

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.02.2021

DELIVERED ON : 02.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.Nos.18302, 16736 & 18036 of 2020

In W.P.No.18302 of 2020

- 1.Pace Digitek Infra Pvt. Ltd.,
(Represented by its Authorised Signatory),
Plot No.V/12, Industrial Estate,
Kumbalgodu, Mysore Highways,
Bangalore - 560074,
Mr.Rajiv Maddisetty.
- 2.Quadgen Wireless Solutions Pvy. Ltd.,
607, World Trade Centre,
Bridge Gateway, Malleshwaram West,
Bangalore - 560055,
Represented by its Vice President,
Mr.Kartik. S
- ...Petitioners

vs.

1. Tamil Nadu Fibernet Corporation Ltd.,
807, 5th Floor, Chengalvaraya Naicker Maaligai,
Anna Salai, Chennai - 600 002,
Rep. By its Managing Director.
2. Government of Tamil Nadu,
Represented by its Secretary,
Information Technology Department,
Tamil Nadu, Secretariat, Chennai - 3.
- ...Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India for writ of certiorarified mandamus calling for the records relating to the impugned communication bearing reference number ROC No.33/TANFINET/2020 dated 01.12.2020 issued by the 1st respondent, quash the same and direct the 1st respondent to consider the Bid submitted by the petitioner's for further evaluation and consideration in accordance with law.

For Petitioners : Mr.AR.L.Sundaresan, Senior Counsel,
for Mr.R.Parthasarathy
for M/s.Lakshmi Kumaran Sridharan

For Respondent 1 : Mr.S.R.Rajagopal, AAG
Assisted by P.Gunaraj

For Respondent 2 : Mr.Vijayanarayan, AG
Asst by Mr.V.Shanmuga Sundar, SGP

In W.P.No.16736 of 2020
Mantra Industries Ltd.,
represented by its Director,
No.17, Shiv Ganga Apartment,
SL Road, Mulund (W),
Mumbai - 400 080.

...Petitioner

vs.

1.Tamil Nadu Fibernet Corporation Ltd.,
807, 5th Floor, P.T.Lee Chengalvaraya Naicker Building,
Anna Salai, Chennai - 600 002,
Rep. By its Managing Director.

2.National Informatics Centre,
Rep. By its Director General,
A- Block, Lodhi Rd, CGO complex,
New Delhi - 110 003.

...Respondents

Prayer: Writ petition filed under Article 226 of the
Constitution of India for writ of mandamus directing the 1st
respondent to enable the petitioner to submit its bid documents
pursuant to tender floated vide Tender Reference:
NIT_TANFINET_002_PACKAGE_B dated 01.10.2020 by extending the
last date for submitting the bid documents and receiving the
same either through the website or through hardcopy.

For Petitioner : Mr.T.Mohan, Senior Counsel,
for Mr.Aditiya Reddy

For Respondent 1 : Mr.S.R.Rajagopal, AAG
Assisted by P.Gunaraj

For Respondent 2 : Mr.K.Seetharaman, CGSC

In W.P.No.18036 of 2020
Sterlite Technologies Limited,
Represented by its Legal Head,
Mr.Ramesh Sharma,
E-1, MIDC, Waluj,
Aurangabad,
Maharashtra - 431 136.

...Petitioner

vs.

Tamil Nadu Fibrenet Corporation Ltd.,
807, 5th Floor, Chengalvaraya Naicker Maaligai,
Anna Salai, Chennai - 600 002,
Rep. By its Managing Director.

...Respondent

Prayer: Writ petition filed under Article 226 of the Constitution of India for writ of certiorarified mandamus calling for the records culminating in the impugned orders disqualifying the petitioner and consequently quash impugned order dated 01.12.2020 (all number as ROC No.33/TANFINET/2020) issued separately for each package (i.e., for Package A, Package B, Package C and Package D) for being illegal and arbitrary and direct the respondent to consider the bids submitted by the petitioner as substantially complaint to the tender conditions and proceed accordingly.

For Petitioner : Mr.P.S.Raman, Senior Counsel,
for Dinesh Pardasani
for M/s.King and Partridge
For Respondent 1 : Mr.S.R.Rajagopal, AAG
Assisted by P.Gunaraj
For Respondent 2 : Mr.Vijayanarayan, AG

COMMON ORDER

These writ petitions challenge the tender process of the first respondent in respect of Bharat Net Project in the State of Tamil Nadu to provide broadband connectivity of one GBPS to 17662 villages in the State of Tamilnadu through laying of optical fiber cables.

2.Pace Digitek Infra Private Limited, the petitioner in W.P.No.18302 of 2020 (hereinafter referred to as "PACE DIGITEK") has challenged the rejection of its technical bid for Package "B" vide communication of the first respondent dated 01.12.2020. The bid of PACE DIGITEK was rejected by the first respondent for the following reasons by the communication of the first respondent on 03.12.2020 (a) The consortium agreement submitted

by PACE DIGITEK as part of tender documents is dated 06.11.2020, whereas the stamp paper is dated 10.11.2020. Hence, according to the first respondent, the consortium agreement is not a valid agreement. (b) The bank guarantee towards the EMD amount has been wrongly furnished by Quadgen Wireless Solutions Private Limited (the second petitioner) and not by PACE DIGITEK who is the lead bidder.

3. Sterlite Technologies Limited, the petitioner in W.P.No.18036 of 2020 (hereinafter referred to as "STERLITE") has challenged the communication of the first respondent dated 01.12.2020 rejecting summarily its bid for Packages "A", "B", "C" & "D". The reason for rejection of bid was communicated to STERLITE by the first respondent on 03.12.2020. The reasons for rejection are that the bids are not in compliance with the minimum eligibility criteria, Sl.No.7 of the Request For Proposal (RFP) as detailed hereunder: "The IP-MPLS Routers along with the sub-components (including pluggable optics (Pre-loaded & Add-on) asked in the Bill of Material) were from two different OEMs, i.e., CISCO & PROLABS, contrary to the minimum eligibility criteria, where all components of the IP-MPLS router have to be from a single OEM.

4. MANTRA, the petitioner in W.P.No.16736 of 2020 (hereinafter referred to as MANTRA) has challenged the tender process of the first respondent on the ground that they have been prevented from participating in the tender of the first respondent as they were unable to upload their bid documents in .xlsx format which according to them is the prescribed format as per the tender conditions.

