

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.12.2014

Delivered on : 07.4.2015

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN

Writ Petition Nos.26762 & 27529 of 2014 &
M.P.Nos.1 to 3 of 2014 in W.P.No.26762 of 2014 &
M.P.Nos.1, 3 & 4 of 2014 in W.P.No.27529 of 2014

CSEPD I - TRISHE Consortium
rep. By its Managing Director Sanjay K.Pillai
No.6, Kasturi Rangan Road
Alwarpet, Chennai 600 018. ... Petitioner in both WPs

Vs.

Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
rep. By its Chairman & Managing Director
144, Anna Salai, Chennai 600 002.

The Chief Engineer/Civil/Project & Environment
TANGEDCO, 3rd Floor, Eastern Wing
NPKRR Maligai, No.144, Anna Salai
Chennai 600 002.

Bharat Heavy Electricals Limited (BHEL)
rep. by its Chairman
BHEL House, Siri Fort
New Delhi 110 049. ... Respondents 1-3 in both WPs

The Chief Engineer/Projects
TANGEDCO, 5th Floor, Western Wing
NPKRR Maligai, 144, Anna Salai
Chennai 600 002. ... 4th Respondent in W.P.No.27529/14

Petitions under Article 226 of the Constitution of India praying
for a
i)W.P.26762/2014:- Writ of Certiorarified Mandamus calling for the
records of the first respondent culminating in the impugned

communication bearing Lr.No.CE/P/SE/M/P/EE-10/E/P/F.2x660MW Ennore SEZ/D.58/2014 dated 27.9.2014, quash the same and forbear the first and second respondents from in any manner taking any steps to proceed with the tender with the third respondent in respect of SPEC.No.CE/C/P&E/EE/E/OT No.3/2013-14 issued by the first and second respondents for the 2 x 660 MW Ennore SEZ Supercritical Thermal Power Project at Ash Dyke of NCTPS in accordance with the provisions of Clause 29(viii) of the Tender Document read with the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tenders Rules, 2000; and

ii)W.P.27529/2014:- Writ of Certiorarified Mandamus calling for the records of the fourth respondent's impugned proceedings bearing Lr.No.CE/P/SE/M/P/EE-10/E/P/F.2x660MW Ennore SEZ/STPP/D.60/ dated 27.9.2014 awarding to the 3rd respondent the tender bearing SPEC.No.CE/C/P&E/EE/E/OT No.3/2013-14 issued in respect of the 2x660 MW Ennore SEZ Supercritical Thermal Power Project at Ash Dyke of NCTPS invited by the 1st and 2nd respondents culminating in its Lr.No.CE/P/SE/M/P/EE-10/E/F.Ennore SEZ/D.64/14 dated 10.10.2014, quash the same and direct the 1st, 2nd and 4th respondents to determine the award of the tender strictly in terms of the Tender/Bid document bearing SPEC.No.CE/C/P&E/EE/E/OT No.3/2013-14 taking into account the petitioner's bid and the comparative merits of the petitioner and the 3rd respondent.

For Petitioner in
both W.Ps.

: Mr.N.L.Rajah

For Respondents 1 & 2
in both W.Ps. & R4
in WP No.27529/14

Mr.AL.Somayaji

Advocate General

: Assisted by Mr.P.Gunaraj

For Respondent-3
in both W.Ps.

Mr.Krishna Srinivas

: M/s.S.Ramasubramanian Associates

COMMON ORDER

The Tamil Nadu Generation and Distribution Corporation Limited, which is the first respondent herein, issued a tender notification on 06.5.2013 for the setting up of two units of 660 MW Supercritical Thermal Power Project at the Ennore Special Economic Zone. After a pre-bid meeting held on 29.5.2013 and after changes to tenders documents were finalised on 25.6.2013, four parties submitted Techno Commercial Bids and Price Bids on 26.7.2013. Two out of those four bids were rejected for non compliance of Bid Qualifying Requirements.

2. A Techno Commercial Meeting was held on 20.11.2013, following which certain clarifications were sought. A letter calling for submission of supplementary bids was issued on 03.02.2014 and the petitioner submitted its supplementary price bid on 05.02.2014. Thereafter there was a lull for a period of about 4 months presumably on account of the elections to the Lok Sabha.

3. Then the petitioner started sending representations on various dates, namely 16.6.2014, 17.6.2014, 01.7.2014 and 08.7.2014, contending that the evaluation of the price bids was not properly done and also requesting the TANGEDCO to disqualify the third respondent as per Clause 29.

4. Finding no response to the representations, the petitioner filed a writ petition in W.P.No.19247 of 2014 seeking the issue of a writ of Mandamus to direct the first respondent to dispose of their representations. After ordering notice of motion in the main writ petition, an order dated 31.7.2014 was passed in the miscellaneous petition in the said writ petition, by a learned Judge directing the respondents 1 and 2 to consider the representations of the petitioner and also to afford an opportunity of personal hearing to the petitioner before finalising the tender.

5. As against the said order passed on 31.7.2014, by way of an interim order by the learned Judge, the respondents 1 and 2 filed an appeal in W.A.No.1065 of 2014. The writ appeal as well as the main writ petition were disposed of by a Division Bench an order dated 19.8.2014, modifying only one portion of the order of the learned Judge, wherein the respondents 1 and 2 were directed to grant an opportunity of personal hearing to the petitioner. The Division Bench directed the respondents 1 and 2 to consider the representations of the writ petitioner along with the documents submitted by both parties and to pass orders before finalising the tender.

6. After the disposal of the writ appeal and the writ petition by the Division Bench, the petitioner submitted another representation dated 25.8.2014. The petitioner submitted several documents along with the said representation.

7. Thereafter, the first respondent served an order dated 27.9.2014 whereby the representations of the writ petitioner stood rejected. Therefore, challenging the said communication, the petitioner filed a writ petition in W.P.No.26762 of 2014. When the said writ petition came up for hearing, the learned Advocate General, appearing for the first respondent Board produced a copy of another letter dated 27.9.2014 awarding the contract to the third respondent-

BHEL. Therefore, challenging the award of the contract to the third respondent, the petitioner came up with the second writ petition, namely W.P.No.27529 of 2014. Hence both the writ petitions were taken up together and I have heard Mr.N.L.Rajah, learned counsel appearing for the petitioner, Mr.AL.Somayaji, learned Advocate General appearing for the Board, assisted by Mr.P.Gunaraj, learned Standing Counsel for the Board and Mr.Krishna Srinivas, learned counsel appearing for the third respondent-BHEL.

8. Before considering the grounds of challenge, it may be necessary to bring on record a few fundamental aspects about the nature of the contract for which tender was floated by the first respondent.

9. What was floated by the first respondent was a tender for the appointment of an Engineering, Procurement and Construction (EPC) Contractor under single point responsibility, including Debt Financing for establishing a coal fired thermal project titled as "2 x 660 MW Ennore SEZ Supercritical Thermal Power Project at Ash Dyke of NCTPS" consisting of Steam Turbine Generator, Steam Generator and complete Balance of Plant equipments, inclusive of Mechanical, Electrical, Instrumentation and Control Systems and Civil, Structural and Architectural works, necessary for putting into commercial operation, a highly reliable, safe, efficient and environmentally compliant plant. The scope of the proposal included the design, engineering, manufacture, assembly, testing at manufacturer's works, packaging into properly sized units and shipping and marine insurance, customs clearance, port clearance and handling, satisfactory re-conciliation with customs authorities, inland transport, inland insurance, delivery at site, receipt and storage at site, erection, testing and commissioning and putting into operation of the complete coal fired thermal power plant, including the supply of mandatory spares, special tools and tackles and three years operation and maintenance spares. The contract was to be on single EPC basis with Debt Financing forming its integral part.

10. The Invitation for Bid issued by the first respondent contained bid specification in seven volumes, namely, (i) Commercial and General Conditions of Contract, (ii) General and Schedules, (iii) Mechanical Works, (iv) Electrical Works, (v) Instrumentation and Control Works, (vi) Civil, Structural and Architectural Works, and (vii) Tender drawings. Paragraph 4.0 of the tender document contained Bid Qualifying Requirements (BQR). Paragraph 4.1 indicated that the bidders shall meet the technical experience criteria stipulated in Clauses 4.1.1 or 4.1.2 or 4.1.3 along with financial criteria stipulated in Clauses 4.1.5 and 4.1.6. Under paragraph 4.1.1, the

bidder should be an Indian Steam Generator and Steam Turbine Generator or the manufacturer of Supercritical Steam Generator. Alternatively, the bidder should be a EPC Contractor or be part of a consortium of not more than four members who shall satisfy the criteria indicated in paragraph 4.1.3. Paragraph 6.1 of the tender document made it clear that time was the essence of the contract. A detailed procedure was laid in the tender document for the submission as well as the processing of the tender. Paragraph 25.1 made it clear that there was no obligation for the first respondent to accept the lowest or any tender. The first respondent also reserved under paragraph 25.3, the right to relax or waive any of the conditions of the specification in the best interests of the first respondent. Paragraph 31 dealt with the evaluation of technical bids and paragraph 31.1 stipulated that the provisions of Tamil Nadu Transparency in Tenders Act, 1998 and the Rules framed thereunder would be followed. Paragraph 32 laid down the procedure for evaluation of price bids. As per paragraph 32.1.6, the Present Value of the project would be determined on the basis of cash flow of the EPC Price during the construction period, IDC, cost of owner's equity, loan drawals and debt service. Under paragraph 32.1.7, certain other factors such as Power Output, Steam Generator Efficiency, Turbine Cycle Heat Rate, etc. will be taken into account. Eventually, the sum total of the factors indicated in paragraph 32.1.6 and 32.1.7 would be taken as the "Evaluated Bid Price" of the bidder.

11. It is important to note at this stage that under paragraph 4.1 of the tender document, the bidders were permitted to take part either as having a collaboration agreement or as a consortium partner. Therefore, the petitioner herein entered into a consortium agreement with a Chinese company and the third respondent had a collaboration agreement with a French company. Finally, the first respondent evaluated the bid price of the third respondent at Rs.7840.87 Crores and evaluated bid price of the petitioner at Rs.9207.258 Crores. Consequently, the first respondent termed the third respondent as L1 and chose the third respondent for the award of the contract. Keeping these minimum essential facts in mind, let me now consider the grounds of challenge of the petitioner.

12. The grounds of challenge of the petitioner could be classified broadly into four heads, as seen from paragraph 2 of the reply filed by the petitioner to the counter affidavit of respondents 1, 2 and 4. They are--

(i) procedural impropriety and the failure of the first respondent to comply with the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Rules issued therein,

(ii) failure of the first respondent to consider certain issues of public interest, (iii) wrong evaluation of the price bid of the petitioner vis-a-vis the third respondent, and (iv) breach of confidentiality, in that the first respondent negotiated with the third respondent even during the period when the evaluation process was on. Let me now take up these grounds of challenge one after another.

PROCEDURAL IMPROPRIETY

13. The first ground of attack of the petitioner is that the impugned order is a non speaking order and it is violative of the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Rules framed thereunder, apart from being unfair. The petitioner also relies upon the provisions of the Right to Information Act, in support of their contention that the order should be a speaking order. The requirement to provide reasons, did not merely flow out of the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and the Right to Information Act, but actually flowed out of the fundamental principles of fairness and transparency in administrative action, which form part and parcel of the right guaranteed under Article 14 of the Constitution. Therefore, the first contention of the petitioner is that the order awarding the contract to the third respondent is bereft of reasons and hence, contrary to law.

14. To understand the reach of the above argument, it is necessary to take note of the provisions of the Act. The State of Tamil Nadu enacted Act 43 of 1998, with a view to provide transparency in public procurement and to regulate the procedure for inviting and accepting tenders. As seen from the preamble to the Act, the objects of the Act are (i) to maximise economy and efficiency in Government procurement, (ii) to foster and encourage effective participation by tenderers in the process of tenders, (iii) to promote healthy competition among tenderers, (iv) to provide for fair and equitable treatment of all tenderers, (v) to eliminate irregularities, interference and corrupt practices in the tender processes by providing transparency in such matters, and (vi) to promote the integrity of the process of tenders and to promote fairness and public confidence in the process of tenders by ensuring transparency.

