

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L.) NO. 1751 OF 2017

Sterlite Technologies Limited,
a Company incorporated under
the provisions of the Companies
Act, 1956 and having its
registered office at E1, MIDC,
Waluj, Aurangabad, 431 136,
Maharashtra, India,

... Petitioner.

Vs

(1) Aurangabad Industrial Township
Limited (through the Managing
Director) Udyog Sarathi,
Maharashtra Industrial Development
Corporation Office, Marol Industrial
Area, Andheri (East),

... Respondents.

(2) Honeywell Automation India
Limited A Company incorporated
under the provisions of the
Companies Act, 1956 and having
its registered office at 56 & 57,
Hadapsar Industrial Estate Pune
411 013 and Branch Office at
Eco-Elite Building, Marol Maroshi
Road, Marol Andheri (East),
Mumbai 400 059, India

(3) Larsen & Toubro Limited
A Company incorporated under
the provisions of the Companies

Act, 1956 and having its
registered office at L & T House,
Ballard Estate, Mumbai 400 001,
Maharashtra, India

... Respondents.

Mr. Ravindra Kadam, Senior Advocate, Mr. Birendra Saraf,
Senior Advocate a/with Mr. Nitesh Jain, Mr. Shantanu Tyagi
and Ms. Fatema Barodawalla i/by Shardul Amarchand
Mangaldas & Co. for the Petitioner.

Mr. Navroz Seervai, Senior Advocate a/with Rajeev Kumar
a/with Gulnar Mistry a/with Omprakash Jha a/with Mr.
Raghav Shekhar a/with Ms. Surabhi Chatterjee i/by the Law
Point for Respondent No.1.

Mr. Janak Dwarkadas, Senior Advocate a/with Mr. Nandish
Vyas, Cyrus Ardeshir, Rahul Dwarkadas, Mr. Joran Diwan i/by
M/s Veritas Legal for Respondent No.2.

**CORAM : ANOOP V. MOHTA AND
SMT.BHARATI H. DANGRE,JJ.**

**RESERVED ON : 10th AUGUST, 2017
PRONOUNCED ON : 24th AUGUST, 2017**

JUDGMENT : (Per Smt. Bharati H. Dangre,J.)

1 Government of India has envisaged the
development of Delhi-Mumbai Industrial Corridor (DMICDC for
short) along the alignment of proposed multi model high axel
load dedicated project corridor between Delhi and Mumbai.

The corridor covers approximately 1483 km and passes through six States. The said corridor proposes of combining high value infrastructure with sustainable development to create 24 smart industrial cities along its length situated along historic silk route, one of antiquity's most important route for International trade, the Aurangabad Industrial City (AURIC) is one of the first cities planned along the golden corridor. The largest infrastructure program in India's history, this investment represents the leading-edge in international standards with the goal of transforming the quality of life and economic prosperity for the country's more than 1 billion people. The said smart city is to feature a transit oriented and workable township, water and energy conservation, renewable power sources and a healthy quality of life.

For giving effect to the ambitious project, a special purpose vehicle is constituted by joint efforts of Maharashtra Industrial Development Corporation and Delhi Mumbai Industrial Development Corporation having 51 & 49 % stakes respectively and it is captioned as 'Aurangabad Industrial

Township Limited' (AITL) to develop the Aurangabad Industrial City. In the State of Maharashtra seven nodes are to be developed as a part of the corridor which includes the Shendra Bidkin Industrial Area, collectively called as Aurangabad Industrial City (AURIC). AURIC will spur demand for wide array of spin off businesses and will offer the full array of services required for Mega Scale Industrial Park and communities located within it. It is expected to generate huge employment and to add value and exports to the Aurangabad District and Maharashtra as a whole. The Broad Vision for the Shendra-Bidkin Industrial Area is to become a 'showcase of Maharashtra's Leading Manufacturing Industries.'

2 For the purpose of development of the Smart City (AURIC) in Maharashtra respondent no.1 invited request for qualification RFQ cum request for proposal (RFP) for appointment of Master System Integrator (MSI) city AURIC. The MSI is to be appointed for implementation, integration,

operations and maintenance of smart city ICT components of AURIC in Maharashtra.

The present writ petition revolves around the tender process for finalization of the appointment of the Master System Integrator for AURIC. The petitioner Sterlite Technologies Limited, Information Technology Company engaged in the manufacture and sale of telecom products and solutions including designing, building and managing smarter network through system and network integration participated in the said process along respondent No.2 and respondent No.3. The petitioner claims that it is the global leader in optical communication products such as optical fibres, fibres optic cables and data cables through its operations in India, China, Brazil and sales network across five continents.

