirement, the Tenderer shall submit certificate/s of performance from user railway administration, including proof of use of the same fastening system encompassing the

same set of components (as is being offered by the Tenderer in this Tender), to the effect that the fastening system has satisfactory performance record for minimum 3 years in service in ballastless track in their system(s). The certificate should be accompanied with the drawing of the fastening system and its components to clearly establish that the fastening system including its components whose performance has been certified is exactly same as the fastening system including its components that has been proposed by the Tenderer in this Tender. The drawings need not be certified by the client.

The certificate(s) should also contain, but not limited to, the following information

(i) Details of the user railway administration such as the Name of the railway administration and its contact person, address, telephone number, e-mail id, Fax number etc;

(ii) Name of the main line in which the system is in use for minimum 3 years

C.2 Assembly Tests reports of the fastening system

In terms of Paragraph 4.7 of Performance Criteria of Fastening System contained in Railway Board's letter No. 2009/Proj/MAS/9/2 dated 18.02.2015, enclosed at Annexure C of Particular Specification to Employer's Requirement of these Tender documents, the Tenderer should submit test report for the fastening system from reputed independent institute/laboratory. The test reports should be accompanied with the drawing of the fastening system and its components to clearly establish that the fastening system including its components which have been tested and reported upon is exactly same as the fastening system including its components that has been proposed by the Tenderer in this Tender. (emphasis supplied)

17. A perusal of Paragraph 6.3 (A) (iii) shows that the proposed fastening System should have a Proven Track record. The fastening system should have satisfactory performance record of minimum three years in service in regular revenue operation on ballastless track on any two different established railway systems for a length of at least 5 km in each metro having speed potential of at least 80 kmph & design axle load of 16T irrespective of wheel profile and rail section.

18. A perusal of the tender documents and the relevant clauses shows that the tenderers must be in a position to supply a fastening system which though may have been modified by them vis-à-vis the original fastening system but the same should have been approved by the Ministry of Railways, the performance criteria of Annexure C-2, which is the Procedure of Safety Certification & Technical Clearance of Metro Systems and that the modified fastening system should have a proven track record, i.e., it should have a satisfactory performance record of minimum three years in service or on any two different established railway systems.

19. The issue which has been raised is that the version which has been provided by the Petitioner is re-engineered version of an earlier fastening system, and therefore, since the earlier system is already stood the test of a satisfactory performance record, the re-engineered version need not once again be put for a fresh satisfactory performance record. The Petitioner has placed reliance upon Annexure C-2 of the safety certification and technical clearance of metro system which deals with performance criteria of fastening system for ballastless track. Paragraph 1.1 and 1.3 of Part A of Annexure C-2 reads as under:

“1.2 A new fastening system, which is fully compliant to performance criteria and not approved by MoR can

also be used by Metro Railways/MRTS system as they are free to choose fastening systems for ballastless track complying with this performance criterion. The detail of such fastening system used shall be submitted to MoR and the same shall be kept in observation by MoR for a period of 2 years under service conditions in association of Metro Railways/MRTS system. The Performa for the monitoring performance shall be advised by MoR to concerned Metros Railways/MRTS system. After successful performance for 2 years, Metro Railways/MRTS system shall process for approval of MoR for further use of fastening system.

1.3 The fastening system already approved by MOR as per previous performance criteria for ballastless track dated 21.5.2010 will not require fresh clearance as per this revised criteria and any of these systems can be used by Metro/ MRTS systems.”

20. The Petitioner, while placing reliance upon the abovementioned Paragraph 1.3 Part A of Annexure C-2, contends that since the fastening system has been approved by the Ministry of Railways as per the previous performance criteria, the same do not require a fresh clearance. The contention of the Petitioner cannot be accepted for the reason that Paragraph 1.2 of Part A of Annexure C-2 which is the Procedure for safety certification and technical clearance for Metro Systems provides that the fastening system submitted to the Ministry of Railways will be kept in observation by Ministry of Railways for a period of two years under service conditions in association of Metro Railways/MRTS system. It also provides that the Performa for the monitoring performance shall be advised by Ministry of Railways to concerned Metros Railways/MRTS system and only after successful performance for 2 years, the Metro Railways/MRTS system shall process for approval of Ministry of Railways for further use of fastening

system. In any event, it is always for the tenderer to insist on a satisfactory performance record and it cannot be said that the insistence of satisfactory performance record for three years as stipulated in Clause 6.3(A) (iii) is unwarranted. The insistence on a performance record is to ensure safety of the passengers which is paramount.