5. Since all the three writ petitions are challenging the very same tender process, a common order is passed by this Court.

W.P.No.18302 of 2020 (Writ petition filed by Pace Digitek)

6. Mr. AR.L. Sundaresan, learned Senior Counsel for the petitioners would submit that on 30.11.2020 at 3.30 P.M., the petitioner's bid was accepted. But, however, arbitrarily on 01.12.2020, it was rejected by the respondents. According to him, in the rejection list, as seen from the web portal of the respondents, the technical bid of the petitioner was rejected without giving any reasons.

7. The learned Senior Counsel for the petitioners drew the attention of this Court to the communication dated 01.12.2020 of the first respondent intimating the bidders as to who are technically qualified and who are not.

8. The learned Senior Counsel for the petitioners also drew the attention of this Court to the letter dated 03.12.2020, sent

by the first respondent to the petitioners giving reasons as to why the technical bid of the petitioner was disqualified. The learned Senior Counsel for the petitioners would submit that the communication dated 03.12.2020, sent by the first respondent was pursuant to oral directions given by this Court in the subject writ petitions. He would also submit that the reasons given for disqualification namely (a) Stamp paper of the consortium agreement is dated 10.11.2020 though the actual date of the agreement is 06.11.2020, (b) Earnest Money Deposit has been given by the consortium bidder (2nd petitioner) and not by the lead bidder (1st bidder). According to him, the reasons given for rejection are factually incorrect and arbitrary.

9.The learned Senior Counsel for the petitioners then drew the attention of this Court to the definition of the term 'bidder' found in Sl.No.8 in the "RFP" and would submit that the bidder includes the consortium bidder and hence the Earnest Money Deposit given by the consortium bidder ought to have been accepted by the first respondent. The learned Senior Counsel for the petitioners would further submit that the tender document is also silent as to who has to pay the Earnest Money Deposit amount.

10.The learned Senior Counsel for the petitioners then drew the attention of this Court to Clauses 5.29 and 5.30 of the terms and conditions of the tender and would submit that as per the said Clause, the technical bid can be opened only after the first respondent is satisfied with the payment of the Earnest Money Deposit. According to him, having accepted the Earnest Money Deposit, the technical bid of the petitioner ought not to have been rejected on the ground that the Earnest Money Deposit was not given by the lead bidder.

11.The learned Senior Counsel for the petitioners then drew the attention of this Court to the consortium agreement between the first petitioner (PACE DIGITEK) and the second petitioner (M/s.Quad Gen Wireless Solutions Private Limited) and would submit that the said agreement was submitted only in accordance with the format prescribed by the first respondent under the tender document. He also drew the attention of this Court to similar consortium agreements submitted by other bidders and would submit that they have also submitted only as per the format submitted by the petitioners. He drew the attention of this Court to the consortium agreements submitted by the petitioners as well as other bidders and would point out even in the other consortium agreements, there was only one witness and there was no necessity for two witnesses as intimated by the first respondent to the petitioners in the rejection letter.

12.The learned Senior Counsel for the petitioners would submit that the consortium agreement was signed only on 10.11.2020 and was executed on the same date and the same was attested by a Notary Public also on the same date as seen from the attestation found in the consortium agreement. According to him, the date found in the consortium agreement i.e. on 06.11.2020 is by inadvertence and is not the actual date of the execution of the agreement. The stamp paper was purchased only on 10.11.2020 and the agreement was also executed only on 10.11.2020. He would also submit that the date is immaterial since the last date for submission of bids as per corrigendum was only on 11.11.2020. However, according to him, arbitrarily, the bid of the petitioners was rejected by the first respondent on the flimsy and frivolous ground that the consortium agreement has been signed by only one witness and there is discrepancy in the date of the agreement.

13.The learned Senior Counsel for the petitioners would also submit that the first respondent all of a sudden has got opinion from the learned Additional Advocate General which is uncalled for during the process of considering the bids submitted by the bidders.

14.The learned Senior Counsel for the petitioners then drew the attention of this Court to the affidavit filed by the petitioner in support of the writ petition and in particular, he referred to the additional grounds raised by the petitioners in J, K and M and would submit that the reasons for the rejection of the technical bid is arbitrary and illegal. He would reiterate that by over sight, the date of the consortium agreement was mentioned as 06.11.2020 though the actual date of execution of the said agreement is only on 10.11.2020.

15.The learned Senior Counsel for the petitioners then drew the attention of this Court to Clause 7.1.2 of the terms and conditions of the tender and he would submit that as per the said Clause, the only requirement with regard to the consortium agreement is that the date must be prior to the submission of the bid. He would submit that the petitioners submitted the bid on 11.11.2020 and the consortium agreement is dated 10.11.2020 and hence the reason given for rejection of the technical bid of the petitioners viz., that there is a discrepancy in the date mentioned in the consortium agreement is immaterial. He would also submit that the bid was submitted only by the lead bidder namely the first petitioner herein in accordance with Clause 7.1.2 of the terms and conditions of the tender.

16.The learned Senior Counsel for the petitioners then drew the attention of this Court to the communication dated 03.12.2020 of the first respondent wherein the petitioners have

been informed the reasons for rejecting their technical bid and would submit that only as per the format prescribed for consortium agreement (Form 28 format), the petitioners have submitted the consortium agreement.

17.The learned Senior Counsel for the petitioners also drew the attention of this Court to the format of the consortium agreement prescribed by the first respondent (Form 28) and would submit that even as per the said format only one witness is required for the consortium agreement. Even as per the format, the place of execution of the agreement has not been mentioned and the petitioners have submitted the agreement only as per the said format.

18.The learned Senior Counsel for the petitioners also drew the attention of this Court to the consortium agreement submitted by other bidders and would submit that those bidders had also submitted the consortium agreement only as per the format submitted by the petitioners. Hence, according to him, the first respondent rejected the petitioners bid arbitrarily and illegally.