3 The RFQ and RFP were invited on 26th April, 2017 by AITL for a Project with estimated cost of INR 116 Crores. The bidders were requested to submit their online response on or before 22nd May, 2017. The respondent No.1 adopted single

stage process for selection of successful bidders. The bidders eligible in accordance with Clause 2, 3, 4 and 5 of RFQ cum RFP were invited to submit their proposals for providing required solution and services which were to consist of three parts (a) qualification documents, (b) technical proposal; and (c) financial proposal, each in the formats specified in Section 3 and 4 of Bid document. The first stage involves qualification of the bidders based on evaluation of their qualification documents to determine compliance with the Eligibility Criteria and only those bidders who are found to meet the Eligibility Criteria were to be qualified for the next stage. In the second stage, the Technical Proposals of the eligible and qualified Bidders were to be evaluated to determine compliance with the requirements of the RFQ cum RFP. Only those bidders who secure minimum qualifying technical score namely 70 out 100 and the minimum of 50% marks in the following criteria namely (a) project experience and methodology and A & M presentation (c) Key Experts qualified for the third and final stage. In the final stage eligible bidders whose technical

proposals have scored at least minimum qualifying technical score were to be opened and evaluated by allotting 60% marks to the technical proposal and 40% marks to the financial proposal. The proposal of the qualified bidders were to be finally opened by the Evaluation Committee on the date and time notified in presence of the bidders.

4 The petitioner along with Respondent Nos. 2 and 3 participated in the tender process and at the first stage evaluation committee was required to scrutinize the qualification documents. On 5.6. 2017 the petitioners submitted bid proposal which was duly received by the AITL. On 8th June, 2017 respondent No.1 asked for clarification regarding pre-bid qualification from the petitioner as well as Respondent Nos. 2 and 3 which was duly submitted. All the bidders were ushered into the second stage of Evaluation of their Technical Bids.

The Technical proposal of the bidders were to be evaluated on three marking points and the petitioner was

invited for presentation of proof of concept. (POC). According to the petitioner, for the said presentation he was allotted the last slot and very less time was allotted to him and the evaluation committee had only four members left for screening of the proof of concept of the petitioner. According to the petitioner, other bidders were afforded sufficient time which caused a great prejudice to the petitioner. The petitioner also alleges that some clarifications was sought from the petitioner which were duly explained by the consortium partner of the petitioner namely Fluentgrid Limited. However, on 29/6/2017 respondent No.1 communicated to the petitioner that its technical bid has been rejected on account of failure to meet the requirement of evaluation criteria as RFP and RPQ. The grievance of the petitioner is that though clause 13 of the Tender Documents cast a mandate on respondent No.1 to convey the scores secured, the same were not communicated. It is the contention of the petitioner that after express demand of the said score, on 1st July, 2017 which was Saturday night, respondent No.1 communicated the scores to the petitioner in

relation to Evaluation of its Technical proposal and it was communicated that he has been marked at 66.53 points out of hundred. The grievance of the petitioner is that the said communication was intentionally delayed since 3rd July, 2017 was the date on which the financial bids of the Technically qualified bidders were to be opened. With the grievance that the petitioner was not properly evaluated and that the respondent no.1 was predetermined to oust the petitioner from the process, the petitioner filed present writ petition before this Court on 03.07.2017.

5 On 5th July, 2017, this Court posted the matter to 6th July, 2017 and it was made clear that any development under the tender concern would be subject to the result of the petition. On 6th July, 2017, the respondent authority sought time to file reply when the matter was taken up for hearing and the matter was directed to be listed on 13th July, 2017. However, the bench comprising of Hon'ble the Chief Justice and Hon'ble Shri Justice Jamdar, directed the parties to maintain status-quo till next date of the hearing. The interim

order was continued till 18th July, 2017 and the matter was directed to be listed for disposal at the admission stage. On the same day, leave to amend was granted to the Petitioner.

The matter was taken up for hearing by us on 10th August, 2017.

We have heard learned senior counsel Shri Ravi Kadam i/by Shardul Amarchand Mangaldas & Co. for the Petitioner, learned senior counsel Shri Navroz Seervai i/by the Law Point for Respondent No.1 and learned senior counsel Shri Janak Dwarkadas, i/by M/s Veritas Legal for Respondent No.2.

6 The counsel for the petitioner Shri Kadam vehemently argued that the manner in which respondent no.1 has carried out the evaluation process smacks of arbitrariness, bias and unreasonableness. According to him the evaluation of technical proposal of the petitioner has been carried out in a malafide manner, which is clearly reflected from the minutes of the meeting dated 27.06.2017 conducted by the evaluation committee, wherein the proposals/experience of the petitioners

and the work tendered by him under various criterion have not been properly marked and have been rejected at places when it required only an objective assessment. According to learned senior counsel Shri Kadam, the evaluation committee failed to consider the actual scope of the work and has virtually expanded factors or narrowed down the scope of the factors at the time of allocating the marks which is very apparent since they have allotted the marks in fraction. According to the learned counsel for the petitioner if the evaluation had been done properly by the evaluation committee, the bids of the petitioners would have been qualified for the financial assessment. Learned counsel Shri Kadam also argued that the differential treatment was accorded to the petitioner as compared to the respondent nos. 2 and 3. He canvassed that it was not possible for him to make out the case of bias, however, the accompanying circumstances, if seen, would demonstrate the bias. In support he relied on judgment of the Hon'ble Apex Court in case of S. Pratap Singh vs. State of Punjab AIR 1994 SC 72. According to the learned senior

counsel since the whole process vitiated on account of the biased attitude against the petitioner, the whole canvass of the tender process was filled with the colour of prejudice against the petitioner who had been intentionally singled out at various stages and therefore, the whole process is deemed to be vitiated.