21. Reliance has been placed by the Petitioner on letters dated 19.07.2022 and 27.07.2022 to state that it has been accepted by the Ministry of Railways and that PDRBA 21166 is only a modified version of the earlier fastening system of PDRBA 13145 and the same has been approved by the Ministry of Railways on 07.10.2011 and the Government of India has also approved the re-engineered design of the Pandrol Double Resilient Baseplate Assembly System (PDRBA) 21166 for Delhi Metro Rail Corporation Limited. It is stated that in view of the aforesaid, the requirement of satisfactory performance record is not necessary in terms of the letters dated 19.07.2022 and 27.07.2022. The said contention of the Petitioner cannot be accepted for the reason that even if it has been approved by the Ministry of Railways still it will have to perform for 2 years before it is approved by the Ministry of Railways for further use. The letters dated 19.07.2022 and 27.07.2022 read as under:

***“GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)***

*2021 /Proj ./DMRC/FS-BLT /30/40
New Delhi, dated 19 07.2022*

OFFICE MEMORANDUM

Sub: Approval of Re-engineered design of "Pandrol Double Resilient Baseplate Assembly" fastening system 21166 for Delhi Metro Rail Corporation Ltd.

Ref: (i) MoHUA OM no. K-14011/03/2022-MRTS-Coord .dated 07.06 2022

(ii) Board's letter of even number dated 15 03 2021.

With respect to MoHUA OM referred at (i) above, it is stated that DMRC proposal for Re-engineered design of two hole "Pandrol Double Resilient Baseplate Assembly fastening system 21166 as Annexure-I was examined in Railway Board in consultation with RDSO and a letter under reference (ii) above for use of above fastening system has been issued with certain conditions which are self-explanatory.

DMRC may use the above fastening system subject to the conditions laid down in the letter under reference (ii) and shall submit the performance to MoR in the Proforma in compliance to clause 1.2 of Annexure C-2 of 'Procedure for Safety Certification and Technical Clearance of Metro systems, December 2015.

Above fastening system can also be used by other metros as per requirement, after obtaining clearance from MoR on submission of various salient features of fastening system in the form of annexure C2.

*(D. K. Mishra)
Director/GS (Civil)-IV
Railway Board
Ph 011 -47845480”*

“No. K-14011103/2022-MRTS-Coord

*Government of India
Ministry of Housing and Urban Affairs
(MRTS Coord Desk)*

*311-B, Nirman Bhawan, New Delhi,
Dated the 27th July, 2022.*

To,

*Managing Directors of All Metro Rail
Corporations
(As per list attached)*

*Subject: Approval of Re-engineered design of "Pandrol
Double Resilient Baseplate Assembly" fastening system
21166 for Delhi Metro Rail Corporation Ltd*

Sir/Madam,

I am directed to refer to Ministry of Railways' (MoR's) letter dated 15.03.2021 (copy enclosed) on the above cited subject and to say that upon DMRC's request, MoR has accorded approval to Re-engineered design of two hole "Pandrol Double Resilient Baseplate fastening system" for adoption in Ballastless track of Metro Rail Systems subject to certain conditions.

2. MoR, vide OM dated 19.07.2022 (copy enclosed), has also clarified that the above fastening system can also be used by other metros as per requirement after obtaining clearance from MoR on submission of various salient features of fastening system in the form of annexure C2 of 'Procedure for Safety Certification and Technical Clearance of Metro Systems, December 2015'.

3. All metro rail corporations are requested to take note of the decision of MoR in the subject matter.

Yours faithfully,

(Rachna Kumar)

Under Secretary to the Govt of India

Tel: 23062935”

22. A perusal of the abovementioned letter dated 19.07.2022 shows that the fastening system can be used by other metros as per the requirement after obtaining clearance from Ministry of Railways on submission of various salient features of fastening system in the form of annexure C-2 and further clearance can be obtained only after successful performance for 2 years, meaning thereby, the letters dated 19.07.2022 and 27.07.2022 issued by the Ministry does not make the fastening system eligible as per the requirement of Paragraph 6.3 (A) (iii) of the general specifications of the bid document.