19.The learned Senior Counsel for the petitioners then drew the attention of this Court to the evaluation of tender made by the Technical Evaluation Committee of the first respondent and in particular referred to the resolutions passed by the Technical Evaluation Committee on 23.11.2020 and 27.11.2020 and would submit that arbitrarily and illegally, the Technical Evaluation Committee in its Minutes of Meeting on 27.11.2020 has come to an erroneous conclusion that the consortium agreement submitted by the petitioners appears to be a fabricated one. He would once again reiterate that the date mentioned in the consortium agreement has been mentioned by oversight and the correct date of the agreement is 10.11.2020 on which date only the stamp paper was purchased and the same was attested by both the parties and was also attested by a Notary Public and he would also reiterate that the date is immaterial as admittedly the date of the consortium agreement is prior to the date of submission of the bid by the petitioners.

20.According to the learned Senior Counsel for the petitioners, the qualified bidder has been non-suited arbitrarily in a ministerial manner by the first respondent. According to him, the reasons given for rejection of the bid is not a technical matter and does not relate to technical specification stipulated under the terms and conditions of the tender and hence the first respondent ought not to have rejected the technical bid of the petitioners.

21.It is contended by the learned Senior Counsel for the petitioners that the petitioners must be allowed to participate in the auction and the first respondent must accept the technical bid submitted by the petitioners in public interest.

W.P.No.18036 of 2020 (Writ petition filed by STERLITE)

22.Mr.P.S.Raman, learned Senior Counsel for the petitioner at the outset would submit that the tender called for by the respondent is for a project relating to supply and installation of Optical Fiber Network in the State of Tamil Nadu. He would further submit that the petitioner submitted bids for all the four Packages namely Package "A", Package "B", Package "C" and Package "D" under the tender notification. He would contend that the petitioner's bids have been disqualified by the respondents arbitrarily and illegally under the impugned order dated 01.12.2020. He would further contend that the petitioner has satisfied the eligibility criteria for both technical and price bids. According to him, if the bids submitted by the petitioner were accepted by the respondent, the Government will be benefited to the tune of Rs.40 Crores as the petitioner has given the lowest price bid for two of the Packages.

23.Learned Senior Counsel for the petitioner then drew the attention of this Court to the tender conditions and in particular, he referred to Clause 7 and would submit that the Packages comprises of both active components and passive components.

24.At the outset, Mr.P.S.Raman, learned Senior Counsel for the petitioner addressed this Court about the credentials of the petitioner's company and would submit that the petitioner is one of the World's leading service provider for Fiber Optic and Optical Fiber Cable Solutions. He would submit that the petitioner has been actively engaged for the past several years in Supply, Installation, Commissioning and Maintenance of Optical Fiber Network across various States in India. He also drew the attention of this Court to the various projects done by the petitioner as mentioned in the affidavit filed in support of the writ petition.

25.The learned Senior Counsel for the petitioner would submit that the petitioner had submitted its bid with the first respondent for all the four Packages namely Packages "A", "B", "C" and "D". According to the learned Senior Counsel for the petitioner, the petitioner has submitted the lowest price bid for two Packages namely Packages "A" and "C" and if the petitioner's bid is accepted, it will benefit the first respondent between Rs.30 and 40 crores. However, according to the learned Senior Counsel for the petitioner, without any justification, by the impugned order dated 01.12.2020, the first

respondent has summarily rejected all the bids submitted by the petitioner.

26.He would submit that the active components is further sub-categorized into the following three categories namely (a) IP-MPLS Routers at Core, Block and GP Level (Category - I), which has to be from one OEM (b) GPON Equipment (Category - II), which has to be from one OEM and (c) remaining active components including Hardware and Software at NOC Block, GP and Revenue Village Level for (Category - III) which has to be from one OEM.

27.According to the learned Senior Counsel for the petitioner, the above sub-categorization means the item falling under each category is to be procured from one OEM. According to him, as per the tender condition OEM for different sub-categories of active components can be different.

28.The learned Senior Counsel for the petitioner drew the attention of this Court to the corrigendum to the tender conditions under Clause 7 issued by the first respondent and would submit that as per the original tender condition (Clause 7), there was a fundamental mistake as it was not possible to have one OEM for each of the sub-categories of active components. According to him, more than one OEM is required for all the active components required by the first respondent under the tender notification.

29.The learned Senior Counsel for the petitioner also drew the attention of this Court to the Bill of Materials submitted by the petitioner as per the tender condition and would submit that Item Nos.I and II are all routers and as per the petitioner's bid they were from one OEM namely CISCO. He would submit that for sub-category-II (GPON Equipment), the OEM of the petitioner was TEJAS and for the sub-category-III i.e. the remaining active components namely SFP Modules (pluggable optics) as set out in the tabular chart from Item Nos.6 to 15 are from OEM namely PROLABS. According to the learned Senior Counsel for the petitioner, there was no prohibition for the bidders as per Clause 7 of the tender conditions to have different OEMs for different sub-categories of active components which are the subject matter of procurement under the tender notification.

30.According to the learned Senior Counsel for the petitioner, the sub-category-III of active components, i.e. SFP Modules/pluggable optics could be used in Spine switches, Leaf switches, Firewall and GPON Equipment and therefore, put under separate category and can be bought from one OEM. According to him, the respondents allegations that the petitioner has quoted for sub-category-I of active components, i.e.IP-MPLS Routers

from both CISCO and PROLABS is therefore factually incorrect and has been raised to mislead this Court to malafidely oust the petitioner from the bidding process.

31.He then drew the attention of this Court to paragraph No.4.2 of the affidavit in rejoinder filed by the petitioner and would submit that IP-MPLS Router and SFP (pre-loaded and additional) are separate and independent active components. According to him, SFP Modules have separate market of their own as popular items of commerce in the International market.

32.The learned Senior Counsel for the petitioner then drew the attention of this Court to the tabular chart in the tender document showing the eligibility requirements under Sl.No.7 for active components and corresponding requirements in the Bill of Quantities (BOQ) for active components. According to him, there was no necessity for the first respondent to sub-categorize the active components into (a) Router, (b) GPON Equipment and (c) SFP Modules in the tender document if they were not separate and independent active components. According to him, the understanding of the tender condition No.7 is that the bidder can procure from different OEMs for each of the sub-categories and the only prohibition is that the sub-category of active components must be procured from only one OEM. According to the learned Senior Counsel for the petitioner, as per the tender condition No.7, the petitioner has offered to procure for the sub-category of active components (a) Router from CISCO, (b) GPON Equipment from TEJAS and (c) SFP Modules/remaining active components from PROLABS.