7 To demonstrate the malafides and arbitrariness, the learned counsel for the petitioner invited our attention to the markings under the criteria 1.1, where out of 8 projects submitted by the petitioner, project nos. 4, 5 and 6 came to be rejected by adopting the subjective criteria. According to learned senior counsel Shri Kadam, the requirement as per the said clause was the experience for implementation of the integrated operations Centre or Command and Control Centre integrating three different cities/campus wide applications/sensors and the project no. 4 of the petitioner, was rejected only on the ground that it used the word “unified contract centre”. Further according to Shri Kadam the

project no. 5 in respect of Assam Power Distribution Company Limited has been disqualified on the ground that it is a smart city project / a smart grid pilot project without any CCC grant in the light of the requirements of tender document. Further the learned senior counsel laid much stress on project no. 6 namely 11 big cities of Madhya Pradesh which according to him was rejected as only CCTV integration is mentioned and, therefore, it did not qualify as CCC project. According to the learned senior counsel the same project was permitted to be bifurcated for the purpose of respondent no. 2 and was considered as three projects.

According to the learned counsel for the petitioners, the petitioner was awarded 10 marks out of 14 under the said caption and this is so because of the improper evaluation of the projects by the evaluation committee. Further he has made a grievance in respect of the requirement in case of go-live project relating to the implementation of outside plant fiber optic infrastructure including at least 150 kilometers (outdoor) with 100 nodes.

According to him, he was under evaluated by 3 marks in this criterion. Further the petitioner is also aggrieved by the allotment of marks under the criteria caption "A" & "M" Presentation which included the technical presentation and Proof of Concept (PoC) in front of Evaluation Committee. Under this criteria, out of 25 marks, the petitioner was awarded 9.96 marks and according to learned counsel said evaluation is arbitrary. He is also aggrieved by the evaluation of the petitioners' project bid under the caption of "Key Experts" where, out of 25 marks, 13.57 marks are allotted to the petitioner bidder. According to Shri Kadam the Evaluation Committee adopted partisan attitude and behaved in a high handed fashion and the petitioner was not even afforded an opportunity to demonstrate their solution, which was afforded to the respondent nos. 2 and 3. Learned counsel Shri Kadam, therefore, contended that the whole approach of respondent no. 1 was unreasonable and that he is conscious of the legal position about interference by the writ courts in tender matters, however, he asserted that this is a fit case where the

court would examine “decision making process” of respondent no.1. He relied upon several authorities in support of his contentions which we would be dealing with at a later point.

8 We have also heard learned senior counsel Shri Seervai, who on the basis of the averments in his reply and through his argument attempted to demonstrate before us that what the petitioner is seeking is interference by this court in “the decision” and not in “the decision making process”, which, are different connotations. Shri Seervai in his able style attempted to demonstrate that the petitioner was a “disgruntled bidder”, in words of the Hon'ble Apex Court, as expressed in the case of Jagdish Mandal vs. State of Orrisa and Ors., reported in 2007 (14) SCC 517. He further argued that if the decision relating to award of the contract is bonafide and is in public interest, the courts would not, in exercise of powers of judicial review interfere even if there is procedural aberration or error in assessment or even if case of prejudice to a tenderer is made out. According to him, the

petitioner was an unsuccessful tenderer and with wounded pride and business rivalry, he is attempting to make a case for interference in the process which according to him is unwarranted.

According Shri Seervai the petitioner's attitude in the whole process was sloppy and that the petitioner has failed to submit the necessary documents to meet the requirements, as per the tender notice. Further, according to respondent No. 1, as stated in their affidavit, equal opportunity was afforded to the petitioners to cure irregularities and in fact the petitioner himself was at fault in not submitting the necessary documents to satisfy the essential qualification which had caused him the technical disqualification. According to Shri Seervai the evaluation committee which was constituted for evaluating the qualifications/documents as well as the technical proposal, was an expert body comprising of the technically expert persons in the field and they were independent persons. According to him the evaluation committee noted that the petitioner was not able to achieve

an overall technical score of 70% nor 50% of marks secured in each section in the A & M and presentation. He submitted that the petitioner committed glaring oversights and according to learned senior counsel Shri Seervai, the petitioner has suppressed crucial information to demonstrate that despite there being substantial lacunae and inconsistencies in the petitioners' bid, the respondent had kept the tender process competitive. According to him most glaring amongst the numerous oversights on the part of the petitioner, is the belated change after proof of concepts (PoC) stage of the product/software to be provided by the petitioner for the enterprise resources planning (ERP) solutions as required by the respondent. According to the respondent in the technical presentation made before the evaluation committee on 19.06.2017, the petitioner was unable to demonstrate how mPower would meet the detailed specifications contained in the tender and that the respondent sought a clarification from the petitioner but instead of clarifying the position qua mPower, the petitioner improperly sought to substitute

mPower with entirely different product / solution, namely, “e.governments.org”.