15. Section 4 of the Act makes it clear that no tender shall be invited or accepted by any authority after the commencement of the Act, except in accordance with the procedure specified in the Act and the Rules made thereunder. Under Section 5 of the Act, the State Government is obliged to appoint one State Tender Bulletin Officer for the entire State and one District Tender Bulletin Officer for

every District. The functions of the Bulletin Officers are indicated in Section 6. Under Sub-section (1) of Section 6, the Tender Bulletin Officer shall publish information (a) relating to details of notice of invitation of tender, and (b) relating to acceptance of tender together with a comparative analysis and reasons for acceptance of tenders. The bulletin so published should be made available for sale in the office of the Tender Bulletin Officer.

16. Under Section 7, the Government or the procuring entity should appoint a Tender Inviting Authority. Section 8 stipulates the procedure for opening of tenders and Section 9 details the functions of the Tender Inviting Authority. Section 10 prescribes the method of evaluation and acceptance of tender and Section 11 provides for a remedy of appeal to the Government as against an order passed by the Tender Accepting Authority.

17. On the basis of the above prescriptions contained in the statute, it is contended by Mr.N.L.Rajah, learned counsel for the petitioner:

(i) that the procedure prescribed for evaluation of the bids of the petitioner and the third respondent under Section 10 had not been followed;

(ii) that no reasons are indicated as required by Section 10(6) for the acceptance of the tender; and

(iii) that no information was passed on, as required under Section 6 to the Tender Bulletin Officer for publication in the Gazette.

The common thread, according to the petitioner, running throughout the provisions of Sections 6 and 10 is that reasons should be recorded by the Tender Accepting Authority and that the same should also be published in the Gazette, along with a comparative analysis. The order awarding the contract, according to the learned counsel, is vitiated for non compliance of these requirements.

18. Apart from the above provisions, Mr.N.L.Rajah, learned counsel for the petitioner also relies upon the Tamil Nadu Transparency in Tenders Rules, 2000. Therefore, let me now take a look at the Rules relied upon by the learned counsel for the petitioner.

19. Rule 3(1) of the Rules, categorises procurement into (i) construction, and (ii) supply of goods and services. The methods of tender are divided under Rule 4 into five categories, namely, (a) piece working contract, (b) lump sum contract, (c) turn key contract, (d) multi-staging contract, including pre-qualification and two cover system and (e) fixed rate contract. Rule 5 obliges the District and

State Tender Bulletin Officers to publish the bulletins once in a week. The importance of such publication needs hardly to be emphasised, in view of the fact that under Sub-rule (4) of Rule 5, the Secretary to Government or the District Collector may even direct the Bulletin Officers to publish extraordinary issues of the tender bulletin, if such publication is required to be made urgently. Rule 6 mandates the Tender Bulletin Officers to make available, copies of the tender bulletin for the benefit of the public as well as to persons who subscribe to the same. Under Rule 7, the tender bulletin is required to contain only an information of the notice inviting tenders and the orders accepting a tender. Rule 7(1) makes it clear that the tender bulletin does not in itself create a legal right or liability. Rule 7(2) makes it clear that a notice inviting tender will not be invalidated merely on the ground that the notice although published in newspapers, has not been published in one or other of the District or State bulletins. Under Rule 8, all notices inviting tenders and the decisions on tenders where the value of procurement exceeds a particular limit, should be published in the District tender bulletin, subject to the provisions of Rule 10. Similarly, all notices inviting tenders and the decisions on the tenders, where the value of procurement exceeds Rs.25.00 Lakhs and where the Tender Inviting Authority is the Government or Local Authority or a Public Sector Undertaking, should be published in the State bulletin.

20. Rule 10 lists out the details to be mentioned in the notice inviting tenders. Rule 15(1) mandates that the tender documents should clearly indicate the criteria in addition to the price, which are to be adopted for evaluating the tenders and as to how such criteria will be quantified or evaluated. Rule 25 mandates that the Tender Accepting Authority should cause the evaluation of tenders to be carried out strictly in accordance with the evaluation criteria indicated in the tender document. Under Rule 27, the process of tender evaluation is required to be kept confidential until the award of the contract is notified.

21. Rule 30 requires the Tender Scrutiny Committee or the officer evaluating the tender, to prepare detailed evaluation report. This report should be considered by the Tender Accepting Authority before taking a final decision on the tender. Sub-rule (2) of Rule 30 makes it necessary for the Scrutiny Committee to prepare the evaluation report in a standardised form. Under Sub-rule (3) of Rule 30, the Tender Accepting Authority should pass orders, after identifying the successful tenderer, accepting the tender. Thereafter, he should communicate the order of acceptance to the successful tenderer and also send a copy to the Tender Bulletin Officer, along with a statement of evaluation with a comparative statement of tenders

received. Rule 32 requires the Tender Inviting Authority to provide for pre-qualification of tenderers, on the basis of experience and past performance. But, this can be done only for reasons to be recorded in writing.

22. Therefore, on the basis of the provisions contained in the Rules, it is contended by the learned counsel for the petitioner that the mandatory requirements of (i) adoption of a proper evaluation criteria, (ii) the evaluation of the tenders in accordance with such criteria, (iii) preparation of an evaluation report, and (iv) the publication of the same in the tender bulletin, have been completely given a go-by, vitiating the whole tender process.

23. In response to the submissions of Mr.N.L.Rajah, learned counsel for the petitioner, Mr.AL.Somayaji, learned Advocate General contended that Section 6 of the Act has to be read with Section 10 (5). According to the learned Advocate General, the requirement to publish the reasons for acceptance of tenders would arise in cases covered by Section 10(5), whereunder, the tender can be split and awarded to two or more tenderers, if all of them quote the same price. Moreover, Rule 27 mandates the process of tender evaluation to be kept confidential and hence, the question of communicating the reasons to the Tender Bulletin Officer, according to the learned Advocate General, would not arise. Drawing my attention to Rule 30 (3), it is contended by Mr.AL.Somayaji, learned Advocate General that the only requirement under the said Rule is for the Tender Accepting Authority to pass orders accepting the tender and to communicate the order of acceptance to the successful tenderer. According to the learned Advocate General, the requirement under the latter part of Rule 30(3) to send to the Tender Bulletin Officer, a statement of evaluation of tenders with a comparative statement of tenders received, has been duly complied with by the Tender Accepting Authority in this case.

24. It is also contended by the learned Advocate General that the process for evaluation of technical bids, as stipulated in Clause 31.0 of the tender document and the method of evaluation of price bid as stipulated in Clause 32 have been followed scrupulously. Therefore, it is his contention that once the procedure stipulated by the tender document itself has been followed scrupulously, there is no scope for importing anything else.

25. Under Clause 25.3 of the tender document, the first respondent reserved the right to relax or waive even the conditions contained in the tender specification in the best interests of the first respondent. Clause 55.1 of the tender document merely

postulates the issue of a letter of intent to the successful bidder. Therefore, it is the contention of the learned Advocate General that so long as these stipulations have been complied with, the tenderer, whose bid was not accepted, cannot make out a case.

26. I have carefully considered the rival submissions, in the light of the statutory provisions.

27. As pointed out earlier, the Tamil Nadu Act 43 of 1998 was enacted with the object of (a) eliminating irregularities and corrupt practices in the tender processes, (b) to provide for fair and equitable treatment to all, and (c) to make the whole process transparent. Therefore, the tripod on which the Act stands, comprises of (i) fairness, (ii) equitable treatment of all, and (iii) transparency.

28. Under the Act, the above objects are sought to be achieved by looking at the whole tender process in a three dimensional setting. All the provisions of the Act and the Rules are aimed at taking care of (i) the best interests of the procuring entity (for whose benefit the tender is floated), (ii) the perspective of those who eventually lose in the race, and (iii) the perception of the public about the manner in which the whole exercise was undertaken. Once these underlying principles behind the Act and the Rules are understood, it will be easy to find out whether or not what the first respondent did or did not do, would satisfy the mandate of law.

29. As pointed out earlier, Section 4 of the Act mandates that no tender shall be invited or accepted by any authority after the commencement of the Act, except in accordance with the procedure prescribed in the Act and the Rules. Though Section 4 is followed immediately by Sections 5 and 6, which provide for the appointment of District Tender Bulletin Officers and State Tender Bulletin Officer and the publication of tender bulletins for the Districts and the State, the role of the Tender Bulletin Officers comes only after the finalisation of the tender. Strictly speaking, the role of a Tender Bulletin Officer would come only after the award of the contract. But, in the chronological order, the law makers have placed Sections 5 and 6 even before the provision relating to the appointment of Tender Inviting Authority. The only reason which I can think of, for this chronological disorder, is perhaps the fact that tender bulletins are intended for public consumption and they play a vital role in guaranteeing to the public of a democratic polity that there was procedural fairness and that public interest, rather than the interest of any private individual, played a vital role in the decision making process.

30. But, we should always keep in mind one fundamental aspect. What was done or omitted to be done after the award of the contract, cannot by itself make the entire process of the award of contract illegal. Though I do not accept the interpretation sought to be given by the learned Advocate General to a combined reading of Sections 6 (1) and 10(3), I should point out that insofar as publication of all the information in the tender bulletin is concerned, it comes post facto, namely after the event. Till a tender is evaluated and the successful tenderer is identified and a contract is awarded, the same is liable to be kept confidential. This is the mandate of Rule 27. There is always a clear and definite distinction between tender and open auction. It is only after a particular stage is crossed that all the information relating to the method of evaluation, the identification of successful tenderer and the issue of letter of intent would come into a public domain.

31. Once it is found that the statutory requirements of Sections 6 come into play only after the event, namely the award of the tender, there is no scope for holding that the non-compliance of Section 6 would vitiate even the choice of L1. If I can metaphor the requirements relating to the process of evaluation of the tender and the publication of information in the tender bulletin, I would think of marriage and child birth. What should happen as a consequence, cannot invalidate or destroy the very cause.

32. In other words, assuming that the respondents have completely failed in their statutory obligations in terms of Section 6, I do not think that the same would invalidate the tender process itself. This interpretation is not born out of imagination, but out of a clue that is available in Rule 7 itself. Rule 7 of the Tamil Nadu Transparency in Tender Rules, 2000, reads as follows:

"Tender bulletin to contain information only.-

(1) The tender bulletin shall contain only information of the notice inviting tenders and the orders accepting a tender and does not in itself create a legal right or liability.

(2) A notice inviting tender will not be invalidated merely on the grounds that the notice although published in newspapers has not been published in one or the other of the District Tender Bulletins or State Tender Bulletins or when published in the State Tender Bulletin could not be published in a District Tender Bulletin or vice versa. "

33. Therefore, it is clear that even assuming that there was utter failure on the part of the respondents to publish information

as required in Section 6, in the State Tender Bulletin, the same cannot invalidate the very tender process.

34. In the case on hand, there is no dispute about the fact that the first respondent issued two communications, one to the third respondent accepting their tender and another to the petitioner giving reasons for not accepting their tender and not even accepting their contentions. There is no dispute about the fact that the communication sent by the first respondent to the petitioner contains elaborate reasons, acceptable or unacceptable. It is only the communication of the first respondent to the third respondent accepting their tender, which does not contain reasons. But, I do not think that the non-communication of the reasons for acceptance, by the Tender Accepting Authority, to the highest bidder, can be said to have any bearing upon the process. It is true that Section 10(6) uses the expression "shall". It reads as follows:

"If the Tender Accepting Authority proposes to accept the tender as per the provisions of this section, he shall pass orders accepting the tender together with reasons for such acceptance."