33.According to the learned Senior Counsel for the petitioner, the Bill of Quantities for active components as required in Sl.No.7 in the eligibility criteria are separate and independent. He would submit that Item Nos.1 and 2 related to first sub-category namely IP-MPLS Router, Item Nos.3, 4 and 5 related to second sub-category namely GPON Equipment and Item Nos.6 to 15 related to third sub-category namely SFP Modules and remaining active components.

34.The learned Senior Counsel for the petitioner would submit that since three different OEMs were submitted by the petitioner for each of the sub-categories of active components, the first respondent rejected the tender of the petitioner arbitrarily and illegally on the ground that only one OEM is permissible for all the active components. He also drew the attention of this Court to the response received from the first respondent for the query raised by the petitioner with regard to Item Nos.6 to 15 (SFPs) and would submit that the respondent replied that these SFPs mentioned in Item Nos.6 to 15 are over and above the optical fiber cable mentioned as part of the

technical specifications of active components (including IP-MPLS Router, GPON Equipment, Spine Switches, Leaf Switches).

35.The learned Senior Counsel for the petitioner would submit that there are inbuilt optical pluggables/SFPs in IP-MPLS Router, GPON Equipment, Spine Switches, Leaf Switches, Firewall and there are optical pluggables/SFPs on standalone basis as well. According to the learned Senior Counsel for the petitioner, since the first respondent has clarified that additional SFPs (mentioned in Item Nos.6 to 15 of the BOQ) are over and above the inbuilt optical pluggables already set out for active components, the submission of the bid by the petitioner by providing different OEMs for each of the sub-categories of active components is perfectly valid. He would also submit that it is not in dispute that SFPs offered by the petitioner can be used with all active components.

36.According to the learned Senior Counsel for the petitioner, the first respondent has not pointed out a single Clause in the tender document (RFP) which states that IP-MPLS Router and SFPs are to be procured from one OEM only. He would submit that introducing new conditions in the bid is impermissible.

37.The learned Senior Counsel for the petitioner drew the attention of this Court to the affidavit filed by the petitioner on 14.12.2020 clarifying that no functionality or warranty issues will arise on account of the use of different OEM for SFP Modules. The learned Senior Counsel for the petitioner also drew the attention of this Court to the warranty letter issued by CISCO on 10.11.2020 and would submit that CISCO has taken responsibility of ensuring inter-operability of IP-MPLS and other equipments supplied by them with those supplied by other vendors based on IETF Open standard RC'S international standards. He would also submit that CISCO has also undertaken that it will take commercial reasonable efforts to assist the bidders in case of any problems /issues arising due to integration of components supplied by them with any other components (s)/product(s) under the purview of the overall solution.

38.According to the learned Senior Counsel for the petitioner, the letters from both OEMs also confirm that there will be no functional difficulties if different OEMs are used for different sub-categories of active components. According to the learned Senior Counsel for the petitioner, once the first respondent realized that its contention on warranty and functionality does not hold any weight, the first respondent in its counter affidavit has tried to shift its stand by stating

that one of the major reasons for disqualifying the petitioner was the recommendations of the Technical Evaluation Committee.

39.The learned Senior Counsel for the petitioner would submit that even in the Technical Evaluation Committee's Minutes, there is not even a whisper on warranty or compatibility issues with regard to the offer made by the petitioner for the various sub-categories of active components. According to the learned Senior Counsel for the petitioner in spite of having specific letters issued by OEMS in their favour, the respondent has travelled outside the tender conditions and is relying on warranty Clause on the website which is arbitrary and illegal.

40.The learned Senior Counsel for the petitioner then drew the attention of this Court to the rejection letters dated 01.12.2020 and 03.12.2020 whereby the technical bid of the petitioner was rejected and would submit that in both the letters, the first respondent has not answered about the warranty support given by OEM and only in the counter affidavit filed by the respondents before this Court, they have disclosed that there will be functional difficulties if different OEMs are accepted for different sub-categories of active components. According to the learned Senior Counsel for the petitioner, the issue involved in this writ petition is not of a technical nature but purely improper interpretation of the eligibility condition in Sl.No.7 of the tender condition by the respondents. According to him, the Courts in catena of decisions have held that while interpreting the validity or subjectivity of the tender conditions, the Courts should give its interpretation in public interest to root out bias, impartiality and corruption. According to him, the petitioner being a reputed company, the respondents ought to have accepted their bid as they have submitted only in accordance with the terms and conditions of the tender.

41.The learned Senior Counsel for the petitioner would submit that the petitioner has recently completed one of the largest Projects for Army in the Country. According to him, it is also having the distinction of completing one of the biggest Projects in the country for building internet network for Indian Navy. He would also submit that the petitioner is doing similar Projects in Maharashtra and Telangana also.

42.The learned Senior Counsel for the petitioner drew the attention of this Court to the judgment of the Hon'ble Supreme Court in the case of Reliance Energy Ltd. and Another vs. Maharashtra State Road Development Corpn. Ltd. and Others reported in 2007 8 SCC 1 and would submit that "legal certainty" is an

important aspect of the rule of law and if there is vagueness or subjectivity in the norms specified, it may result in unequal and discriminatory treatment and violate the doctrine of "level playing field". He would submit that the Hon'ble Supreme Court held that expression of difference of opinion, if any, in exercise of contractual powers by the State must be based on specified norms. He would rely upon paragraph Nos.37 and 38 of the aforesaid decision in support of his submission.

43.The relevant paragraphs of the aforesaid judgment is extracted hereunder:

37.In Union of India v. International Trading Co. [(2003) 5 SCC 437] the Division Bench of this Court speaking through Pasayat, J. had held: (SCC p. 445, paras 14-15)

"14. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

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

44. According to learned Senior Counsel for the petitioner, at the end of the day, the State should see what is the loss caused to the State if the bid of the petitioner is not accepted that too when the petitioner is not a fly-by-night operator. The learned Senior Counsel for the petitioner also drew the attention of this Court to the judgment of Hon'ble Supreme Court in the case of New Horizons Limited and Another Vs. Union of India and Others reported in (1995) 1 SCC 478 and would submit that the terms and conditions of the tender should be construed from the stand point of a prudent businessman and hence the petitioner's bid ought to have been accepted.