23. A perusal of the material on record shows that the very same issue which has been raised by the Petitioner in the present petition had been raised by the Petitioner in a pre-bid query. Vide the pre-bid query, the Petitioner had sought for a change in the tender conditions. However, the same had been negated by the DMRC.

24. The relevant queries raised by the Petitioner and the reply by the DMRC negating the contentions of the Petitioner read as under:-

CONTRACT: DT-05: “INSTALLATION, TESTING & COMMISSIONING OF BALLASTLESS TRACK INCLUDING SUPPLY OF FASTENING SYSTEM, BUFFER STOP & OTHERS FOR LINE-7 EXT (MAUJPUR-MAJLIS PARK) (CH. 0.0M TO CH. 12098.520M) OF DELHI MRTS PROJECT OF PHASE-IV”.					
REPLY TO PRE BID QUERIES					
S. No.	Section No.	Clause No.	Description of Clause	Clarifications Sought/ Queries	DMRC Reply
2	Part-2 (Section-VI)	Employers 2. Part 2-1, ER, PS, Cl. 6.3, Track Components, Technical specification of Fastening	A Essential requirements of Proposed Fastening system (iii) The proposed Fastening System should have a Proven Track record. The fastening system should have satisfactory performance record of minimum three years	Reference para (v) above, we would like to propose our fastening system Pandrol Double Resilient Baseplate Assembly System (PDRBA) 2 Hole Assembly 21166 as	No change in tender conditions.

		system	in service in regular revenue operation on ballastless track on any two different established railway systems (except exclusive freight tracks) for a length of at least 5 km in each metro having speed potential of at least 80 kmph & design axle load 16T irrespective of wheel profile and rail section. (v) Any deviation/Modification in Proposed fastening system against Para 4.6 of Performance criteria issued by Ministry of Railways under Annexure C II of Procedure of safety certification & Technical clearance for Metro Systems, December 2015 will be considerable only if, system with deviation/ modification is approved by Ministry of Railways and Modified system will have Proven Track record as mentioned in A.(iii). In such a case an Assembly Test will be required to be done with the fresh samples and same to be witnessed by DMRC nominated Third Party Inspecting agency/DMRC. C.1 Certificate of Provenness of the fastening system In terms of Paragraph 4.1 (ii) of Performance Criteria of Fastening System enclosed at Annexure C of Particular Specification to Employer's Requirement, the Tenderer shall submit certificate/s of performance from user railway administration, including proof of use of the same fastening system encompassing the same set of components (as is being offered by	approved by RDSO and by Ministry of Railways (MoR) to various contractors who have submitted their bids against the referred tender. We have supplied more than 20 Lakhs baseplate sets of PDRBA 13145 in last 10 years into Indian Metros (including approx 7 Lakh sets supplied to DMRC for Phase III and MMRDA projects). As a continuous innovation and development exercise and based on feedbacks received from Metros (including DMRC) and associate Track installation agencies regarding economy in plinth cost, compliance to distance of Derailment guard to running rail as per RDSO Annexure C2 Dec'2015, and compatibility factors for installation of tracks, M/s. Pandrol Re-engineered its existing system of PDRBA 13145 (approved by MOR dated 07.10.2011) and offered to DMRC on 26.09.2020, the value engineered / modified version PDRBA 2-Hole system Type 21166 making it more compatible, suitable & economical. One of the key feature that was modified in the fastening system was use of 2x 33mm bolts on curve track instead of 4x27mm bolts. Similar arrangement had been in use for more than 20 years in Singapore and	
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			the Tenderer in this Tender), to the effect that the fastening system has satisfactory performance record for minimum 3 years in service in ballastless track in their system(s). The certificate should be accompanied with the drawing of the fastening system and its components to clearly establish that the fastening system including its components whose performance has been certified is exactly same as the fastening system including its components that has been proposed by the Tenderer in this Tender. The drawings need not be certified by the client. The certificate(s) should also contain, but not limited to, the following information (i) Details of the user railway administration such as the Name of the railway administration and its contact person, address, telephone number, e-mail id, Fax number etc; (ii) Name of the main line in which the system is in use for minimum 3 years	was also installed in Riyadh Metro and Dhaka Metro. In Dhaka Metro, DMRC as lead consultant of NKDM Association (Nippon-KOEI-NK India-DMRC-MOTT UK-MOTT India DDC) has already approved the usage of the similar system in 2019. Copy of the approval by DMRC is enclosed. PDRBA 2 Hole fastening system 21166 was proposed by us under para 4.6 of Annexure C2 to DMRC vide letter dated 26.09.2020. DMRC after being satisfied / accepted the same and forwarded to RDSO/MOR vide their letter dated 23.12.2020 for approval as per Para 4.6 of Annexure C2 of RDSO Dated Dec'2015. RDSO vide their letter dated 01.03.2021 and MOR vide their letter dated 15.03.2021 has already approved the same for usage in Ballastless Track system by Metros (including DMRC). We thus request DMRC to kindly remove requirement of provenness as highlighted in para (iii) above as PDRBA 2 Hole fastening system 21166 is a re-engineered version of PDRBA 13145 already proven in India (including approx 7 Lakh sets supplied to DMRC for Phase III and MMRDA projects) since last 10 years.	
3	Part-2 (Section-VI)	3. Part 2-1, ER, PS, Cl. 6.3, Track Components,	C.6 In case Vendor unit not approved earlier or no any supply made earlier to DMRC then fresh approval of	Based on the above highlighted portion, since fastening system and its components are	No change in tender conditions.