35. But, there are at least three reasons as to why I would hold that the petitioner cannot take advantage of Section 10(6). First of all, what is contemplated under Section 10(6) is only an obligation to record reasons for accepting the tender of one. Once these reasons are communicated to the losers, Section 10(6) would stand satisfied. Secondly, victors neither need reasons nor would be interested in knowing the reasons. For them, victory is sufficient. Thirdly, Section 10(6) speaks only of an obligation to record reasons for acceptance of tender and does not speak of any obligation to communicate the reasons. Such an obligation arises out of Section 10(7), which reads as follows:

"The Tender Accepting Authority shall intimate the information regarding the name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers."

36. The object behind Section 10(7) is to inform the public as to why one was chosen over the others. As pointed out earlier, this obligation arises after the finalisation and hence, it cannot vitiate the tender process. Apart from the members of the public, the losers have a right to know the reasons. This obligation is fulfilled, the moment reasons are communicated to the writ petitioner.

37. To put it differently, the recording of reasons by the first respondent in the note file is a sufficient compliance of Section 10 (6). The communication of the reasons for non acceptance of the petitioner's tender by the letter dated 27.9.2014, is a sufficient compliance of the requirement to act fairly and to avoid arbitrary exercise of power. A careful look at section 10 (7) shows that it comprises of two obligations namely (i) to intimate the information regarding the name and address of the tenderer whose tender has been accepted and (ii) to communicate it along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers. In the case on hand, the first respondent has complied with both obligations. In any case the failure to comply with Section 10 (7) cannot result in the consequence of the tender itself being set aside. Therefore, I am unable to sustain the first ground of attack, namely, that the order communicating the acceptance of the tender was a non-speaking order and that there was a violation of the provisions of the Act and the Rules, vitiating the tender process itself.

38. Incidentally, one more contention was raised in this regard, with respect to the failure of the first respondent to notify the appellate authority under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998. But, in this case, there is actually no scope for considering the said contention. As admitted by the petitioner themselves, the supplementary bid was submitted by them on 05.02.2014. Thereafter, the petitioner sent several representations not only to the first respondent, but also to the Government on 16.6.2014, 17.6.2014, 01.7.2014 and 08.7.2014. These representations were addressed to all important officers of the Government, including the Chief Secretary, the Secretary to Government, Environment and Forests, etc. The petitioner even came up with a writ petition in W.P.No.19247 of 2014 seeking a Mandamus to direct the first respondent to dispose of his representations. Therefore, this is a case where the petitioner ignited the fire of litigation much before the finalisation of the tenders. In such circumstances, I do not think that the notification of an Appellate Authority would have really made a difference. In any case, I do not propose to hold the non availing of an alternative remedy of appeal under Section 11 against the petitioner. This is the second round of litigation in respect of the same contract, with the first one preceding the finalisation. Therefore, this incidental plea relating to non notification of the Appellate Authority cannot be accepted by me.

39. Another contention advanced by Mr.N.L.Rajah, learned counsel for the petitioner with regard to the obligation of the public authorities to provide reasons for their actions, stems out of the provisions of the Right to Information Act, 2005. As in the case of

the Tamil Nadu Transparency in Tenders Act, 1998, the Right to Information Act, 2005 also has as its objects, the right to information of individual citizenry in a democracy and the need for transparency of information. Keeping these objects in mind, Section 4 of the Act lists out the obligations of public authorities. Under Section 4(1)(d) of the Right to Information Act, 2005, every public authority shall provide reasons for its administrative or quasi judicial decisions to affected persons. The definition of the expression "public authority" under Section 2(h) is very comprehensive. It includes any authority or body or institution of self-government, established or constituted either by or under the Constitution or by any other law made by Parliament or by any other law made by State legislature or by notification issued or order made by the appropriate Government. It includes a body, owned, controlled or substantially financed. More than all this, the definition includes even non-governmental organisations substantially financed, directly or indirectly by funds provided by the appropriate Government.

40. Therefore, the learned Advocate General does not dispute the applicability of the provisions of the Right to Information Act, 2005, to the first respondent. But, it is his contention that the obligation under Section 4(1)(d) arises only in respect of administrative or quasi judicial decisions. According to the learned Advocate General, what is now in issue is a contractual matter and that therefore, Section 4(1)(d) will have no application.

41. But, I do not agree. In *Hasbi Traders v. The Chief Engineer [MANU/TN/1265/2008]*, a Division Bench of this Court held that the Tamil Nadu Electricity Board is a public authority and that even in contractual matters, it cannot have an unfettered discretion. The Division Bench held that this requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. It is long established by a catena of decisions starting from the one in *Ramana Dayaram Shetty v. The International Airports Authority of India* that contracts awarded by public authorities may fall either under the category of statutory contracts or under the category of non statutory contracts. The relationship that arises due to the award of the contract may fall within the realm of a contract. But, the decision to prefer one person over the other, for the award of the contract, which is really a public largesse, cannot be exercised any more, at the sweet will and pleasure of the public authorities. Whether the contract is statutory or non statutory, the decision to enter into the contract is administrative. Therefore, the first respondent has an obligation under Section 4(1)(d) to provide reasons

for its administrative decision to award the contract.

42. As pointed out by the Supreme Court in *Star Enterprises v. City and Industrial Development Corporation* [(1990) 3 SCC 280], the traditional limitations on the power of judicial review started vanishing long time ago and that when the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer has also become large justifying larger social audit, judicial control and review by opening the public gaze. But, at the same time, the Supreme Court was cautious enough to point out in the last portion of paragraph 10 of its judgment that when highest offers are rejected, reasons sufficient to indicate the stand of the appropriate authority should be made available and that the same should also be communicated to the concerned parties. In the case on hand, the obligation imposed upon the first respondent was actually elevated in status, by the order passed by this Court in the first round of litigation, from that of a mere administrative action to that of something close to a quasi judicial decision. By the interim order passed in the first writ petition filed by the petitioner, a learned Judge of this Court directed the first respondent to consider the representations of the petitioner and take a decision after giving an opportunity of personal hearing. On appeal by the first respondent, the Division Bench merely removed the portion of the order of the learned Judge directing the grant of an opportunity of personal hearing. Therefore, the obligation imposed by Section 4(1)(d) of the Right to Information Act, 2005, actually got elevated in status in the case on hand, by virtue of the order of this Court directing the first respondent to consider the issues raised by the petitioner. In such circumstances, I cannot accept the stand taken by the learned Advocate General that the matter lies in the realm of contracts and is not covered by Section 4(1)(d).

43. But, at the same time, the provisions of Section 4(1)(d) do not arm the petitioner with any weapon that is potent enough to strike at the root of the award of the contract. The obligation under Section 4(1)(d) to provide reasons is to the affected persons. The petitioner is the person affected by the award of tender to the third respondent. To him, the first respondent has provided reasons, by his communication dated 27.9.2014. Therefore, the petitioner cannot complain of non-compliance with the mandate of Section 4(1)(d) of the Right to Information Act. The reasons given by the first respondent may be acceptable or not. But, it is not a case where there is non-compliance of the provisions of Section 4(1)(d).

44. In view of the above, the first ground of attack to the impugned action of the first respondent has to fail.
ISSUES OF PUBLIC INTEREST:

45. The second ground of challenge is that the award of the contract to the third respondent and the procedure adopted for choosing the third respondent, were contrary to public interest. In brief, the argument of the petitioner is that the contract in question was intended to be a EPC-cum-debt financing contract. While the petitioner originally quoted interest at the rate of 7.2% per annum and was willing to reduce the same to 6.2% per annum, the third respondent originally quoted interest at the rate of 12.25% and subsequently reduced the same clandestinely to 12.15%. Even after such reduction, the acceptance of the offer made by the petitioner would have resulted in a saving of Rs.1,300 Crores to TANGEDCO in the total cost. A sick undertaking such as TANGEDCO cannot afford to lose such huge savings, as the project is of great public importance.

46. The second mistake committed by the first respondent, according to the petitioner, is that the third respondent was invariably guilty of delaying all the projects entrusted both by the first respondent as well as by others. The report of the Comptroller and Auditor General, the statement made by the Hon'ble Chief Minister, the statement made by the Electricity Minister and the stand taken by the Tamil Nadu Government in a counter filed by them before the Madurai Bench of this Court in a public interest litigation, are all relied upon by the petitioner to establish that the third respondent had delayed the completion of several major projects. It is contended by the petitioner that due to these delays, the first respondent as well as others had suffered losses to the tune of thousands of crores of rupees.

47. In other words, the award of the contract by the first respondent to the third respondent, is assailed as contrary to public interest basically on account of two facts namely (a) huge difference between the rate of interest offered by the banker of the petitioner for debt financing and the rate of interest offered by the banker of the third respondent; and (b) the past performance of the third respondent invariably delaying the execution of the previous contracts. Heavy reliance is placed in this regard upon the decision of the Supreme Court in Manohar Lal Sharma v. The Principal Secretary [(2014) 9 SCALE 693].

48. In response to the above contention, it is submitted by Mr.AL. Somayaji, learned Advocate General that the Price Bid was opened on 05.02.2014 and that it was only in June 2014 that the

petitioner offered that the rate of interest could be scaled down from 7.2% to 6.2%. This offer of the petitioner, according to the learned Advocate General, being a post bid offer, was liable to be rejected in terms of Clause 25.4 of the tender document. But, the offer made by the third respondent for the reduction of the rate of interest was after they were identified as L1.

49. It is the further contention of the learned Advocate General that the representation of the petitioner dated 16.6.2014 was made not only to the first respondent, but to several others. This, according to the learned Advocate General, amounted to tampering, making the bid of the petitioner liable for disqualification under Clause 29.

50. However, the above submissions of the learned Advocate General are repudiated by Mr.N.L.Rajah, learned counsel for the petitioner on the short ground that if the evaluation process had not been over in June 2014 as the first respondent submitted before this Court in the previous writ petition, the first respondent ought to have given the very same opportunity as was given to the third respondent in relation to the reduction of the rate of interest. The failure of the first respondent to treat the petitioner on par with the third respondent in the matter of post bid negotiations with regard to the rate of interest, struck at the root of fairness and equality of treatment.

51. I have carefully considered the above submissions. It is true that in the previous writ petition, the first respondent took a stand that the process of evaluation was still on. But it is seen from the current files that the Consultant appointed by TANGEDCO had already submitted a report on 30-5-2014. As per this report titled "Price Evaluation Report", the third respondent was identified as L1. From the sequence of events that have taken place, which I have culled out from the files produced before me and which I have dealt with in the last part of this judgment, it appears that the petitioner started making representations only after the submission of the said evaluation report. I do not know if this happened by sheer coincidence. I do not wish to think that the offer of the petitioner to reduce the rate of interest was made after the petitioner gained an inside information about the submission of the evaluation report. Nevertheless, the offer was subsequent to the consultant's report. Therefore, the first respondent was right in not considering the reduction in the rate of interest, which the banker of the petitioner was also willing to offer. In so far as the third respondent is concerned, their offer to reduce the rate of interest did not actually tilt the balance in their favour, since there was already a

report of the consultant in their favour.

52. Though I do not see the representations made by the petitioner during the period June - July 2014 (one of which was for reduction of the rate of interest) as an attempt to bring about any external influence, I do not think that it can also be approved as a healthy practice. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India* [2006 (10) SCC 1], the Supreme Court took exception to the letters written by the appellant before the Supreme Court to various authorities connected with the decision making process. In the "Request For Proposal", there was a bar for the tenderers to establish any contact with the authorities. It was argued before the Supreme Court that the expression "contact" should be understood to mean only an illegal attempt to pay bribe. But, the said contention was rejected by the Supreme Court and it was held that there was a violation of the RFP norms. But, fortunately for the petitioner, they were not disqualified on this score. They should only be happy about it. Admittedly, the tender was floated in May 2013 and a pre-bid meeting was held on 29.5.2013. On 26.7.2013, Techno Commercial Bids were opened and the bids of two parties were rejected leaving only the petitioner and the third respondent in the race. Therefore, both the petitioner as well as the third respondent participated in the Techno Commercial Meeting held on 20.11.2013. The first respondent sought clarifications in December 2013 and a letter inviting supplementary bid was also issued on 03.02.2014. At least till this date, namely 03.02.2014, there is no complaint that the race between the petitioner and the third respondent had been conducted in an unfair and non-transparent manner.