45. He would further submit that the object of the Tamil Nadu Tender Transparency Act is to promote transparency and greater participation to get best prices. According to him, the rejection of the petitioner's bid by the first respondent on flimsy grounds has defeated the very said object.

W.P.No.16736 of 2020 (writ petition filed by Mantra)

46. Mr. Mohan, learned counsel for the petitioner would submit that the petitioner's Company is one of the reputed Companies in the country in the field of Electronics and Digitization. According to him, the petitioner and his consortium Members have been regularly participating in tenders floated by the Government of Tamil Nadu and other State undertakings and in many of which, they have emerged as a successful bidder.

47. Mr. Mohan, learned counsel for the petitioner submitted that the petitioner proposed to participate in the subject tender called for by the first respondent for Package "B". He drew the attention of this Court to Clause 5.1.2 of the tender document which gives the details of the documents to be uploaded during bid submission and in particular, he referred to Clause 5.1.2-3 which instructed the bidders to submit the financial bid, Bill of Quantities in the prescribed format i.e. in .xlsx format only. The learned counsel for the petitioner would submit that the said condition makes it clear that non-adherence to the specified format will lead to the rejection of the bid.

48.The learned counsel for the petitioner then drew the attention of this Court to Clause 5.3.9-4 of the terms and conditions of the tender and would submit that as per the said condition, the respondents have the right to reject the petitioner's tender if the same does not confirm to the financial bid format. According to Mr.Mohan, the petitioner has followed each and every instruction in the terms and conditions of the tender and Earnest Money Deposit criteria of Rs.9 crores has also been satisfied.

49.Mr.Mohan would submit that the petitioner is not a fly by night operator. He would submit that the petitioner has participated and submitted bids in various similar projects and has been successful. Therefore, according to him, the petitioner's non participation in the bid will cause loss to the public exchequer as the bid being a competitive one, there is a possibility that the petitioner's bid may be the best one. He would submit that in atleast 3 places in the terms and conditions of the tender, more particularly, in Clauses 5.12.1.2 and 5.12.3.1, it is made clear that the bids will have to be uploaded only in .xlsx format. He also drew the attention of this Court to Clause 3.2.2 in the Corrigendum-08 for Packages "A", "B", "C" and "D" dated 29.10.2020 and would submit that the said Clause makes it clear that non adherence to the prescribed format will result in the bid getting rejected.

50.According to Mr.Mohan, learned counsel for the petitioner, the Corrigendum-08 dated 29.10.2020 issued by the respondents changed the rules of the game and several new formats were introduced which are found in P1, P2 and P3. According to him, .RAR is nothing but a compressed format like a zip file and hence, the mentioning of .RAR format in the Corrigendum-08 is immaterial and will have no relevance as the prescribed format which is only .xlsx as per the original terms and conditions of the tender.

51.Mr.Mohan then drew the attention of this Court to the letters dated 11.11.2020 and 15.11.2020 and would submit that despite the best efforts to upload the tender in .xlsx format, MANTRA was unable to upload the same. He also drew the attention of this court to the tender conditions and would submit that BOQ has to be uploaded in the portal as per the tender document only in .xlsx format and any change to the said format would lead to the bid getting summarily rejected. Hence, he would submit that MANTRA has been prevented by the respondents from participating in the tender. Mr.Mohan also drew the attention of this Court to the various file formats that are supported by Excel and would submit that .xlsx format supports only Excel 2010 and Excel 2007 and therefore, according to him, .xlsx file format can be

saved only in Excel 2010 and Excel 2007 versions. He would submit that in contra distinction .xls which according to him, is the prescribed format supports only Excel 97 - Excel 2003 Binary file format. He would submit that if the contention of the respondents that the bidders have uploaded their bids in .xls format is to be accepted, the same is in violation of terms and conditions of the tender which according to him, supports uploading of the bids only in .xlsx format and therefore, according to him, their bids will also have to be rejected.

52.Mr.Mohan then drew the attention of this Court to the query raised by one of the bidders seeking clarification from the respondents as to whether they have to submit 2 price bids, one as given in form-2 wherein details of HSN/SAC code is asked and another file which is to be uploaded on the portal and doesn't have HSN/SAC claim and the response received from the first respondent. He would submit that the first respondent replied that the bidders understanding is correct and all financial bid forms to be uploaded in .RAR folder and to be uploaded as part of financial bid. According to Mr.Mohan, even when a specific query was raised, the respondents did not give a proper answer and hence, according to him, the petitioner has submitted the bid only as per the terms and conditions of the tender.

53.Mr.Mohan then drew the attention of this Court to the response sent by the respondents to various queries raised by various other bidders and in particular with regard to the submission of BOQ. According to him, in none of the responses made by the first respondent, no change of format has been intimated to all the bidders which includes the petitioner. Mr.Mohan also drew the attention of this Court to the terms and conditions of the tender and referring to one of the Clauses therein, he would submit that price in financial bid should be provided in prescribed format and according to him, the prescribed format is only .xlsx.

54.Mr.S.R.Rajagopal, learned Additional Advocate General representing the first respondent at the outset highlighted the public interest involved in the subject project. He would submit that Bharat Net project entails providing secure, reliable, affordable and high quality broadband to approximately 250,000 Gram Panchayat Villages across the Country through optical fibre cables. He would also submit that the project is funded entirely by the Department of Telecommunication, Government of India and is governed by the Universal Service Obligation Fund (USOF). He would further submit that Bharat Broadband Networks Limited

(BBNL), the nodal agency was formed by the Central Government for monitoring the approval of Bharat Net Project across all states in India. He would submit that the State of Tamil Nadu chose the State led Model and implementation which entails end to end implementation responsibility for that State given to the State Nodal Agency with a flexibility to choose the Technology and Design Architecture within the approved Budget.

55.Mr.S.R.Rajagopal, learned Additional Advocate General would further submit that the Bharat Net Project in the State of Tamil Nadu entails providing high speed broadband connectivity to 17662 villages in the State of Tamil Nadu. He would further submit that TANFINET, an SPV formed as the State Implementation Agency for Tamil Nadu Project was formed as the nodal agency for the State. After referring to the highlights of the project, Mr.S.R.Rajagopal, learned Additional Advocate General would submit that huge public interest is at stake and hence, judicial review of the tender process is impermissible. Mr.S.R.Rajagopal, learned Additional Advocate General was categorical in his submission that none of the petitioners have merit over their respective cases.