		Technical specification of Fastening system:-	Engineer will be required. In such a case Tenderer have to submit proposal for consideration of vendor unit along with relevant details like Manufacturing & testing facilities, technical evaluation report, Past supply records to any user administration, Test reports for the components, Assembly test report with the samples produced by proposed Vendor unit, QA report, Approval of system supplier and others. New Vendor units having adequate manufacturing & Testing facilities but no Past supply record or not enough one as per eligibility criteria, then such units will be considered for manufacturing & supply only after successful Third-Party Technical evaluation followed with DMRC approval.	safety item hence we request DMRC that any New manufacturing units for CRITICAL COMPONENTS (viz. Clips, Pads etc.) developed in India should only be approved by DMRC once the given manufacturing unit has been approved by the Original Designer / OEM of the respective fastening supplier following the process of "proposer-maker-checker" and receipt of Technology transfer from the Overseas Designer / OEM supplier / manufacturer, backed by their warrantee and guarantee of the performance in the given assembly and track We thus request DMRC for necessary clarification and changes as requested above please.	
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CONTRACT: DT-05: "INSTALLATION, TESTING & COMMISSIONING OF BALLASTLESS TRACK INCLUDING SUPPLY OF FASTENING SYSTEM, BUFFER STOP & OTHERS FOR LINE-7 EXT (MAUJPUR-MAJLIS PARK) (CH. 0.0M TO CH. 12098.520M) OF DELHI MRTS PROJECT OF PHASE-IV".

REPLY TO PRE BID QUERIES

S. No.	Section No.	Clause No.	Description of Clause	Clarifications Sought/ Queries	DMRC Reply
4	Part-2 (Section-VI)	Part 2-1, ER, PS, Cl. 6.3, Track Components, Technical specification of Fastening system:-	A Essential requirements of Proposed Fastening system (iii) The proposed Fastening System should have a Proven Track record. The fastening system should have satisfactory performance record of minimum three years in service in regular revenue operation on ballastless track on any two different established railway systems (except exclusive freight tracks) for a length of at least 5 km in each metro	Reference para (v) above, we would like to propose our fastening system Pandrol Double Resilient Baseplate Assembly System (PDRBA) 2 Hole Assembly 21166 as approved by RDSO and by Ministry of Railways (MoR) vide their letter dated 15.03.2021 respectively. PDRBA 2 Hole fastening system 21166 is a re-	Please refer clause 6.3 A(v) of Particular Specification of Employer Requirement of the bidding documents. However, same will be dealt in due course as per guidelines from MoR, if any.