53. After 05.02.2014, the first respondent put the entire contract in the cold storage, probably on account of the elections to the Parliament scheduled to be held in April/May 2014. Thereafter, there was no occasion for anyone of the two parties left in the fray (namely the petitioner and the third respondent) to start sending representations. Unfortunately, the petitioner did two things namely (i) sending representations after representations on 16.6.2014, 17.6.2014, 01.7.2014 and 08.7.2014, and (ii) filing a writ petition seeking a Mandamus to dispose of the representations. Such an anxiety on the part of the petitioner was both uncalled for and inexplicable.

54. If the first respondent had perceived the above two actions on the part of the petitioner as amounting to the exertion of any pressure, the same cannot be rejected as wholly unwarranted and illusory. Though it is contended by the learned counsel for the petitioner that the representations were sent only to those officials, who were in the Board of Directors of the first

respondent, I do not know why the copies were also sent to the Chief Secretary to Government and the Minister for Electricity. However, the petitioner was not eventually disqualified on that account, by invoking Clause 29. Therefore, the petitioner should be happy about it.

55. In any case, there appears to have been some kind of suspicion with regard to the loading of management fees, commitment fees and legal fees. Therefore, if the reduction in the rate of interest was not considered by the first respondent to be very advantageous in terms of overall financial implications, the Court cannot sit in judgment over the same. The jurisdiction of this Court to test the correctness of the decision to award tender to a party, does not extend to the arithmetic and financial jugglery. Therefore, I am unable to accept the first part of the second contention that revolves around the benefit that would have accrued to the first respondent in the form of reduced rate of interest, if the tender had been awarded to the petitioner.

56. In so far as the second aspect of the second ground of attack is concerned, the same revolves around the delay in the completion of several contracts by the third respondent and the damage that such delays have caused to the Power Sector and the Industrial Sector of the country as a whole. As stated earlier, the learned counsel for the petitioner relies upon the report of the Comptroller and Auditor General, the statements made by the Hon'ble Chief Minister and the Electricity Minister and the counter affidavit filed by the State Government to a public interest litigation filed on the file of the Madurai Bench of this Court.

57. Relying upon the decision of the Supreme Court in *State of Punjab v. Pritam Singh & Sons.* [1998 (9) SCC 606], where the Supreme Court emphasised the importance of vendor rating, it is contended by the learned counsel for the petitioner that the poor performance of the third respondent was not taken into account by the first respondent. The learned counsel for the petitioner also relies upon the decision of a Division Bench of the Bombay High Court in *B.Himmatlal Agarwal v. Western Coal Fields Limited* [(2007) 1 AIR Bom.R 485], where the Court pointed out that the Tender Committee was obliged to consider the past performance of each bidder and then record its reasons whether or not the bidder has incurred disqualification.

58. In yet another decision relied upon by the learned counsel for the petitioner, a Division Bench of the Punjab and Haryana High Court held in *SCT Limited v. Punjab State Electricity Board* [AIR 2006

P&H 44] that the price offered is only one of the criteria and assessment of quality of the goods and the past performance of the tenderer are material factors for deciding to whom the contract should be awarded.

59. I have carefully considered the above submissions and the ratio decidendi of those decisions. There is no denial of the fact that some of the projects undertaken by the third respondent not only for the first respondent, but also for the other States have gone beyond schedule. But, I do not think that delay by itself could have actually tilted the balance. It was contended by Mr. Krishna Srinivas, learned counsel for the third respondent that the third respondent was established in 1964 and it has so far put up about 910 power sheds with installed capacity of 126000 MW of power, out of the total production of 218000 MW in the country. In other words, more than 50% of the total installed capacity of power generation in the country, was established by the third respondent. About 63% of the power generated in the country (including perhaps the power cut) is the contribution of the third respondent both directly and indirectly. In Tamil Nadu alone, the third respondent has set up projects that contribute for 68% of the total generation. There are 344 power projects in the country, including 7 nuclear power projects undertaken by the third respondent. 12 out of 13 power stations, which came up in 2011-12, are equipped with the sheds put up by the third respondent. According to the learned counsel for the third respondent, the third respondent bagged 32 out of a total of 63 International Competitive Bidding contracts in India, in respect of steam generator boilers. They also bagged 27 out of 63 contracts in respect of turbine generators.

60. According to the learned counsel for the third respondent, an Engineering, Procurement and Construction contract has three components, such as (i) Boiler Thermal Generator known as BTG, which constitutes 45%, (ii) BOP which constitutes 30%, and (iii) civil work that constitutes 25%. The contract which is now the subject matter of the dispute is a Supercritical Project floated on EPC cum Debt Financing basis. According to the third respondent, it has already done 18 supercritical projects, some of which were for the generation of more than 660 MW of power. In contrast, the consortium of the petitioner had done only three projects, all of which are only BTG and not EPC, and they were for the production of less than 660 MW.

61. Mr. Krishna Srinivas, learned counsel for the third respondent also drew my attention to various meritorious awards, given for the power stations/ projects commissioned by the third respondent during the period from 1995 to 2013 for outstanding performance. The learned

counsel also brought to my attention a report of The Bank of America Merrill Lynch, Research Analyst, which compared the various projects undertaken by the Consortium company of the first respondent as well as the third respondent. Though the report also takes note of delay in the commissioning/completion of the projects, the overall performance was rated to be good. In a letter dated 12.12.2012, the first respondent itself appreciated the help extended by the third respondent, in restoring Unit IV of MTPS, when it was taken out of service due to high turbine vibration. A similar certificate was issued by the Nuclear Power Corporation of India Limited in respect of Unit II of Koodankulam Power Project appreciating the extra mile that the third respondent willing to go. Therefore, on the basis of all these, it is contended by Mr. Krishna Srinivas, learned counsel for the third respondent that the first respondent could not have judged the capacity of the third respondent only on the basis of the delay in the completion of a few projects.

62. In paragraph 12 of the counter affidavit filed by the fourth respondent on behalf of respondents 1 and 2 as well, he has dealt with the issue of delay and the statements made by the Chief Minister and the Electricity Minister. Insofar as the report of the Comptroller and Auditor General is concerned, the fourth respondent has stated that the report has to be examined by the Public Accounts Committee of the Parliament, after consulting the concerned Administrative Department. According to the fourth respondent, time is not yet ripe to examine the same. The fourth respondent has also stated that the statement of the Hon'ble Chief Minister cannot be read in isolation. It was a statement which contains complaints about various aspects, one of which was the delay on the part of the third respondent.

63. I have carefully considered the rival submissions. Just as the completion of a project on time need not necessarily be an indicator of efficiency, every delay in the completion of a project need not also indicate inefficiency. At any rate, Indian Courts cannot buy such an argument, as it will be self-destructive.

64. It is not the case of the petitioner that every project undertaken by the third respondent in India and abroad has always been completed after a delay. If the statistics furnished by the third respondent are more or less correct, the third respondent has put up at least 50% of the power projects that have come up in the country. While dealing with a staggering volume of projects, it is not always possible to stick to a time schedule. If this is true of the judiciary, it should be true of any other industry also, except perhaps, the olympics.

65. Admittedly, there were only four offers to the tender in question. Two of them were disqualified and ultimately, the petitioner and the third respondent alone were left in the fray. As between the petitioner and the third respondent, there were no common denominators upon which a comparison could have been made. If the petitioner had the advantage of age, the third respondent had the advantage of experience. In terms of the number of projects so far handled in India and abroad and in terms of the sheer volume of installed capacity, the third respondent perhaps appeared in the eyes of the first respondent to be a giant, while the petitioner appeared to them to be a novice. As a public sector undertaking, if the first respondent did not want to take a chance and bet on the petitioner as David and the third respondent as Goliath, the same cannot be found fault with.

66. One disadvantage that the first respondent had in the matter of deciding on the choice of the contractor is that while the past performance of the third respondent was available on hand to be assessed, there was not a long history of past performance for the petitioner. Therefore, a comparison could not have been possible. If both the petitioner and the third respondent have had a fairly good amount of experience in commissioning several projects in India, a comparison of the merits of both of them would have been possible. Since the petitioner is comparatively a new entrant at least in India and their past performance was incapable of being assessed with precision, the only thing that the first respondent could have done is to choose whom the petitioner may brand as a known devil rather than choosing the petitioner who was an unknown angel.

67. The entire thrust of the argument of Mr.N.L.Rajah, learned counsel for the petitioner, in simple terms, is that the first respondent ought to have exercised a vote of rejection as against the third respondent and not a vote of choice in favour of the petitioner.

68. Time and again, Courts have held that in matters relating to the award of tenders, the Court cannot act as an Appellate Authority substituting its own wisdom to that of the Tender Accepting Authority. Once it is seen from the records that the first respondent was conscious of the delay on the part of the third respondent in the matter of execution of a few contracts and had yet chosen to award the contract to the third respondent, which itself is a Public Sector undertaking and not a private player, the scope for judicial review is reduced.

69. The focus on vendor rating and past performance would have gained importance in this case, if other than the petitioner and the

third respondent, a few others had also been left in the fray, with some of them having past experience. But, when only two persons are left in the fray with one having little past experience in India worthy of any assessment and the other having a long past, some of which also had its bad patches, there is no point in finding fault with the decision of the Tender Accepting Authority in choosing the person with a huge past experience. It must be remembered that the third respondent is a public sector undertaking. Admittedly, it is rated as Maharatna company. A Central public sector enterprise is considered for Maharatna status only if the following criteria are satisfied:

(a) Listed on Indian stock exchange with minimum prescribed public shareholding under SEBI regulations;

(b) An average annual turnover of more than Rs.25,000 crores during the last three years;

(c) An average annual net worth of more than Rs.15,000 crore during the last three years;

(d) An average annual net profit after tax of more than Rs.5,000 crore during the last three years; and

(e) Should have significant global presence/international operations.

70. The huge size of the third respondent and the past experience that they have in the field of power, transmission, renewable energy, oil and gas, defence etc. is not in doubt. It is claimed in the counter affidavit of the third respondent, that the third respondent has a widespread network of 17 manufacturing units, 2 repair units, 4 regional offices, 8 service centres, 8 overseas offices and current project execution taking place at more than 150 sites across India and abroad, with a presence in 76 foreign countries. The cumulative overseas installed capacity of the third respondent is claimed to be about 10,000 M.W. in countries such as Malaysia, Oman, Iraq, Libya, UAE, Egypt and Bhutan. In the area of research and development, the third respondent has stated to have spent about Rs.1,114 Crores. It has also developed new, fuel flexible supercritical boilers which can operate and maintain steam generation in the extreme cases of 100% specified Indian coal and 100% specified imported coal. In association with the Indira Gandhi Centre for Atomic Research and National Thermal Power Corporation (NTPC), this Respondent is all set to develop India's first ever coal fired Advanced Ultra Supercritical Power Plant and to give impetus to the same, the Union of India has allocated Rs.100 crore in the Union Budget 2014-2015 for the preparatory work on modern ultra supercritical coal based thermal power technology.

71. The only accusation made by the petitioner against the third respondent is that the third respondent had delayed the completion and commissioning of a few projects, resulting in huge financial loss to the Government. The delay had a spiraling effect upon the growth of the industrial sector. Therefore, it is contended that if the first respondent had looked into the bad past of the third respondent, by taking recourse to the process of vendor rating, the tender of the third respondent would have been rejected outright.