According to the learned senior counsel Shri Seervai, the minutes of meeting of the evaluation committee dated 27.06.2017 dealt in detail as to how the petitioner and his competitors scored and according to Shri Seervai the said process was conducted in a transparent manner by meeting all parameters of Article 14. More-soever Shri Seervai also attempted to argue that the project is of great importance for the State of Maharashtra and, being unique in itself, needs to be evaluated in the backdrop of the fact that the said project is going to become a “showcase of Maharashtra's leading manufacturing industries” and intends to provide a broad vision of industrial development. According to him the overall vision of AURIC includes positioning of information and communications technology (ICT) as the key enabler to integrate various functions of the city development and operations, provide advance and affordable services to the citizens along with efficient governance and management of

the city operations. According to him, the ICT will enable creation of a sustainable eco-system of the government. Thus, according to him the appointment of master system integrator (MSI) has to be a person who would deliver all the expected results for supply, implementation, integration, operations and maintenance of smart city ICT components. With this background in mind, the respondent no. 1 has evaluated the bids.

We have also heard learned senior counsel Shri Dwarkadas, appearing on behalf of the Respondent No.2, who has adopted the arguments of the learned counsel for respondent no.1 and attempted to demonstrate that respondent no. 2 met the eligibility criteria as per requirement of the tender document and therefore, was found to be eligible for opening of financial bid and his bid was found to be lowest. He however, disputed the argument of the learned counsel appearing for the Respondents that the tender could not have been allotted immediately after the opening of financial bid and there ought to have been negotiations with the successful

bidder. However, according to the learned senior counsel the said condition stipulated is respondent no.1's outlook and since the word used in the clause, calling for negotiations is “may”, it cannot be held to be mandate and thus he prayed for dismissal of the writ petition.

9 In the backdrop of all the arguments of the learned senior counsel of both sides, it is necessary for us to examine the legal parameters within which the relief can either be granted or refused to the petitioner. The Hon'ble the Apex Court in Tata Cellular vs. Union of India, reported in (1994) 6 SCC 651 has cautioned that in such matters the judicial review should be not of reviewing the merits of the decision in support of which the application for judicial review is made but only of decision making process. The Hon'ble Apex Court deduced the principles for judicial review in tender matters and has held that the government must have freedom of contract and a fair play in the joints is a necessary concomitant for an administrative body functioning in an

administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. The Hon'ble Apex Court has laid down a test and permitted judicial review when the wrong is of such a nature that the court would set right the decision making process but would not substitute its own opinion for that of experts. Learned senior counsel Shri Kadam relied upon the judgment in the case of Sterling Computers Ltd. vs. M/s. M & N. Publications Ltd., and Anr. Reported in 1993 (1) SCC 445 to canvass that the Apex Court has held that though the court may not sit in appeal while examining administrative decision, however, the court cannot ignore the action which is against the mandate of Article 14 of the Constitution of India on the ground that the authorities concerned must have some latitude or liberty in contractual matters. Reliance is also placed by the petitioners on Indian Railway Construction Co.

Ltd., vs. Ajay Kumar reported in (2003) 4 SCC 579 to support plea of infirmity in decision making process.

10 The principle emanating from the judgments cited before us lead us to formulate a question to apply the test as to whether there is any infirmity in the decision making process since we cannot examine the decision but only the process and whether the decision of the authority is vitiated by the arbitrariness, unfairness, illegality and irrationality. We are also required to record a finding as to whether the process adopted or decision made by the authority is malafide or intended to favour the respondent no.2 or whether the decision made is so arbitrary and irrational that no responsible authority, in accordance with the relevant law, could have reached the same and whether the public interest is affected.

11 In the frame work of the above proposition, we proceed to examine the matter in hand. The tender floated by respondent no. 1 for appointment of master system integrator

(MSI), prescribe the basic eligibility criteria to be satisfied by the bidder which included the company profile, company standing, local presence etc.. The eligibility criteria also prescribes a bidder to possess experience in carrying out the work of similar nature and the bidder is to be evaluated for his project experience on the following parameters :

(A) The Bidder (any member in case of consortium) shall have successfully commissioned/Go-live at least two (2) projects related to implementation of integrated operations center/command and control centre integrating at least three (3) different city/campus-wide applications/sensors at the command and control centre with a minimum value of INR 10 crores per project (excluding civil works) during last seven (7) years.