56.Mr.S.R.Rajagopal, learned Additional Advocate General drew the attention of this Court to the tender notification dated 01.10.2020 issued by the respondents for selection of project implementation agency for planning, survey, testing, end to end integration, operation and maintenance of Optical Fibre Network and Electronics for Bharat Net Phase-II in Tamil Nadu in respect of the following (a) for four Packages i.e., "A", "B", "C" & "D", (b) for 12525 villages - IP-MPLS Router technology. He then drew the attention of this Court to the Corrigendum-03 dated 14.10.2020 issued by the respondents to the tender notification dated 01.10.2020 wherein 5137 revenue villages were added in addition to 12525 villages and GPON technology added only for the new villages numbering 5137. He then submitted that the pre-bid meeting was convened by the respondents on 16.10.2020 and also submitted that only 104 participants attended the said meeting and MANTRA the petitioner in W.P.No.16736 of 2020 did not participate in the said meeting and hence, they are not entitled to challenge the tender process as they have not raised any query during the pre-bid meeting specifically convened for all the participants.

57.Mr.S.R.Rajagopal, learned Additional Advocate General then drew the attention of this Court to Corrigendum-07 dated 28.10.2020 wherein the respondents have extended the last date of submission of bids to 11.11.2020 from 28.10.2020.

Mr.S.R.Rajagopal, learned Additional Advocate General would also draw the attention of this Court to Corrigendum-08 dated 29.10.2020 and would submit that the respondents issued the said Corrigendum only after giving due consideration to the pre-bid queries raised by various bidders. According to him, more than 2700 persons have raised queries with the respondents with regard to the tender. He would submit that the revised BOQ-Excel file was also uploaded by the respondents. He would also refer to the notice dated 09.11.2020 and would submit that helpdesk number was also furnished to all the interested parties and the petitioner in W.P.No.16736 of 2020 could have very well contacted the helpdesk number and sought for clarifications.

58.Mr.S.R.Rajagopal, learned Additional Advocate General would submit that the last date for submission of bid was on 11.11.2020 and 22 bids were received by the respondents for all the four Packages. Mr.S.R.Rajagopal, learned Additional Advocate General would submit that on 12.11.2020, the bids accepted for technical evaluation / technical bid was opened by the respondents at 15.00 hours and documents were downloaded in offline mode. Mr.S.R.Rajagopal, learned Additional Advocate General drew the attention of this Court to the minutes of the Technical Evaluation Committee meeting dated 23.11.2020 and would submit that the Technical Evaluation Committee is comprised of Experts and Senior Professors from Anna University, Department of Electronics and Communication, Senior Technical Directors/ Scientists from National Informatics Centre (NIC, GoI) and Technical Experts from Project Management Consultant, M/s.RITES Ltd. He drew the attention of this Court to the findings of the first Technical Evaluation Committee meeting dated 23.11.2020 and would submit that PACE DIGITEK, the petitioner in W.P.No.18302 of 2020 committed the following irregularities in submission of their bid (a) EMD was not furnished by the lead bidder, (b) Consortium agreement deed - material difference observed, (c) sent for legal review (further evaluation not conducted).

59.In respect of STERLITE, the petitioner in W.P.No.18036 of 2020, Mr.S.R.Rajagopal, learned Additional Advocate General would submit that the Technical Evaluation Committee found the following irregularities: (a) non-compliance of minimum eligibility as per Clause 7 "Maximum 1 OEM for all IPMPLS Router" across all bids submitted i.e., "A", "B", "C" & "D". Mr.S.R.Rajagopal, learned Additional Advocate General then drew the attention of this Court to the report, pursuant to the evaluation committee meeting held on 27.11.2020 based on which, the bid of PACE DIGITEK, the petitioner in W.P.No.18302 of 2020 was rejected. He would submit that based on clarifications

sought and documents received from interested participants, 14 bids were accepted by the respondents and identified as technically qualified. According to him, the respondents have accepted the Technical Evaluation Committee report and based on the same only, the bids of PACE DIGITEK as well as STERLITE were rejected. He would submit that on 30.11.2020, the bids which were accepted for evaluation were disclosed on the NIC, E-portal and this automatically enabled all bidders to view bids from other participants, thus ensuring transparency and compliance to procedural requirements.

60.Mr.S.R.Rajagopal, learned Additional Advocate General then drew the attention of this Court to the outcome of the Technical Evaluation of the various bidders and uploaded on the E-portal. Mr.S.R.Rajagopal, learned Additional Advocate General would submit that 14 bids were accepted across 4 Packages and 8 bids which were rejected across 4 Packages are as follows: (a) Polycab Limited -3 bids (Packages "B", "C" & "D"), (b) PACE DIGITEK - 1 bid (Package "B") and (c) STERLITE - 4 bids (Packages "A", "B", "C" & "D"). Mr.S.R.Rajagopal, learned Additional Advocate General would submit that on 02.12.2020, the price bids of the successful bidders were opened by the respondents.

61.After drawing attention of this Court to the methodology adopted by the respondents, Mr.S.R.Rajagopal, learned Additional Advocate General would submit that all the three petitioners who have approached this Court are not entitled to interfere with the tender process of the respondents with regard to the subject project. After referring to the dates and events with regard to the subject tender, Mr.S.R.Rajagopal, learned Additional Advocate General submitted his separate rebuttals to each of the three cases.

62.Firstly Mr.S.R.Rajagopal, learned Additional Advocate General began with the case of PACE DIGITEK, the petitioner in W.P.No.18302 of 2020. Insofar as their bid is concerned, he would submit that the first petitioner had submitted the bid for Package "B" with the second petitioner M/s.Quadgen Wireless Solutions Pvt. Ltd., as a consortium partner. He then drew the attention of this Court to the Consortium agreement between PACE DIGITEK and M/s.Quadgen Wireless Solutions Pvt. Ltd and would submit that Consortium agreement was executed on 06.11.2020 and typed on a Stamp Paper purchased on 10.11.2020 at Hosur, Tamil Nadu and hence, the said Consortium agreement is an invalid contract. He then drew the attention of this Court to the tender Clause 7.1.12 Note 3 "Special Conditions for the

Consortium Bidders" (under Sl.No.IV) and would submit that without a valid Consortium agreement, the consortium bid will have to be necessarily treated as a non-responsive bid.