72. But as stated earlier, the above allegation of the petitioner is pitched on the mat of public interest. Hence I think it is the very same public interest that mandates the protection of a public sector undertaking such as the third respondent. At a time when public sector undertakings and inefficiency are branded by some critics as siamese twins, the third respondent had attained Maharatna status and established their presence in 76 foreign countries. If one public sector undertaking like the first respondent in India, dumps the third respondent as a highly inefficient and incompetent enterprise, the damage that would be done to the public interest at large will be much greater. After all there are different facets of public interest. The argument of the petitioner against the third respondent covers only one facet of public interest namely the probable delay that may occur in the completion of the contract by the third respondent. But there are other facets of public interest which will suffer irreparable damage, if the third respondent is dumped. Therefore, I do not think that the second contention of the petitioner based upon the aspects of (i) rate of interest, and (ii) vendor rating can be sustained. The decision in Manohar Lal Sharma is of no assistance to the petitioner. In the said case, which came to be known popularly as "coal block allocation case", the Supreme Court found that the Screening Committee was never consistent, it had no transparency and there was also no application of mind. The Court found in paragraph 154 of the report that there was not even an objective criteria, nor any criteria for evaluation of comparative merits. The Court virtually found that common good and public interest had suffered heavily. But, in the case on hand, the first respondent had an objective criteria before it and it had actually evaluated the comparative merits. What the petitioner actually wants me to do is to work out the financial aspects and see whether the award of the contract to the petitioner would have been more fruitful. But, this cannot be done in exercise of the power under Article 226.

73. Insofar as the argument of the learned counsel for the petitioner revolving around the report of the Comptroller and Auditor General is concerned, the issue is no longer res integra. The Supreme

Court pointed out in Arun Kumar Agarwal v. Union of India [2013 (7) SCC 1] that the report of the Comptroller and Auditor General is always subject to parliamentary debates and it is for the Public Accounts Committee either to accept the Ministry's objection to the report or to reject the report itself. It is no doubt true that the Supreme Court highlighted the respect to be shown to the report. But, the Court held that the comments offered on the report also assumed significance. Therefore, I do not think that the petitioner can pitch the claim on the basis of the report. Hence the second ground of attack is also liable to be rejected.

WRONG EVALUATION :-

74. The third ground of attack to the impugned order is that there has been a wrong evaluation of the bids of the petitioner and the third respondent. According to the petitioner, the first respondent failed to evaluate the bids in the proper perspective and that the wrong evaluation led the first respondent to conclude that the third respondent was L.1.

75. The petitioner has presented a tabulation of Comparative Financial Evaluation, allegedly worked out as per Clause 32.0 of the Tender Document. The first tabulation is prepared on the basis of the rate of interest at 12.15% quoted by the third respondent and 6.20% quoted by the petitioner. The second tabulation is based upon the rate of interest at 12.25% originally quoted by the third respondent and 7.20% originally quoted by the petitioner. Both tabulations are as follows:-

Comparative Financial Evaluation
(as per Clause 32.0 "Price Bid Evaluation" of the Tender Document
Section 1, Volume I)
Amount in INR Cr

S. No	Description	Consortium	BHEL	Advantage to First Respondent
1	EPC Cost	9207.264 (Cost include customs duty of Rs.908.15 crore)	7788.000	
2	% Debt	85% (Rs.7826.175 Crore)	75% (Rs.5841 Crore)	
3	% Equity	15% (Rs.1381.089 Crore)	25% (Rs.1947 Crore)	565.911

S. No	Description	Consortium	BHEL	Advantage to First Respondent
4	Interest Rate per annum	6.20%	12.15%	5.95%
5	Total Cost of Ownership after 15.5 Yrs (TCO)	17182.115	18744.627	1562.512
6	Present Value of Total Cost of Ownership (TCO)	9671.160	10550.639	879.479
7	Present Value per MW	7.327	7.993	0.666
8	Present Value (After Loading on Performance Guaranteed Values)	9844.389 (173.229)	10560.926 (10.287)	716.537
9	Present Value per MW (After Loading on Performance Guaranteed Values)	7.457	8.00	0.544

Comparative Financial Evaluation
(as per Clause 32.0 "Price Bid Evaluation" of the
Tender Document Section 1, Volume I)
Amount in INR Cr

S.No.	Description	Consortium	BHEL	Advantage to First Respondent
1	EPC Cost	9207.264 (Cost include customs duty of Rs.908.15 crore)	7788.000	
2	% Debt	85% (Rs.7826.175 Crore)	75% (Rs.5841 Crore)	
3	% Equity	15% (Rs.1381.089 Crore)	25% (Rs.1947 Crore)	565.911

S.No.	Description	Consortium	BHEL	Advantage to First Respondent
4	Interest Rate per annum	7.20%	12.25%	5.05%
5	Total Cost of Ownership after 15.5 Yrs (TCO)	18180.421	18830.102	649.681
6	Present Value of Total Cost of Ownership (TCO)	10233.069	10598.749	365.680
7	Present Value per MW	7.752	8.029	0.277
8	Present Value (After Loading on Performance Guaranteed Values)	10406.298 (173.229)	10609.036 (10.287)	202.738
9	Present Value per MW (After Loading on Performance Guaranteed Values)	7.884	8.037	0.154

76. Before considering the contents of the above tabular column, I must keep in mind the boundaries indicated by the Supreme Court in Jagdish Mandal v. State of Orissa [(2007) 14 SCC 517]. It was pointed out by the Supreme Court in the said case that the purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. A contract is a commercial transaction and hence, evaluating tenders and awarding contracts are essentially commercial functions. Therefore, the Supreme Court cautioned that principles of equity and natural justice stay at a distance. In fact, the Court went to the extent of pointing out that even if a procedural aberration or error in assessment or prejudice to a tenderer is made out, the Courts will not interfere. The Court held that before interfering in tender or contractual matters, the Court 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 public interest is affected.

77. Eventually, the Court held that if the answers to the above questions are in the negative, there should be no interference under Article 226. In this regard, the Court made a distinction between cases involving blacklisting or imposition of penal consequences on a tenderer/contractor on the one hand and cases involving distribution of State largesse.

78. Again, in *Tejas Constructions and Infrastructure v. Municipal Council* [2012 (6) SCC 464], the Supreme Court elicited with approval, the principles laid down in *Tata Cellular v. Union of India* [1994 (6) SCC 651], *Raunaq International Limited v. IVR Construction Limited* [1999 (1) SCC 492], *Master Marine Services (P) Ltd. v. Metcalfe* [2005 (6) SCC 138] and *Jagdish Mandal* cited above.

79. In response to the tabular statements given by the petitioner, the first respondent has also provided tabular statements in their counter affidavits. After pointing out in the first tabular column in paragraph 7 of the counter affidavit that the actual price quoted by the petitioner as per the foreign exchange rate prescribed in the tender document would be Rs.9716.5974 Crores, the first respondent has indicated that there are also certain financial charges such as (i) guarantee fee at 5%, working out to Rs.337.6078 Crores, (ii) management fee at 1.5%, working out to Rs.106.6130 Crores and (iii) commitment fee at 1%, working out to Rs.142.1596 Crores, to be paid to the petitioner Consortium.

80. However, it is contended by the learned counsel for the petitioner that commitment charges are levied only if the credit facility is not utilised by the borrower. It is also contended that the first respondent failed to take note of the availability of interest free holiday period, offered by the Consortium.

81. But, in paragraph 10 of the counter affidavit, the fourth respondent has pointed out that the evaluation of the bids was done in accordance with Clauses 31.0 and 32.0, which stipulated various factors such as interest during construction and financing charges during the entire tenure of the loan, interest being calculated on the basis of cash flow of the draw down schedule for the period known as "Interest During Construction" (IDC), etc.

82. A careful look at the contents of paragraphs 7 to 10 of the counter affidavit filed by the fourth respondent would show that the

first respondent has taken into account the overall implication that the management fee, commitment fee and guarantee fee, would have upon the total financial outlay. Though the petitioner has filed a reply to the counter affidavit, purportedly attempting to remove the misgivings on the part of the first respondent, I do not think that I can take the role of a Financial Analyst to come to a conclusion as to whether the apprehensions of the first respondent were baseless or not.

83. In other words, if the case on hand is examined by experts in the field of finance and banking, they may probably agree with the petitioner. But, what lies within the realm of experts, is an area where Courts, like angels, fear to tread. A court, in matters of this nature, is concerned only with the legal soundness and not the financial soundness of the ultimate decision. If I have understood the defence of the first respondent correctly, it appears that they fear hidden costs in the proposal of the petitioner. Today, the fear of hidden costs cannot be easily dispelled, especially in the Insurance and Banking sectors. Therefore, once it is shown that the first respondent has carried out an analysis of the financial implication of the debt structure quoted by two rival bidders, it is not possible for the Court to adorn the role a super specialist in the field of finance and find out which of the two offers is beneficial to the first respondent. Hence, the third contention of the petitioner is also liable to be rejected.

BREACH OF CONFIDENTIALITY:

84. The fourth ground of attack is that the first respondent negotiated with the third respondent even during the period when the evaluation process was going on. But, when the petitioner sought the very same benefit by offering to reduce the rate of interest, the first respondent turned down the same. Therefore, it is contended by the learned counsel for the petitioner that Article 14 was also violated and a level playing field was not provided.

85. Drawing my attention to the references made in the impugned letter of acceptance dated 27.9.2014, it is contended by Mr.N.L.Rajah, learned counsel for the petitioner that several meetings appear to have taken place and a series of correspondence entered into between the respondents 1 and 3. Even the manner in which the impugned letter dated 27.9.2014 was served would disclose that the third respondent was already aware of the evaluation process. While the letter of rejection of the petitioner's bid was issued at 14.56 pm, the letter of acceptance by the third respondent was sent at 15.15 pm. Therefore, it is contended by the learned counsel that it would not have been possible for the third respondent

to receive the communication and prepare the letter of acceptance within the time span of 19 minutes. This, according to the learned counsel for the petitioner, amounted to breach of confidentiality. Under Section 10(3) of the Tamil Nadu Transparency in Tenders Act, 1998, any price negotiation during the course of evaluation was prohibited and that therefore, the impugned action is completely illegal.

86. Apart from tantamounting to breach of confidentiality, the action of the respondents 1 and 2, according to the learned counsel for the petitioner, also deprived the petitioner of a level playing field. When only two parties were left in the fray, the respondents 1 and 2 ought to have treated both of them equally and should not have held any negotiations with the third respondent alone, especially in the light of the bar under Section 10(3). Therefore, it is contended that the whole process is vitiated.

87. In support of the above contention, the learned counsel for the petitioner relies upon the decision of the Supreme Court in *Reliance Energy Limited v. Maharashtra State Road Development Corporation Limited* [2007 (4) RAJ 139 (SC)]. In that case, the appellant before the Supreme Court was disqualified in a tender floated by Maharashtra State Road Corporation Limited, for providing Mumbai Trains Hyper Link between Mumbai and Navi Mumbai on BOT basis. The High Court upheld the disqualification. When the matter was taken to the Supreme Court, the Supreme Court pointed out that the principle underlying Article 14 is not a free standing provision and that it had to be read in conjunction with the rights conferred by other Articles like Article 21. After referring to the decision of the Constitution Bench in *IR Coelho v. State of Tamil Nadu* [2007 (2) SCC 1], the Supreme Court held that Article 21/14 is the heart of the Chapter on Fundamental Rights and that "Level Playing Field" is an important concept while construing Article 19(1)(g). The Court also pointed out that in the world of globalisation, competition is an important factor to be kept in mind and that the Doctrine of Level Playing Field is embodied in Article 19(1)(g). Therefore, it is contended that the petitioner was not given a Level Playing Field by the first respondent.