(B) ERP : The Bidder (any member in case of consortium) shall have successfully commissioned/Go-live at least two (2) projects related to implementation / integration and support of ERP (Entrepreneur Resources

Planning) system including finance, utility, billing, maintenance & asset management modules (with at least 2 of these modules), having a minimum value of INR 10 crores per project during last seven (7) years. At least one (1) project shall be international.

(C) e-Governance : The Bidder (any member in case of consortium) shall have successfully commissioned/Go-live at least two (2) projects related to implementation/integration and support of people centric governance applications integrating at least four (4) different services having a minimum value of INR 5 crores per project during last seven (7) years.

(D) OFC : The Bidder (any member in case of consortium) shall have successfully commissioned/Go-Live at least two (2) projects related to implementation of outside plant fibre optic infrastructure including at least 150 km (outdoor) with at least 100 nodes per project

having a minimum value of INR 10 crores per project during last seven (7) years.

The technical proposal of a bidder was required to be evaluated in the backdrop of 3 criteria namely (a) project experience, (b) A & M and presentation and (c) Key Experts.

The evaluation committee was constituted by respondent no.1 to evaluate the responsiveness of the participants bidders. Each responsive technical proposal submitted by the eligible bidder was to be given a technical score on the basis of the evaluation criteria based upon point system for number of marks to be allotted as specified in the bio-data sheet.

12 The criteria of “project experience” was further divided into five sub-criteria and total 50% marks were allotted for project experience.

The petitioner was evaluated against those criteria and was allotted 43 marks. He is basically aggrieved by the less marks allotted to him in criteria numbers 1.1 and 1.4. Under the remaining project experience heads, the petitioners secured full marks. Under the criteria of 1.1, which relates to command and control centre, the petitioner submitted 8 projects and according to the petitioner, the marks which ought to have been allotted to him were 14 as he had experience of more than 5 projects. The contention of the petitioner is that the marks were to be allotted on the basis of the objective assessment. Out of the 8 projects submitted by the petitioner under these criteria, the project no. 4, 5 and 6 came to be rejected.

The evaluation committee in its detailed report has evaluated the said projects of the petitioner as follows :

As regards the project no. 4 : Da Afghanistan Breshna Sherkat, as mentioned above, the evaluation committee made following observations

- “not qualifying as it is an ERP project not a CCC project with required components”.

Project no. 5, which was a Smart Grid Project in APDCL was rejected with the following observations - “not qualifying as it is a smart grid project with no CCC implementation in-line with the requirements”.

Project no. 6 : 11 Big Cities at Madhya Pradesh State was rejected with the following observations - “not qualifying as CCC implementation scope is not clear and not clearly in-line with requirements”.

As regards the project no. 5, the evaluation committee has observed that there is no three different cities/ campus wide applications/ sensors integration in project nos. 4 and 5 and in project no. 6 only the CCTV integration is mentioned. The technical evaluation committee with expert persons did not find the project of the petitioner fulfilling the said requirement and it has observed in a detail report that the

project was to be one with command and control centre and that the petitioner's attempt to demonstrate that the said project was using the word “unified contact centre”, means the same thing and requirements of command and control centre was not correct. The technical committee, however, observed that the said project was not a CCC project but it is a ERP project and it has clearly given reasons for the same in technical terms in the minutes of the evaluation committee. However, the technical evaluation committee also clarified that the client certificate produced from Fluentgrid Limited towards the “unified contract centre” as interchangeable with the “call centres” in fact do not fulfill the requirement of CCC project. However, in respect of the project no. 5, the Committee observed that the letter of the Award pertaining to the project, as submitted, indicated that the scope of work included “assisting APDCL in implementation smart-grid project activities” such as “establishment of communication between the consumer/DTR/bidder for sub-station meters and Smart Grid Control Centre Services” is indicative of the

fact that CCC in this project has already been established and merely acting as a conduit instead of the CCC cannot qualify the same as CCC project.

In respect of project no. 6 : relating to 11 big cities in Madhya Pradesh State, the project in question was undertaken by consortium in which the respondent no.1 and Technosys Limited, being a consortium member of the Petitioner for the present tender, were members. Respondent No. 1 and the petitioner both have used the project experience of this project but the petitioner cited the entire tender as single project whereas Respondent No. 2 has cited it as three different projects with three different cities, namely, Bhopal, Ujjain and 9 cities in Madhya Pradesh.