63.Mr.S.R.Rajagopal, learned Additional Advocate General then submitted as per the tender document, a specific format for Consortium agreement is prescribed in form-28. As per the specific format only the lead member ought to furnish the bid Security/ Earnest money deposit (EMD) on behalf of the bid consortium. But PACE DIGITEK who is the lead member of the consortium has not furnished the bid security / Earnest Money Deposit (EMD), but instead the bid security in the form of bank guarantee was furnished by M/s.Quadgen Wireless Solutions Pvt. Ltd, the consortium partner. Hence, he would submit that the submission of the bid security is not in accordance with the tender conditions.

64.Mr.S.R.Rajagopal, learned Additional Advocate General would submit that based on the aforementioned two discrepancies, the bid of the petitioner in W.P.No.18302 of 2020 was rejected by the Technical Evaluation Committee of the respondents. He would submit that PACE DIGITEK, has admitted their mistake in their affidavits filed in support of their writ petition, but however, would state that the date was wrongly mentioned as 06.11.2020 due to oversight. Mr.S.R.Rajagopal, learned Additional Advocate General would submit that when there are discrepancies in the tender documents submitted by the petitioner, the bid will have to be necessarily rejected as according to him, if the same is accepted, other bidders will object to the same which will result in delay in the completion of the tender process which ultimately will be detrimental to public interest.

65.Insofar as the writ petition filed by STERLITE, the petitioner in W.P.No.18036 of 2020 is concerned, Mr.S.R.Rajagopal, learned Additional Advocate General would submit that the bid of the said petitioner was rejected during Technical Evaluation for the following reasons, (a) the bidders were to supply IP-MPLS routers, which included SFP modules. Few of the SFP Modules were pre-loaded and Additional SFP Modules were asked as part of the BOQ that can be utilized on requirement basis. According to him, both IP-MPLS Routers and SFP modules are a unified product (One single equipment as SFP is part of the Router). According to him, the same is evident from the technical specifications for Routers wherein the specifications of SFP modules are incorporated as part of the Routers and no separate specifications of the SFP modules have

been given in the published documents as part of the RFP. Mr.S.R.Rajagopal, learned Additional Advocate General then drew the attention of this Court to Clause 7.1.9 of the terms and conditions and would submit that as per the minimum eligibility criteria prescribed therein, the bidders were to have maximum 1 OEM for all IP-MPLS Routers at Core, Block & GP Levels. But STERLITE, the petitioner in W.P.No.18036 of 2020 has submitted a bid wherein the additional SFP modules quoted by them were from two different OEMs i.e., CISCO & PROLABS. Hence, according to Mr.S.R.Rajagopal, learned Additional Advocate General, the bids for Packages "A", "B", "C" & "D" submitted by STERLITE were rightly rejected by the Technical Evaluation Committee. He would further submit that the Technical Evaluation Committee comprises of experts who were reputed professors and scientists and after referring to the minutes of the Technical Evaluation Committee meeting dated 23.11.2020 rejecting the petitioner's bid, he would submit that it is a well considered technical report and no arbitrariness or irrationality can be found.

66.As a rebuttal to the petitioner's submission, namely (a) IP-MPLS Routers and SFP modules are two separate active components and cannot be treated as an unified product, (b) The SFP modules is considered as a separate active component and can be used for other active components such as GPON, Spine Switch, Leaf Switch, Firewall are concerned, Mr.S.R.Rajagopal learned Additional Advocate General would submit the following:

(a)The technical specifications of the SFP modules (Pre-loaded or additional) are incorporated within the router specifications. (Under Part 4-Technical Requirements Clause No. 1.4.1 Core Router Sl. No. 14). He would further submit that no separate technical specification for additional SFPs is mentioned in the tender document, there cannot be a different OEM for the SFP modules quoted by STERLITE.

(b)Additional SFP modules have been asked in all Packages, however, active components other than IP-MPLS Routers are there in Package "A". In all the remaining Packages, there is no active component other than IP-MPLS Routers. So, according to Mr.S.R.Rajagopal, learned Additional Advocate General, reason for doubt does not arise.

(c)According to Mr.S.R.Rajagopal, learned Additional Advocate General, for Package "A", which has spine switch, leaf switch and firewall, it is very clear from the technical specification that no additional SFP Modules can be added as they are fully preloaded. So according to him, the assumption by the petitioner that they can be used for other active components is incorrect.

(d)According to him, the SFP modules were asked in the tender document published on 01.10.2020. However, the GPON equipment was only added vide Corrigendum-03 dated 14.10.2020. According to him, post addition of GPON equipment, no change or addition was done in the quantities of additional SFP modules. So according to Mr.S.R.Rajagopal, learned Additional Advocate General, the claim of the petitioner that additional SFP modules can be used for GPON equipment is not a valid contention.

(e)The network infrastructure for Bharat Net Project comprises of two types of Products viz., Active components and Passive components. The Active components are all electronic equipments and softwares and the Passive Components are OFC Cables and accessories.

(f)According to Mr.S.R.Rajagopal, learned Additional Advocate General, the Tender was originally published for providing connectivity to only 12525 villages. However according to him, post directions from DOT and in-line with the vision of providing connectivity to all villages, an additional 5,137 villages were also added.

(g) Mr.S.R.Rajagopal, learned Additional Advocate General would submit that only in order to incorporate this change, Corrigendum-03 was published on 14.10.2020 by which GPON technology was opted for additional 5,137 Villages only.

67.Mr.S.R.Rajagopal, learned Additional Advocate General drew the attention of this Court to the list of active components based on corrigendum in Packages "B", "C" and "D" and would submit that the bidders will have to give their quotation for a maximum of one OEM for IP-MPLS routers, GPON OLT/ONT and cannot give different OEMs for IP-MPLS and GPON OLT/ONT.