88. I have carefully considered the above submission.

89. In order to test the correctness of the above contention, it is necessary to take a look at three communications dated 27.9.2014, by one of which, the third respondent was informed of the acceptance of their offer by the Board, by the second of which, the third respondent accepted the award of contract and by the third of which,

the petitioner was informed of the reasons for the rejection of their bid. None of the communications of the fourth respondent bear any indication of time, at which they were signed. The letter of acceptance of the contract dated 27.9.2014 signed by the Senior Manager of the third respondent alone bears the time 15.15 hours. The letter of rejection dated 27.9.2014 sent by the first respondent to the writ petitioner appears to have been tendered at the post office (MES Post Office) at Chennai-2 at about 14.56 pm for being sent by speed post.

90. Therefore, merely because the letter of rejection of the petitioner's representation travelled from the office of the first respondent to the speed post counter of the post office located in the immediate vicinity and registered there at 14.56 pm to be carried by speed post, it cannot be contended that the letter of award issued to the third respondent by the office of the fourth respondent should have also travelled simultaneously, giving only a time span of 19 minutes for them to accept it. The entire argument of the learned counsel for the petitioner loses sight of two important factors, namely (i) that the letter of rejection was sent from the office of the first respondent to the writ petitioner by speed post, and (ii) that the letter of acceptance of the offer of the third respondent emanated from the office of the fourth respondent.

91. After all, the finalisation of the tender has actually taken about 16 months, from the date of the notification, namely 06.5.2013. After the pre-bid meeting held on 29.5.2013 and the submission of Techno Commercial Bid and Price Bid on 26.7.2013, a Techno Commercial Meeting was admittedly held on 20.11.2013. To be fair to the first respondent, he had sought clarifications from the petitioner and the petitioner gave clarifications on 16.12.2013 and 18.12.2013. Thereafter, a letter dated 03.02.2014 was issued calling for supplementary bid and the petitioner submitted a supplementary bid on 05.02.2014. Then, the elections to the Lok Sabha were announced and there was no activity till about the third week of May 2014.

92. Thereafter, it was only the writ petitioner who started showing signs of anxiety, by giving representations dated 16.6.2014, 17.6.2014, 01.7.2014 and 08.7.2014 elaborating the manner in which calculations should be done and the bid of the third respondent should be disqualified as per Clause 29. Not stopping at firing a series of representations, the petitioner also moved a writ petition in W.P.No.19247 of 2014 and secured an order on 31.7.2014, directing the first respondent to consider their representations and to pass orders. The respondents 1 and 2 filed a writ appeal, which was disposed of on 19.8.2014. Along with a copy of the order, the

petitioner sent one more representation along with the documents on 25.8.2014.

93. Therefore, if the third respondent had also exhibited at least a percentage of the same anxiety as exhibited by the petitioner and made one of their officials to wait at the entrance of the Electricity Board to know the outcome of the tender and happened to collect the letter of acceptance by hand, I cannot find fault with them. After all, I have to test, from the notings found in the files, as to whether there has been any procedural irregularity in the decision making process. If I find that there was no procedural irregularity in the decision making process, the allegations that border on presumptions cannot be accepted.

94. As pointed out by the Supreme Court in Reliance Airport Developers, "while balancing several claims, a rational approach is necessary and that is to be formed in line with the scope of judicial interference." In paragraph 91 of the report in Reliance Airport Developers, the Supreme Court quoted the famous dicta issued by the Queen's Bench in R.Vs. Deptt. of Constitutional Affairs [2006 All E.R.(D) 101] that "it is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review". Therefore, from the three letters dated 27.9.2014, I am unable to come to a conclusion that there had been a breach of confidentiality. On the contrary, the petitioner had exhibited a great deal of anxiety right from May/June 2014 even when the evaluation process was on.

95. Even the contention with regard to the alleged denial of "level playing field", does not appeal to me, especially in the light of what is disclosed in the current files produced before me. In fact, a similar argument was advanced in Reliance Airport Developers, as seen from paragraphs 75 and 76 of the report. But, it was rejected.

96. A careful perusal of 6 volumes of current files circulated would show the following:-

(i) Way back in May 2007, the TNEB decided to set up two units of 800 MW coal based thermal power project at Udangudi in Tuticorin District under the State Sector. In October 2007, the Government of Tamilnadu approved the signing of a MOU between TNEB and BHEL. Pursuant to the MOU, a Joint Venture Agreement was signed between TANGEDCO and BHEL on 26.12.2008. The Joint Venture was named as Udangudi Power Corporation Limited and the Joint Venture Partners were to invest 26% each in the equity of the company. But, despite the fact that a sum of Rs.32.5 Crores was allotted by TANGEDCO and an equivalent amount was allotted by BHEL, environmental clearance was not obtained due to

the failure to obtain long term coal linkage.

(ii) In the meantime, a proposal for setting up a coal based thermal power plant was mooted in 2010. The Standing Committee examined the merits and demerits of several modes of execution of the project such as (i) single EPC cum finance contract; (ii) single EPC without finance contract; (iii) multiple EPC without finance contract; (iv) joint venture contract; and (v) tariff based competitive bidding. Eventually, the Board took a decision in May 2011 for the establishment of what was called "Ennore SEZ Project of 2 X 800 MW Coal Based Super Critical Thermal Power Plant in Ash Dyke of NCTPS" under single EPC without finance basis.

(iii) Thereafter, steps were taken for engaging a Project Consultant to prepare EPC bid specifications and to offer pre and post contract consultancy services till the commissioning of the plant under open tender two part system. It appears that eight consultancy firms participated and eventually a Delhi based company by name Desein Private Limited was chosen for the award of the consultancy contract in January 2012. Simultaneously, steps were also taken to enter into a memorandum of understanding with the Minerals and Metals Trading Corporation Limited, which is a Government of India Enterprise, for the supply of coal to the extent of about 4.549 MT per annum. The memorandum of understanding was entered into on 26.5.2012. (iv) But, in December 2012, the Board of TANGEDCO decided to standardise the unit capacity as 660 MW supercritical units instead of 800 MW. The Government of Tamil Nadu accepted the proposal to standardise the unit capacity as 660 MW, in February 2013. Consequent upon the standardisation of the unit capacity, the Board appears to have taken a survey of all the Thermal Units commissioned during the period 2010-11 and 2011-12 throughout India, as seen from Vol.III of the current file. Thereafter, the Board appears to have resolved to call for tender on EPC cum debt financing basis with the Government guaranteeing for the debt financing. This resolution of the Board for standardisation of unit capacity and for Government guarantee for the financing by the EPC contractor was approved by the Government on 1.2.2013.

(v) Pursuant to the above decisions, open tender with two part system was floated in May 2013. The pre bid meeting was held on 29.5.2013. 16 companies had purchased the tender documents, but only 13 attended the pre bid meeting. Out of them, 9 forwarded the pre bid queries. Among them, 4 furnished commercial queries. On the basis of the queries and reply submitted by the Consultant, necessary amendments were issued.

(vi) Thereafter, Techno Commercial Bids were opened on 26.7.2013. Only 4 bidders including the writ petitioner and the third respondent herein had submitted the bids. While the third respondent participated under the category of "Indian Steam Generator and Steam

Turbine Generator Manufacturer", as per Clause 4.1.1(a) of BQR, the writ petitioner participated as EPC contractor having consortium with an Indian partner, as per BQR Clause 4.1.3.

97. It is seen from the note prepared and signed by the second respondent on 14.11.2013 (available in the current file) that the Techno Commercial Bids of two of the four bidders were rejected, leaving only the petitioner and the third respondent in the race. The note discloses the following :

(A) The third respondent participated as Indian Steam Generator and Steam Turbine Generator Manufacturer, as per Clause 4.1.1(a) of BQR. The petitioner participated as a Foreign EPC Contractor having consortium with an Indian partner as per BQR 4.1.3.

(B) The third respondent furnished end user certificate dated 15.2.2012 from Sanjay Gandhi Thermal Power Station MPPGCL, MP for having supplied and installed 1 X 500 MW Coal Fired Thermal Power Unit on turnkey basis inclusive of civil, mechanical and electrical works related to boiler, turbine, cooling water system, coal handling system and their auxiliaries. But, the writ petitioner did not furnish the end user certificate for supercritical equipments along with the bid. It was only after a clarification was sought that the writ petitioner furnished copies of the end user certificates for steam generator, supercritical steam turbine and turbo generator from the respective Chinese companies.

(C) The consortium agreement entered by the writ petitioner did not include supercritical equipment manufacturer, but they had entered into a joint undertaking with supercritical equipment manufacturers.

(D) The writ petitioner was noted as having not furnished documentary evidence for their own engineering division. But, when questioned, the petitioner produced a certificate dated 8.10.2013 issued by the Chinese company for having done detailed power project engineering with their own set up and

(E) Interestingly, the note dated 14.11.2013 also discloses that in their anxiety, the writ petitioner produced a Bipartite Consortium Agreement, where the name of the project was wrongly mentioned as 2 X 660 MW Udangudi Supercritical Thermal Power Project, instead of "Ennore SEZ Project". Only after the second respondent sought clarifications, the petitioner replaced the relevant pages.

98. It is seen from the conclusion portion of the note dated 14.11.2013 prepared by the second respondent for the approval of the Board Level Tender Committee that though the petitioner produced a consortium agreement that did not include supercritical equipment manufacturer and though they did not produce the end user certificate in the first instance, the second respondent treated the petitioner fairly and allowed them to rectify the mistakes and shortlisted the

petitioner as having satisfied BQR conditions. It is also seen that when the note was generated on 14.11.2013, the end user certificate duly attested and authenticated by the Indian Embassy was actually awaited. Even the Letter of Intent produced by the writ petitioner was valid only for six months, which was not in compliance with BQR. But, their bid was taken as qualified on their assurance that they will obtain extension of the validity of the Letter of Intent before the expiry.

99. I am constrained to point out all the above factors, only to demonstrate that the complaint of unfair treatment, made by the writ petitioner is uncharitable. As a matter of fact, if the contract had been awarded to the writ petitioner, the other persons might have made allegations of favouritism against the first respondent, for showing the above concessions to the writ petitioner.

100. At this stage, it is also necessary to take note of the distinction between Clauses 4.1.1, 4.1.2 and 4.1.3 of BQR, which are as follows :

"4.1.1.(a) Bidder shall be an Indian Steam Generator and Steam Turbine Generator manufacturer, who has designed, engineered, manufactured, supplied, erected, commissioned at least one number of 500 MW or above coal fired steam generator and steam turbine generator along with associated auxiliaries which is in successful operation for at least one year as on the date of techno commercial bid opening. Such Indian manufacturer shall have valid ongoing collaboration and technology transfer agreement(s) including license to manufacture and supply in India the supercritical steam generator and supercritical steam turbine generator sets covering the type, size and rating specified with a supercritical steam generator manufacturer and a supercritical steam turbine generator manufacturer who has supplied, erected, commissioned such equipments at least for one unit of capacity 660 MW and above. The collaboration and technology transfer could be separate for supercritical steam generator and supercritical steam turbine generator and be valid at least up to the defect liability period of the contract

(or)

(b) Bidder shall be a manufacturer of supercritical steam generator or a manufacturer of supercritical steam turbine generator or manufacturer of both the equipments, who has designed, engineered,

manufactured, supplied, erected, commissioned at least one unit of minimum 660 MW capacity coal fired supercritical steam turbine generator/supercritical steam generator as the case may be, along with associated auxiliaries which is in successful operation for at least one year as on date of techno commercial bid opening. If the bidder is the manufacturer of only supercritical steam generator or supercritical steam turbine generator, the bidder has to source the other equipment i.e the steam generator or steam turbine generator as the case may be, from a manufacturer who also satisfies the above criterion. The steam generator/ steam turbine generator manufacturer shall have life time facility for services and spares in India for the equipments supplied by them before the COD of the first unit and this facility shall meet the requirements indicated in Annexure 1.1 - BQR - Para 1.5 (A) of this section.

The Indian subsidiary/joint venture company set up by the above supercritical equipment manufacturer satisfying Clause 4.1.4 can also participate based on the experience and strength of the parent company/technology partner.