			having speed potential of at least 80 kmph & design axle load 16T irrespective of wheel profile and rail section. (v) Any deviation/Modification in Proposed fastening system against Para 4.6 of Performance criteria issued by Ministry of Railways under Annexure C II of Procedure of safety certification & Technical clearance for Metro Systems, December 2015 will be considerable only if, system with deviation / modification is approved by Ministry of Railways and Modified system will have Proven Track record as mentioned in A.(iii). In such a case an Assembly Test will be required to be done with the fresh samples and same to be witnessed by DMRC nominated Third Party Inspecting agency/DMRC.	engineered version of already approved PDRBA 13145 by MOR vide their letter dated 07.10.2011. PDRBA 2 Hole fastening system 21166 was proposed by us under para 4.6 of Annexure C2 to DMRC vide letter dated 26.09.2020 which states “Any change in component subsequent to the approval of the fastening system by MoR shall be permitted only for specific requirement of the metro. MoR approval of such changes shall be processed by metro with specific recommendations enclosing test report of the component / whole assembly with detailed justification.” DMRC after being satisfied / accepted the same and forwarded to RDSO/MOR vide their letter dated 23.12.2020 for approval as per Para 4.6 of Annexure C2 of RDSO Dated Dec’2015. RDSO vide their letter dated 01.03.2021 and MOR vide their letter dated 15.03.2021 has already approved the same for usage in Ballastless Track system by Metros (including DMRC). We thus want to request DMRC that provenness of fastening system PDRBA 13145 under MOR approval 07.10.2011 should be acceptable and considered for the modified system PDRBA 2 Hole fastening system 21166 as approved by MOR	
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				<i>vide letter dated 15.03.2021, which is a re-engineered system of the mother system PDRBA 13145.</i>	
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25. A perusal of the material on record shows that the Petitioner had raised a pre-bid query, before opening of the technical bid, requesting Respondent No.1 to remove the requirement of “performance record of three years in service” i.e., provenness as highlighted in Clause 6.3 A (iii) and 6.3 C.1 of Employer’s Requirements-Particular Specifications. The same was duly replied to by the Respondent No. 1 stating that no change in tender conditions would be made for the Project. Even then, the Petitioner proceeded with PDRBA 21166 as the chosen fastening system for bidding for the Project. Subsequently, there were also post bid queries raised by Respondent No.1 intimating the Petitioner that PDRBA 21166 is found to be technically non-responsive and thus, not acceptable. It is stated in the same communication that since the Petitioner had submitted the credentials for PDRBA 13145, and that the same has been approved by the Ministry of Railways, the Petitioner can submit a confirmation with regards to the use of the same in the Project. However, there was no communication received by Respondent No.1 giving a confirmation to this end thereafter. In response, the Petitioner only continued to dispute the fact that PDRBA 21166 is in fact technically responsive and the finding arrived upon by Respondent No.1 is erroneous. Reliance was placed by it on various communications exchanged with stakeholders to buttress the same.

26. A perusal of the above shows that the Petitioner cannot, subsequent to having participated in the entire tender process and disagreeing with the

tender issuing authority, approach a Court of equity to quash the impugned communications whereby the bid of the Petitioner was rejected.

27. It is well settled that after participating in a tender, it is not open to a participant to turn around and challenge the very same clause by filing a writ petition.

28. The Petitioner had chosen not to challenge the condition before participating in the tender. The Petitioner did not approach this Court challenging the tender conditions but chose to participate in the tender. After participating in the tender, the Petitioner cannot be permitted to turn around and challenge the very same clauses. A Division Bench of this Court by Judgment dated 05.10.2016 passed in Monnet Ispat & Energy Ltd v. Union of India & Anr., **W.P.(C) 1501/2015** has observed as under:-

“36. After having heard the learned counsel for the parties and examining the rival contentions on this issue, we are of the view that once a prospective bidder participates in the tender process without any demur, protest or reservation, he cannot be allowed to challenge the very same tender process, at a later stage in which he has lost out. This is a well settled principle. When the petitioner filed the earlier writ petition [WP(C) 1672/2015], it did not raise any ground whatsoever with regard to the order dated 18.12.2014 or the tender documents. All the points sought to be raised in the present petition appeared to be afterthoughts and cannot be entertained by this Court. Consequently, the petitioner is not entitled to any relief in the present petition.”

(emphasis supplied)

29. Similarly another Bench of this Court in R.K. Jain & Sons Hospitality Pvt. Through Its Director v. Union of India & Anr., **W.P.(C) 3712/2020**, has observed as under:-

“15. The petitioner has participated in the tender process with its eyes wide open. After participating in the tender process, it is not open to the petitioner to turn around and challenge the tender conditions. In this context, a Division Bench of this Court in Siemens Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd., reported as 2013 SCC OnLine Delhi 1982, had observed thus:-

“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 stopped from challenging the tender conditions or the manner of financial bids evaluation.”