The evaluation committee has noted that neither the purchase orders in respect of the project nor the bill of material/bill of quantity (being a document) with list of all hardware components of the project to enable the technical evaluation committee to ascertain the nature of the project were ever submitted. On the other hand respondent no.2

Honeywell had submitted to the respondent no.1 the entire purchase order and bill of material / bill of quantity and also three separate applications / completion certificates issued by the Madhya Pradesh Police Head Quarter, issued on letter head, which was required as per clause 1.1 of the tender document. The completion certificate submitted by the Honeywell indicate that three separate CCC for separate contract for value of INR Rs. 10 crores indicate separate commencement and completion dates of major components showing more than three applications/sensors online on only CCTV surveillance. Therefore, the Committee evaluated them as three separate projects though they were participated in a single unified tender. Perusal of the tender document reveals that for the purpose of establishing and demonstrating that the bidders have successfully commissioned, command and control centre, the tender document itself required certain specific documents to be submitted viz. the work order/contract clearly highlighting the scope of the work; bill of material and value of the contract/ order with value excluding civil

works; and completion certificate issued by the competent authority or self certificate from the bidder signed by the concerned officer/project -in-charge of the bidder and counter signed by the authorized signature.

13 Perusal of the submissions of the MP project by the petitioner reveals that the petitioner had submitted completion certificate cum performance certificate dated 09.05.2017 signed by the Senior Superintendent of Police (Radio) MP, Bhopal for a value of INR Rs. 1,53,12,49,497/- only, but the Committee found that the said certificate/ performance report it only mentions the date of the site acceptance test and final acceptance test by District Inspection Committee/RHQ Committee, declaration of System “go live” and different dates were mentioned and the said document further certify that customization, resource person development and man power training is in progress and hence, it could not have been sited to be a completion certificate. The petitioner submitted a self certification. The evaluation committee

mentioned that the petitioner's said project do not fit in the criteria of “three different cities/campus wide applications/sensors integration for the reasons that “only CCTV” integration is mentioned. In the result, the said project was disqualified as experience of CCC implementation.

14 It was thus the duty of the petitioner to project his “project experience” in a proper manner in-consonance with the document required to be submitted as per the tender document and even if respondent no.2 - Honeywell Automation India Ltd., had executed the said work of integrated security surveillance system at 11 big cities of Madhya Pradesh with the Technosys Security System (P) Ltd., as consortium partner of the petitioner, the respondent no. 2 had submitted documents, bifurcating the project into three since there were three different work orders, three different completion certificates and the value of the each of them qualifying more than INR Rs.10 crores which was required by the tender document. It was for the petitioner to aptly demonstrate as to

how the said project qualify him to secure the required marks for his successful implementation and integrated operation centres /command and control centre. The evaluation committee in detail has dealt with the said project submitted by respondent no. 2 and accepted the said project as three different projects since the documents required as per the tender notice were submitted by respondent no.2.

At this stage, it is necessary to point out that the evaluation committee evaluated the project experience of the petitioner on the basis of the document submitted and it was not in fact incumbent on the part of the evaluation committee or the respondent no. 1 to personally call or seek clarification from the petitioner as to why he did not bifurcate his MP 11 city project as is done by the respondent no. 2-Honeywell Automation. As per the tender document, the necessary documents were required to be submitted so that the particular project is counted towards “project experience” and respondent no.1 or the evaluation committee cannot be said to be at fault when they treated this condition of submission of

the requisite document as the essential condition of the tender and by non-submission of the necessary documents, the work of MP 11 city was not qualified for evaluation and hence, not considered for marking.

15 The petitioner has also raised grievance that the Evaluation Committee has not properly evaluated his bid in respect of clause No. 1.4 which required the bidder to have successfully commissioned Go-Live at least 2 projects regarding implementation of optic plan fibere optic infrastructure with at least 100 nodes. The petitioner had submitted six projects under this caption out of which the project No. 1 and 2 i.e. Smart City Ahmedabad and BSNL telecom project were accepted. However, the petitioner has raised a grievance about wrongful rejection of his project No.3-NLD backbone and optical access routes- BSNL. The said project is rejected on the ground that self certificate mentioned more than hundred nodes but it was nowhere reflected in the work order. Further the purchase order mentioned that the project was a fiber

laying project with no mention of implementation nodes either in the purchase order or in the bill of quantities attached to the project. The contention of the petitioner is that rejection of the said project is wrongful as the said project has satisfied the minimum requirement of 100 nodes. However, the terminology used for NODES was different and in fact though the Ahmedabad project mentioned the term “stations” and not nodes still it was accepted. However, in this project the word used was “stations” and hence it was rejected. It was also attempted to argue that as far as respondent No.2 is concerned in its evaluation of OFC Project the word “SWITCHES” was used, still the said project was accepted.

We have carefully examined the tender document. It is to be mentioned that for the work to be qualifying under this clause requires submission of certain documents which are as follows:

- * Work order/Contract clearly highlighting the scope of work, Bill of material and value of the contract/order;

* Completion / commission certificate issued and signed by the competent authority of the client entity on the entity's Letterhead.

Or

* Self-certificate from the bidder signed by the concerned project in-charge of the bidder and counter signed by authorized signatory.”