(or)

4.1.2. Bidder shall be a EPC contractor having their own Engineering Division who has executed EPC contracts for one coal based thermal power project of unit capacity of not less than 500 MW. These projects shall be in successful operation for at least one year as on date of techno commercial bid opening. The bidder shall source the steam generator and steam turbine generator from equipment manufacturers satisfying Cl. 4.1.1. (b) above.

(or)

4.1.3. Bidder may quote as a consortium of not more than four members and the members of the consortium will be from the following :

1. Manufacturer of supercritical steam generator or manufacturer of supercritical steam turbine generator or manufacturer of both the above equipments satisfying Cl. 4.1.1.(b).

2. An EPC contractor who has executed contracts having their own Engineering Division in the area of Power Generation Projects with a total value of such contracts being INR 1500 Crores or more in the last ten years and one of such contracts should have a

contract value of INR 400 Crores or more for a power generation project, which is in successful operation for at least one year as on date of techno commercial bid opening. The leader of the consortium shall either be a steam generator/steam turbine generator/EPC contractor as mentioned above.

3. The conditions for consortium are as per Annexure 1.1 - BQR Para 1.5 (B) of this section."

101. Therefore, the participant in the tender could fall either under Clause 4.1.1 or under Clause 4.1.2 or under Clause 4.1.3. The writ petitioner applied in terms of Clause 4.1.3. Though the tender notification was issued on 6.5.2013, the writ petitioner entered into a consortium agreement with the Chinese company only 11.5.2013. The respondents 1 and 2 accepted the same and did not raise an issue. Therefore, the allegation of a partisan attitude is baseless especially when the petitioner itself reaped some benefits.

102. It is also seen from Vol.IV of the current file that a thorough analysis of the commercial deviations, technical deviations as well as term sheets for debt financing, in respect of the petitioner and the third respondent was carried out. Thereafter, both of them were called for post bid clarification meetings. While the petitioner was called for post bid clarification meetings from 16th to 22nd December 2013, the third respondent was called for such a meeting on 27th and 28th November 2013. Thereafter, it was decided by the Board of TANGEDCO, in its meeting held on 30.1.2014 to open the price bids of both of them.

103. Thereafter, supplementary price bids were obtained from both parties for the additional implication items in respect of the declared technical deviations quoted by both parties, as seen from the note to the Board available in Vol.IV. A confirmation was also obtained from the writ petitioner for adopting the values indicated by the third respondent for evaluation of Auxiliary Transformer Losses and Service Transformer Losses. It was only then that the price bids were opened on 5.2.2014.

104. The price bids were evaluated by the Consultant namely Desein Private Limited, New Delhi. It appears that as per Clause 31.0 of Tender Specification Evaluation, loading on account of certain performance parameters such as (i) Turbine Cycle Heat Rate (ii) Auxiliary Power Consumption and (iii) Capitalization of Transformer Losses was to be applied.

105. It appears from the "Price Evaluation Report" submitted by the Consultant, available from pages 361 to 366 of Vol.IV of the current file that the Consultant adopted a certain methodology of evaluation. While the Methodology of Evaluation is spelt out in paragraph 3.0 of the report of the Consultant, the actual evaluation is done in paragraph 4.0. Paragraph 5.0 of the report of the Consultant contains the Evaluated Lower Cost. It would be useful to extract paragraphs 4.0 and 5.0 of the report of the Consultant. They are as follows :

"4.0. Evaluation

4.1 BHEL

BHEL has arranged finance from M/s.Power Finance Corporation of India.

They are arranged to finance 75% of the total cost as debt at an interest rate of 12.25% p.a.

Attached Annexures 1 to 5 indicate the methodology adopted in calculating the various components required for evaluation like IDC-Debt, IDC-Equity, IDC-UF Fess, Debt Repayment Schedule etc.

4.2. CSEPDI - TRISHE

CSEPDI-TRISHE has arranged finance from M/s.ICBC, China.

They have arranged a finance 85% of the total cost as debt at an interest rate of 7.2% p.a.

Attached Annexures 6 to 12 indicate the methodology adopted in calculating the various components required for evaluation like IDC-Debt, IDC-Equity, IDC-UF Fess, Debt Repayment Schedule etc.

5.0. EVALUATED LOWER COST

			BHEL	CSEPDI-TRISHE
			All figures in Rs. (Crores)	All figures in Rs. (Crores)
	Capacity		1320 MW	1320 MW
A	Total EPC cost excluding VAT		7762.977	9207.264
B	EPC Debt	75%	5822.233	7826.174
C	EPC Equity	25%	1940.744	1381.090
D	IDC Debt	12.25%	1295.079	1228.378

			BHEL	CSEPDITRISHE
E	EPC Debt including IDC (B+D)		7117.311	9054.552
F	Upfront Fees Including Interest		8.925	801.180
G	Total Debt (E+F)		7126.237	9855.732
H	Interest on Equity	14%	509.597	456.606
I	Total Equity (C+H)		2450.341	1837.695
J	Total Project Cost (G+I)		9576.578	11693.427
K	Total Cost per MW		7.255	8.859
L	PV - Debt		7553.364	8164.318
M	PV - Equity		2809.403	2106.984
N	Total PV		10362.767	10271.302
O	PV Cost per MW		7.851	7.781
P	Loading for Deficiency		10.287	173.229
Q	Total (N+P)		10373.054	10444.531
R	Evaluated Bid Price per MW		7.858	7.913

106. Paragraphs 4.0 and 5.0 of the "Price Evaluation Report" submitted by the Consultant, which I have extracted above, show that the Consultant took into account only the interest rate of 12.25% per annum for the debt component arranged by BHEL from the Power Finance Corporation of India. The Consultant did not take note of the reduced rate namely 12.15%, subsequently offered by BHEL, for arriving at the conclusion that the "Evaluated Bid Price" of BHEL was the lowest. Therefore, the contention of the learned counsel for the petitioner (i) that there was negotiation between the respondents 1 and 3 during which the interest rate was reduced by the third respondent from 12.25% to 12.15%; (ii) that such negotiations constituted a breach of confidentiality; and (iii) that the benefit of such negotiation was not extended to the petitioner leading to an infringement of the right to have a level playing field, cannot hold good in the light of paragraphs 4.0 and 5.0 of the report of the Expert available at pages 361 to 366 of Vol.IV of the current file.

107. It is quite interesting to note that the "Price Evaluation Report" was submitted by the Consultant namely Desein Private Limited

at Delhi on 30.5.2014. This report was supposed to be confidential. The file does not disclose that this report was communicated to the writ petitioner. But nevertheless, the writ petitioner started sending representations one after another, right from 30.5.2014. In the representation dated 16.6.2014, the petitioner questioned the correctness of the calculation made by the respondents 1 and 2 to arrive at the Evaluated Bid Price per MW. I do not know how the petitioner came to be aware of the evaluation made by the first respondent.

108. In the comparative analysis presented by the writ petitioner in their representation dated 16.6.2014, they provided the analysis in three columns, with the first one presenting the calculations made by TANGEDCO, the second presenting a calculation as made by the writ petitioner, as per the original offer and the third column presenting a calculation with a reduced rate of interest at 6.2% instead of 7.2%. Even then, the Evaluated Price Bid was 7.86 per MW for BHEL and 7.82 per MW for the petitioner. Only at the reduced rate of interest, the Evaluated Price Bid of the petitioner could become 7.44 per MW.

109. Very strangely, the representation dated 16.6.2014 sent by the writ petitioner also contains a reference to a meeting that allegedly took place between TANGEDCO and BHEL on 13.6.2014. I do not know where from the petitioner gained such inside information.

110. Once it is seen (i) that even as per the original rate of interest of 12.25% quoted by the third respondent, their Evaluated Price Bid was lower than that of the writ petitioner and (ii) that the reduction of the rate of interest from 12.25% to 12.15% had taken place after the report of the Consultant that the third respondent is L1, the contention regarding breach of confidentiality and the denial of level playing field vanishes into thin air.

111. As a matter of fact, there appears to have been no confidentiality at all, as the petitioner was able to monitor every move made by the respondents 1 and 2 and bring them on record in the form of representations. At least to the writ petitioner, every step taken by the respondents had been more transparent than what is actually required.

112. It appears from Vol.V of the note file that the reduction in rate of interest from 12.25% to 12.15% took place only after the third respondent was found to be the L1 bidder. Eventually, the EPC price itself was reduced to Rs.7,788 Crores as against the quoted price of Rs.7,840.087 Crores. The respondents 1 and 2 also appear to have done a comparison of the EPC Cost with the Benchmark Capital

Cost, as per the CERC Order dated 4.6.2012. Thereafter, the Consultant appears to have justified the rate reasonableness, as seen from a report attached to the note for the 164th Meeting of the Board Level Tender Committee scheduled to be held on 7.7.2014. In this note, the vendor rating of the third respondent was also recorded to be satisfactory.

113. Vol.V of the current file discloses that apart from the representations dated 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014, which the writ petitioner has chosen to disclose in their affidavits in support of the writ petitions, they had also made three more representations. The first representation was made on 30.5.2014, which was the very date on which the Consultant submitted a Price Evaluation Report. This representation was addressed to the Chairman and Managing Director of the first respondent. Interestingly, the copies of this representation were also sent to (i) Mrs. Sheela Balakrishnan, IAS, Advisor to the Government of Tamil Nadu (ii) Mr. Mohan Verghese Chankath, IAS, Chief Secretary (iii) Dr. P. Rama Mohan Rao, IAS, Secretary-II, Chief Minister of Tamil Nadu (iv) Mr. K. Shanmugam, IAS, Finance Secretary and (v) Mr. Rajesh Lakhoni, Energy Secretary.

114. The second representation sent by the petitioner is dated 9.6.2014. It is in this representation that the petitioner indicated that their finance partner namely the Industrial and Commercial Bank of China had offered by their letter dated 4.6.2014 to reduce the rate of interest. But by this date, the Price Evaluation Report, submitted by the Consultant was already in place. Therefore, the respondents 1 and 2 were not obliged to take this reduction in the rate of interest into account, as it had happened post facto. They are actually forbidden by law from doing this.

115. In the third representation dated 13.6.2014, which appears to have been sent by the petitioner by fax at 5.39 PM, the petitioner appears to have clarified their stand on the commitment fee. Interestingly, this representation was addressed by name to one Mr. R. Ganapathy Sankaran, Officer on Special Duty (EM & NTP), TANGEDCO. In the first paragraph of this representation, the petitioner had claimed that the respondents 1 and 2 had front-loaded the commitment fee portion in their bid evaluation process and that this was wrong. I do not know who gave this information to the petitioner and in what manner.

116. On the very same day namely 13.6.2014, the petitioner had addressed yet another letter to the very same officer namely R. Ganapathy Sankaran. But, this letter appears to have been sent by

post. This letter related to a clarification in respect of the financial charges provided in the Term Sheet. As in the case of the first letter dated 30.5.2014, copies of this letter dated 13.6.2014 were also sent to the various officials including the Adviser to the Government and the Secretary to the Chief Minister.

117. Therefore, it is clear that the petitioner was aware of every move made in the office of the respondents 1 and 2 and engaged themselves in pre-emptive strikes at every stage. Such a person crying hoarse about breach of confidentiality is nothing but an irony of fate.