16. The captioned judgment of the Delhi High Court was upheld by the Supreme Court in Siemens Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd. reported as (2014) 11 SCC 288. In Meerut Development Authority vs. Assn. of Management Studies reported as (2009) 6 SCC 171, the Supreme Court held as below:-

“27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is

entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

17. From a perusal of the above, the principle which emerges is that after having participated in the tender process, a bidder cannot turn around and challenge the tender conditions. The bidder has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested parties in response to the NIT in a transparent manner and free from any hidden agenda.

18. In view of the above discussion, we are unable to persuade ourselves to interfere in the tender conditions, more so after the petitioner has participated in the process. Even on merits, we do not find that the conditions imposed in the tender are arbitrary, discriminatory, irrational or manipulated in order to eliminate fair competition, as has been alleged in the petition. 19. Consequently, the petition is dismissed as meritless alongwith the pending application.”

(emphasis supplied)

30. The reliance of the Petitioner on the Judgment of this Court in Patil Vossloh (supra) is also not warranted. The said Judgment was not passed in a petition in which a tender or a result of the tender was under challenge. In the facts of that case, the Petitioner therein had challenged the decision of the government to relax the condition which mandated satisfactory record of five years for being eligibility criteria to supply fastening equipment to metro rail for laying ballastless tracks. The Court was not considering as to whether such a condition could be imposed as a criteria of eligibility to participate in the tender process. The observations made by the Court in the

said Judgment cannot be used while deciding as to whether conditions of provenness of three years as highlighted in Clause 6.3 (A) (iii) and 6.3 C.1 of Employer's Requirements/Particular Specifications is justified or not.

31. It is well settled that the tender floating authority is the best judge of the requirements for the said project. The fact that new mechanism/system which is given by the Petitioner has been approved by the Ministry of Railways on the request of the DMRC alone cannot lead to an inference that DMRC will adopt that new system in their new project without it being tested. It is upto the tenderer to accept as to when to use the new system in any metro project/ any other project. It is upto the tenderer to decide as to in which project they desire to use any new/ re-engineered version of components/ designs/ structures etc. The letter of the Govt. of India that this new/ re-engineered fastening system can be used by metros as per requirement does not make it mandatory on the tenderer to adopt the system. The same also holds true, especially in light of the high responsibility bestowed upon the tender issuing authority herein, to ensure the safety of citizens utilising the metro lines for commuting. The aforesaid finding of this Court moves on to supplement the settled position of law that the tender issuing authority is in fact the best person to interpret its own document and lay down technical requirements at its own discretion. This has been held by the Hon'ble Supreme Court and this Court in a plethora of Judgements.

32. In Afcons Infrastructre Ltd. v. Nagpur Metro Rail Corpn. Ltd.,(2016) 16 SCC 818, the Apex Court has held as under:-

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions

*that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. **Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.***

12. In *Dwarkadas Marfatia and Sons v. Port of Bombay* [*Dwarkadas Marfatia and Sons v. Port of Bombay*, (1989) 3 SCC 293] it was held that the constitutional courts are concerned with the decision-making process. *Tata Cellular v. Union of India* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. **However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority.** This was confirmed in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] as mentioned in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99].

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala

fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.”

(emphasis supplied)

33. In Silippi Constructions Contractors v. Union of India & Anr., (2020)

16 SCC 489, the Apex Court has observed as under:-

*“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. **The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector***

undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.” (emphasis supplied)

34. It is pertinent to mention that the contention of the Petitioner that the Judgment of a Coordinate Bench of this Court in Patil Vossloh (supra) would apply to the facts of this case and that the clauses in the tender insisting on a three year provenness is contrary to the Judgment of the Coordinate Bench in Patil Vossloh (supra) cannot be accepted.

35. It is up to the tenderer to lay down the tender conditions and it is for the DMRC to decide as to which system would be safe and more particularly for the metro system wherein the lives of people are at stake. The decision of

the tenderer to fix a provenness criteria cannot said to be unreasonable or unfair and as rightly submitted by the learned Counsel for Respondent No.1, as the same is borne out of the technical and safety considerations and has been evolved by the practical experience of the officials of DMRC.

36. The contention of the Petitioner that the new system is only a re-engineered version of the metro system, i.e., PDRBA 13145, and, therefore, the insistence on the requirement of three year provenness is arbitrary, cannot be accepted and the decision of the tenderer to insist on a three year provenness cannot be found fault with, especially, when it touches with the safety of passengers.

37. In view of the above, the petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

FEBRUARY 24, 2023

hsk/DA