16 The Evaluation Committee has rejected the said Project in the OPI category since the bill of material did not show presence of at-least hundred nodes which was an essential requirement for qualifying the project work under Clause 1.4. Further the certificate submitted in respect of the Project was unsigned by the Project In-charge and hence there was no way to ascertain whether or not the Project meets tender requirement. We find that the contention in respect of mala fides are not made since other two Projects in the same category, which according to the evaluation committee, in consonance with the tender conditions, were rightly evaluated.

Another major grievance of the petitioner is in respect of erroneous marking under criteria No.2.3, for which total number of marks were 25 and the petitioner was marked to 9.96. We must mention that Clause 2.3 was a complete subjective assessment of the following factors (a) proposed solution and Architecture (b) Overall Approach, Project methodology, Implementation and Deployment plan (c) Technical presentation and PoC (proof of concept) in front of Evaluation Committee and the (d) CMMI Level-3. The petitioner has made several allegations against the Evaluation Committee and its indifferent attitude towards the petitioner, which we must mention, have been strongly denied by Respondent No.1 by filing an affidavit. The petitioner has even made allegations against the Evaluation Committee by alleging that last slot was allotted to the petitioner for presentation of proof of concept (PoC) and all the members were not present. However, we do not intend to go into such allegations as the same is denied by the respondents. There is no way, we can ascertain as to what had actually transpired before the

Evaluation Committee and rather we express that Evaluation Committee was comprising of Experts in the field and while assessing the bidders in respect of their technical capacity to operate the smart city, they have taken into consideration all the relevant criteria suiting the bidder to be a successful Master System Integrator (MSI). The respondent no.1 has categorically stated in the affidavit that the petitioner belatedly substituted the ERP solutions from mPower to e.government.org after the POC stage and thus violated clause 29 of the tender document. The petitioner along with the bid document in compliances with Clause 17(c) of the tender where he was asked to specify the details of solution sought to be made for ERP Project sought to employ a Project data solution known as mPower in respect of ERP component of the Project. However, it is to be noted that he did not suggest that the product would be used along with other components i.e. “mPower Set” or “mPower Suite” or otherwise. However, at the POC stage, the petitioner indicated that mPower would be used in tandem with e.government. The Committee noted that this was contrary to

the original submission of mPower and it was indicative of the fact that this situation require degree of customization and therefore could not be considered as COTS protect. In fact, a clarification was sought from the petitioner to that effect and the petitioner responded by submitting a clarification wherein it was indicated that they choose to “partner with e.government.org” and their mPower product features come “with configurability rather customization”. However, the committee noted that the petitioner was unable to indicate with degree of specificity the exact nature of the proposed solution before the evaluation committee. But the RFQ cum RFP had clearly stated defined set of requirement for the functional, performance, business and technical requirements for the ERP systems. The evaluation committee observed as below :

“While evaluating the approach and methodology for all the three (3) bidders, the evaluation committee noted that for Bidder 3, the ERP solution proposed was that of m-power from Fluentgrid. The RFQ cum RFP had clearly stated a defined set of requirements for

the functional, performance, business and technical requirements for the ERP system. It was noted that no detailed information on how the proposed solution meets the requirements of the RFQ cum RFP has been provided by Bidder 3. The evaluation committee deliberated on the fact that the proposed solution not “Commercial-Off. The Shelf (COTS)” and the applicant would be developing these functionalities specifically for the purposes of the project, which is not in-line with the requirements of the RFQ cum RFP.”

17 Though the petitioner has attempted to demonstrate before us as to how there is no distinction in the RFQ solution either by egovernment.org or by empowerment, we do not feel that we possess any expertise to find out as to whether customizations and configuration of these two solution is interchangeable or not and according to us the evaluation committee which comprised of experts have duly deliberated on the issue and did not find that the petitioner complied with the RFQ and RFP requirement to this extent.

The evaluation committee also allotted the marks to the petitioner under eligibility criteria of “Key Experts and out of 25 marks allocated under this caption the petitioner was awarded 13.57 marks. The allotment of the said marks is admitted by the petitioner whereas respondent No.1 has justified the allotment of the marks under this caption which was based on minor details including the qualifications of the Project Director taking into consideration their CV. However, we also did not propose to go into the said evaluation since the expert committee has allotted the marks taking into consideration all the relevant factors.