118. Vol.VI of the current file discloses that every point raised by the petitioner in their representations, was considered threadbare, in the Meeting of the Board held on 26.9.2014. Additionally, the Board had also noted a few points, in so far as the past performance of the third respondent is concerned. They may be extracted usefully as follows :

"In addition to the above, TANGEDCO Board noted that the past performance of all twelve 210 MW Units of BHEL in TANGEDCO are satisfactory with high Plant Load Factor. The period of performance of BHEL Units in TANGEDCO is a long one and twelve numbers of 210 MW Sets of BHEL are in service with high performance in TANGEDCO viz. TTPS (5 X 210 MW commissioned in July 1979, December 1980, April 1982, February 1992, March 1991 respectively), MTPS (4 X 210 MW commissioned in August 1987, June 1988, December 1989, July 1990), NCTPS (3 X 210 MW commissioned in April 1995, June 1995, March 1996). TANGEDCO is able to run these twelve numbers of 210 MW Power Plants Equipments supplied by BHEL even more than 30 years and they have been given Government of India's meritorious productivity rewards for all the three thermal stations for the 'Best Performance of the plant.' TANGEDCO Board also noted the following bid documents submitted by BHEL in their bid in respect of 2 X 660 MW Ennore SEZ :

BHEL have installed capacity totalling to 1,09,506 MW in our country as on 31.12.2012 and that constitute 69% of the total power generated.

Worldwide, their installed capacity stands at around 1,20,000 MW.

Their sets are operating at a PLF of 77% in 2011-12.

BHEL have contracted 475 thermal sets with

ratings from 30 to 800 MW and many of these sets were executed on EPC basis. Major thermal projects executed on EPC basis with various capacity totalling to 12340 MW.

BHEL have enclosed for Bid Qualifying Requirements (BQR) :

i. A list of 58 numbers of 490/500/525 MW sets commissioned by them to a capacity totalling to 29,030 MW.

ii. A list of 122 numbers of sub-critical thermal plants/combined cycle power plants under execution by them to a capacity totalling to 46,991 MW.

iii. A list of 15 numbers of supercritical thermal plants under execution by BHEL to capacity totalling to 21,760 MW.

For Bid Qualifying Requirements in 2 X 660 MW Ennore SEZ, BHEL have enclosed end user certificate from :

a. Chief Engineer (Gen)/Sanjay Gandhi Thermal Power Station for having commissioned 1 X 500 MW (Unit 5) in MP.

b. Executive Director/Bellary TPS/Karnataka Power Corporation Limited for having commissioned 1 X 500 MW (Unit 1) in Karnataka.

c. Chief Engineer (Gen. P & P)/Maharashtra State Electricity Board for having commissioned 2 X 500 MW (Unit 5 & 6) at Chandrapur in Maharashtra.

d. Chief Engineer (Gen. P & P)/Maharashtra State Electricity Board for having commissioned 1 X 500 MW (Unit 7) at Chandrapur in Maharashtra.

Considering various certificates issued by the end users and also the performance of the thermal power plants supplied by BHEL in TANGEDCO, the vendor rating/past performance of BHEL is satisfactory to TANGEDCO."

119. Therefore, it is clear that the respondents 1 and 2 (i) took into account all relevant considerations (ii) avoided irrelevant considerations and (iii) dealt with each and every objection raised by the writ petitioner. Once this is clear, I do not think that the Court can do anything more.

120. From the time the law of contracts evolved, with an underlying principle that a contract without consideration is void, the expression 'consideration' has attained different connotations. This is especially true of contracts awarded by Governments,

Government Enterprises and Public Sector Undertakings. Therefore, there is a public perception that the award of every contract is to be viewed with suspicion. Though the Courts are not empowered to view the award of every contract with suspicion, the manner in which human mind is tuned at the subconscious level, may make it impossible to avoid the suspicion.

121. Even if I look at the case on hand with magnifying glasses, colored with a tinge of suspicion, taking an extra mile and breaking the barriers of the scope of judicial review, I cannot overlook the following aspects :

(i) that the third respondent is a Government of India Enterprise with a Maharatna status, while the petitioner is a private limited company having a consortium agreement with a Chinese company;

(ii) that the debt component of the offer made by the third respondent would also come only from a Government of India Enterprise namely the Power Finance Corporation Limited, while it has to come from the Industrial and Commercial Bank of China in so far as the writ petitioner is concerned;

(iii) that normally a decision in favour of a public sector undertaking whose major shareholding is with the Government of India, may have to be viewed with a lesser amount of suspicion than a decision in favour of private players;

(iv) that though after the advent of globalisation, no argument can be advanced on the basis of Videshi-Swadeshi concept, the fact remains that a decision in favour of a public sector enterprise cannot be easily upset without a strong case being made out and

(v) that it is seen from the current files that the writ petitioner was aware of every move and every step taken by the respondents 1, 2 and 4 and the writ petitioner appears to have chased the decision making process at every stage right from 30.5.2014, making their conduct more suspicious than that of the others. Therefore, the 4th contention of the writ petitioner also deserves the same fate as that of the others.

122. Before winding up, two more contentions raised by the learned counsel for the petitioner also deserve to be dealt with. One is that while evaluating the price bid, the respondents 1 and 2 have clandestinely and mischievously brought into focus environmental aspects such as heat rate and auxiliary power consumption. This, according to the petitioner, is wholly unfair, after having treated the petitioner as qualified in all respects.

123. But unfortunately, the above contention loses sight of the fact that the Electricity Board has not, by itself, pulled out something out of imagination to evaluate the price bids of the

competitors. It is the Consultant appointed for the purpose by the TANGEDCO, who had arrived at the evaluated price per MW by following certain methodology. The Consultant was appointed through an independent process of selection that preceded this tender. Moreover, under paragraph 32.1.7, certain factors such as Power Output, Steam Generator Efficiency, Turbine Cycle Heat Rate, etc. will have to be taken into account. Eventually, the sum total of the factors indicated in paragraph 32.1.6 and 32.1.7 are to be taken as the "Evaluated Bid Price" of the bidder. Therefore, there is no substance in the contention of the petitioner.

124. The other argument of the learned counsel for the petitioner is that by taking 2 decisions in the same meeting of the Board of Directors held on 26.9.2014, to award the contract to the third respondent and to reject the representations of the petitioner, the first respondent had violated the order of the learned Single Judge dated 31.7.2014 in W.P.No.19247 of 2014.

125. In response to the said contention, it was contended by the learned Advocate General that the order of the learned Single Judge merged with the order of the Division Bench dated 19.8.2014 in W.A.No.1065 of 2014.

126. But, the said argument is sought to be repelled by the learned counsel for the petitioner on the ground that the order of the learned Single Judge was confirmed in all respects by the Division Bench, except on one aspect relating to the grant of an opportunity of personal hearing. Therefore, it is contended by the learned counsel for the petitioner that the first respondent had clearly violated the order of the learned Judge dated 31.7.2014 as confirmed by the Division Bench, not to finalise the tender before disposing of the representation of the petitioner.

127. I have carefully considered the above submissions.

128. The operative portion of the order of the learned Judge dated 31.7.2014 reads as follows :

"This Court can take a judicial notice of the fact that this State is reeling under power shortage and the commissioning of the above said projects is vital and very much important to the welfare of the State and therefore, expects the respondents 1 and 2 to act fairly and reasonably by considering the representations of the petitioner dated 16.6.2014, 17.6.2014, 1.7.2014 and 8.7.2014. The letter dated 20.7.2014 addressed to the learned Advocate General by

the Principal Secretary/ Chairman and Managing Director of TANGEDCO also states that the above said post bid representations submitted by the petitioner will be duly considered by its Board of Directors while finalising the tenders and appropriate orders will be passed strictly in accordance with the tender specifications and Tamil Nadu Transparency in Tenders Act, 1998 and the rules framed thereunder and being a State Agency, it is under obligation to do so and till the respondents 1 and 2 consider and pass orders on the above said representations, after affording opportunity of personal hearing to the authorised representative of the petitioner and communicate the same to the petitioner, finalisation of bid/ tender cannot be done.

129. A careful reading of the operative portion of the order of the learned Judge extracted above, would show that the direction primarily followed the letter dated 20.7.2014 sent by the first respondent to the learned Advocate General.

130. Keeping the above in mind, if we have a look at the order passed by the Division Bench, it will be clear that the Division Bench did two things namely (a) that it clarified that the writ petitioner cannot demand personal hearing as a matter of right and (b) it also fine-tuned the direction of the learned Judge by directing TANGEDCO to give opportunities to both parties to produce whatever documents they wanted. Eventually, the Division Bench also issued a direction as to how the first respondent herein should deal with the matter. Paragraphs 13 to 15 of the order of the Division Bench read as follows :

"13. On a perusal of the statutory provisions, we find that the rule nowhere contemplates affording of personal hearing to the person who is objecting. Hence, the first respondent cannot demand personal hearing, as a matter of right. However, it is made clear that if any clarification is required regarding the documents submitted by the first respondent to the appellants to consider its objections, the same shall be called for from the first respondent and if such clarification is sought, the same shall be communicated to the second respondent also and after considering the clarification to be given by the first respondent, the first appellant shall pass an order as directed by the learned Single Judge. It is also made clear that if an opportunity of personal hearing is

afforded to the first respondent, if it is required to be afforded, after considering the clarification given by the first respondent, the same shall be extended to the second respondent also.

14. At this juncture, the learned counsel for the first respondent submitted that the first respondent is having some additional materials to prove the disqualification of the second respondent and he has prayed for a reasonable time to submit the said documents in support of its contention.

15. In view of the above submission made by the learned counsel for the first respondent, the first respondent is granted one week time from the date of receipt of a copy of this order to submit the additional particulars/documents before the first appellant along with a copy of this order and the first appellant shall pass an order as stated above. The order to be passed by the first appellant shall be communicated to the first respondent as well as the second respondent. The order of the learned Judge is modified accordingly."

131. Therefore, if the first respondent has construed the direction contained in paragraph 15 of the judgment of the Division Bench to mean a direction to pass orders and communicate the same to both the parties simultaneously, their understanding cannot be found fault with. It must be remembered that I am not dealing with a contempt petition arising out of the order dated 31.7.2014. Even if the writ petitioner had filed a contempt petition, I am not sure whether what the first respondents did on 26.9.2014 and 27.9.2014 would tantamount to violation of the order of the learned Judge especially in the light of the direction contained in paragraph 15 of the order of the Division Bench. Therefore, the additional contention that the impugned orders are violative of the order of this court, cannot be sustained.

132. Therefore, in fine, all the grounds of attack of the petitioner to the impugned action of the respondents 1, 2 and 4 are devoid of merit. The manner in which the respondents 1, 2 and 4 have conducted the process of evaluation of the tenders, does not appear to be arbitrary, capricious or unfair. The Price Bids of the petitioner as well as the third respondent had been evaluated as per the parameters indicated in the tender notification, by an independent consultant, who himself was selected through a tender floated in the earlier stages. Therefore, the writ petitions are bound to be rejected. Accordingly, the writ petitions are dismissed.

There will be no order as to costs. Consequently, M.P.Nos.1 of 2014 in both the writ petitions are also dismissed.

133. The Trade Unions of the workers of the third respondent, viz. BAP Mazdoor Sangam and BHEL Mazdoor Sangam, have filed petitions for impleading themselves as parties to both the writ petitions, in M.P.Nos.2 and 3 of 2014 and M.P.Nos.3 and 4 of 2014 respectively. Fortunately, the applications for impleading are opposed by the third respondent themselves, as otherwise, I would have viewed those applications with suspicion. The Trade Union of workers has nothing to do with the tender floated by the first respondent. As a matter of fact, they must ensure, if they are interested in the welfare of the third respondent that there is no room for any allegation of delay in the completion of the projects by the third respondent. They have no right to poke their nose into this litigation. Therefore, M.P.Nos.2 and 3 of 2014 and M.P.Nos.3 and 4 of 2014 in W.P.Nos.26762 and 27592 of 2014 respectively are dismissed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kpl/RS

To

1. The Chairman & Managing Director
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144, Anna Salai, Chennai 600 002.
2. The Chief Engineer/Civil/Project & Environment
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4. The Chairman,
Bharat Heavy Electricals Limited (BHEL)
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+3cc's to Mr.N.L.Rajah, Advocate, S.R.No.18945
+2cc's to Mr.P.Gunaraj, Advocate, S.R.No.18935

W.P.Nos.26762 & 27529 of 2014

GR(CO)
CA(22/04/2015)



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