18 We do not find substance in the argument advanced by the petitioner that since the evaluation criteria mentioned in the tender notice is definitive and objective and there is no element of any discretion. It is argued by the Counsel for the petitioner that RPQ and RFP did not require any qualitative assessment to be made and points are to be allotted if the requisite documents are submitted or not as a

proof of their technical ability to execute the Project and award marks accordingly on the basis of number of Projects. We, however, do not agree with the submission of the learned Counsel for the Petitioner. The tender process is ultimately going to result into award of contract in favour of a successful bidder and having commercial element, some more discretion has to be conferred on the authorities giving them liberty to assess overall situation for the purpose of taking a decision as to whom the contract is to be awarded and who would better execute the project competently. Every time it may not be possible for such authorities to act like quasi judicial authority though they are expected to follow recognized norms while dealing with the public project. However, if the decision is taken in a bonafide, it would be necessary to grant certain measure of “playing in the joints” to the authority. Looking to the over all view of the matters, we are of the view that respondent No.1 in order to technically evaluate the participants in the process had constituted a 'Evaluation Committee' and there is no allegation made by the petitioner

that they were not experts in the field nor they are personally impleaded as parties to attribute malafides to them and when such expert committee evaluated the bids of the participants, we feel that their decision has to be honoured unless the petitioner would demonstrate a case of arbitrariness or favoritism of such nature for this court to intervene. Though the petitioner has attempted to demonstrate that the whole tender process was tainted with malice and from the beginning attitude was to oust the petitioner, it is to be noted that the evaluation marking was done by an expert committee and we have noted that the petitioner has faulted at many occasions by not submitting the necessary documents which according to respondent no.1 did constitute “essential conditions” and at times opportunity was given to the petitioner to make up those “non essential items” by submitting necessary documents. Said opportunity was given to all three bidders equally and therefore it cannot be said that the petitioner was discriminated. However, when it came evaluation of the projects on the basis of the prescribed norms specified in the

tender notice, the evaluation committee had to be technical and had to consider the project of each of the bidders based on the requirement of the documents submitted in support of the Project to meet the tender requirement. We do not find any arbitrariness in the report of the evaluation committee which is in detail and reasons have been cited by the committee while accepting or rejecting a particular project of the petitioner. We do not possess a technical expertise to sit in appeal over the said reasons which are purely of technical nature. What we require to examine is fairness of the decision making process and not the decision itself.

We also do not find any merit in the contention of learned counsel for the petitioner that to get the competitive response more number of bidders should have been welcomed by respondent no.1, however, by scuttling the petitioners participation there are only two bidders left and this has minimized the competition financially. The said submission does not appeal to us, though we agree with the broad proposition of the learned Senior Counsel, however, if the

bidder is not found technically qualified according to the authority, such technically unqualified bidder will pose no competition in the field.

19 The Hon'ble Apex Court in the case of Afcons Infrastructure v. Nagpur Metro Rail Corpn. Ltd reported in (2016) 16 Supreme Court Cases 818 has observed as follows :-

15. “We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a

reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.

17. Under the circumstances, we find merit in the appeals filed by the appellants and set aside the judgment and orders passed by the High Court and restore the decision of NMRCL to the effect that GYT-TPL JV was not eligible to bid for the contract under consideration.”

It is settled position in law by this time that though in contractual matters the State or “other authorities” are bound

to act within the legal limits and their actions are required to meet the touchstone of fairness unless and until a case is made out of mala-fide or arbitrariness or favoritism, the constitutional courts will not interfere and they are expected to restrain themselves in interfering with administrative decision and ought not to substitute their view for that of the administrative authority and mere disagreement with the decision making process or decision of the authority is no reason for the Constitutional Court to interfere.

20 In the light of the settled proposition of law and analysing the facts in the present case, we are of the opinion that respondent no.1 has found that the technical bids of the petitioner did not qualify for acceptance of financial proposal and the said decision being based on the evaluation criteria stipulated in the tender document and when the bid of the petitioner has been evaluated by expert committee and marked by taking into consideration the technical requirement of the Project to gauge the technical capacity of the bidder, we do not

find any reason to interfere. As regards the contention of the petitioner about arbitrariness or favoritism, we have already recorded above that the same is not substantiated and is only an expression of discontent of the petitioner which is not borne from the record. The said project being of national interest and also public interest, we find that respondent no.1 authority has acted with great responsibility and had assessed the bidders capability and capacity to perform in the overall interest of the project. No extreme case has been made out by the petitioner reflecting mala-fides and since the petitioner himself did not reach the bench mark prescribed by the tender committee, we do not feel that the petitioner is entitled for any relief. The project which is of grave importance for the State Government needs to go ahead expeditiously and any hurdle in the same would seriously affect the Industrial Development and resultant job opportunities for large number of people and hence there is no better interest in stopping the project.

21 For the reasons stated above, the writ petition deserves to be dismissed and it is accordingly dismissed. No order as to costs.

22 At this stage, Shri Nitesh Jain, the counsel appearing for the Petitioner submitted, after pronouncement of this judgment / order in the court, to continue the status-quo granted by this court vide order dated 6th July, 2017. Learned senior counsel Shri Navroz Seervai appearing for the Respondent No.1 strongly opposed the same.

Considering the reasons so recorded in the judgment/order and in view of the fact that it is the project of the general public importance, no reason to halt it at the instance of the petitioner. We see that no case is made out to continue the order of status-quo dated 6th April, 2017. Prayer is accordingly rejected.

(SMT. BHARATI H. DANGRE,J.)

(ANOOP V. MOHTA,J.)