68.To substantiate his arguments, Mr.S.R.Rajagopal, learned Additional Advocate General drew the attention of this Court to Clause 7.1.9 of the Corrigendum-08 (Sl.no.7) as well as Clause 1.3 (Sl.No.m). Mr.S.R.Rajagopal, learned Additional Advocate General would submit that the petitioner's bid was rejected only after proper scrutiny and other bidders' bid which have been accepted have satisfied the eligibility criteria. There was no doubt about the same and even in the pre-bid meeting such a doubt was never raised by the bidders. Hence according to him, the petitioner's bid was rightly rejected.

69. Insofar as MANTRA, the petitioner in W.P.No.16736 of 2020 is concerned, Mr.S.R.Rajagopal, learned Additional Advocate General would submit that when the bid has not been submitted, the petitioner has no locus standi to challenge the tender process. Mr.S.R.Rajagopal, learned Additional Advocate General would submit that the petitioner's claim that he could not submit the bid online due to technical error is factually incorrect. According to him, the allegation of the petitioner that they could not upload the BOQ in .xlsx format as mentioned in the tender document and due to the said reason, the bid could not be uploaded by the petitioner is false. Mr.S.R.Rajagopal, learned Additional Advocate General would submit that BOQ is a document available on the e-portal which has to be downloaded, filled up and uploaded in the same format. As per the original tender document, Clause 5.12.1.2 financial bid - BOQ was to be uploaded in .xlsx file on e-portal. According to him, the Petitioner had failed to notice the Corrigendum-08 published, by which the revised BOQ in Excel file (.xls file) was uploaded. According to him, the said file was to be downloaded from the e-portal and details filled in and uploaded in the portal in the same format. According to Mr.S.R.Rajagopal, learned Additional Advocate General, the petitioner who has not followed the due procedure for uploading their bid as disclosed in Corrigendum-08 is not entitled to challenge the tender process.

70. Mr.S.R.Rajagopal, learned Additional Advocate General would further submit that the petitioner never participated in the pre-bid meeting of the respondents in which 104 persons participated. He would also submit that the petitioner has not raised any queries with the respondents regarding the file format. He would further submit that the first communication received from the petitioner was only on 11.11.2020 at 3.15 P.M. i.e., after the last time and date of submission of bids. He would further submit that the petitioner has sent an e-mail to NIC only on 15.11.2020 i.e., 4 days after the last time and date of submission of bids. Mr.S.R.Rajagopal, learned Additional Advocate General would submit that NIC in its mail to the petitioner has clearly stated that the present system will support .xls format only.

71. Mr.S.R.Rajagopal, learned Additional Advocate General lastly drew the attention of this Court to the relevant Clauses in the tender document and in particular, he referred to Clause 5.25 which stipulates that late bids will not be accepted, Clause 5.12.1.2 which stipulates that BOQ will have to be submitted in the prescribed format, Corrigendum-08 which stipulates that revised BOQ will have to be uploaded in .xls only and Corrigendum-11 which gives details of the helpdesk who can give clarifications for the queries raised by the bidders.

72.Mr.S.R.Rajagopal, learned Additional Advocate General then drew the attention of this Court to the following authorities:

- (a) Jagdish Mandal vs. State of Orissa - (2007) 14 SCC 517;
- (b) Michigan Rubber India Ltd vs State of Karnataka - (2012) 8 SCC 216
- (c) Afcons Infrastructure Ltd., vs. Nagpur Metro Rail Corporation Ltd - (2016) 16 SCC 818;
- (d) Municipal Corporation, Ujjai vs. BVJ India Ltd., - (2018) 5 SCC 462;
- (e) Silppi Constructions Contractors vs. UOI - 2019 SCC Online SC 1133;
- (f) Bharat Coking Coal Ltd vs. AMR Dev Prabha - 2020 SCC Online 335.

73.After referring to the aforementioned judgments, Mr.S.R.Rajagopal, learned Additional Advocate General would submit that when there is no arbitrariness, irrationality or malafides on the part of the respondents in all the three cases, there is absolutely no merit in these writ petitions. He would submit that none of the grounds or submissions made by the petitioners calls for any judicial interference.

74.Mr.Vijay Narayan, learned Advocate General representing the second respondent/State would at the outset submit that the scope of judicial review of tender contracts is very limited. In support of his submissions, he relied upon the following authorities: (a) JSW Infrastructure Ltd. vs. Kakinada Seaports Ltd. reported in (2017) 4 SCC 170 and would submit that law is well settled that superior Courts while exercising the power of judicial review must act with restraint while dealing with contractual matters.

(b)The oft quoted decision of the Hon'ble Supreme Court in tender matters namely Tata Cellular vs. Union of India reported in (1994) 6 SCC 651 and would submit the following: (i) there should be judicial restraint in review of administrative action; (ii) the Court should not act like Court of appeal; it cannot review the decision but can only review the decision-making process; (iii) the Court does not usually have the necessary expertise to correct technical decisions; and (iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries.

(c)While awarding contract in a tender, (i) It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract (ii) Essential terms of the terms and conditions of the tender have to be fulfilled. In support of this submission, he relied upon the decisions of the Hon'ble Supreme Court in the case of W.B.SEB vs. Patel Engineering Co. Limited reported in (2001) 2 SCC 451 at page 467 and in the case

of B.S.N. Joshi & Sons Limited vs. Nair Coal Services Limited reported in (2006) 11 SCC 548.

75. Learned Advocate General also relied upon a decision of the Hon'ble Supreme Court in the case of G.f.Fernandez vs. State of Karnataka reported in (1990) 2 SCC 488 at page 500 and would submit that the tender issuing authority has the right to rigidly enforce the terms and conditions of the tender. He would submit that there was no scope for judicial review, when the party issuing a tender has rigidly enforced the tender condition.

76. Learned Advocate General also drew the attention of this Court to the decision of the Hon'ble Supreme Court in the case of Poddar Steel Corporation vs. Ganesh Engineering Works reported in (1991) 3 SCC 273 and would submit that there is no scope for judicial review when the tender inviting authority has rigidly enforced the tender condition.

Discussion:

77. Public procurement plays a vital role in the socio-economic development of a country. Transparent public procurement is quite essential for judicious utilization of the tax payers money. The Government with that object in mind introduced the E-procurement system. The benefits of E-procurement are (a) Wide publicity, (b) Easy to participate, (c) Able to get more number of bidders, (d) Transparency and (e) Check on corruption.

78. The Central Public Procurement Portal was launched by National Informatics Centre on behalf of Department of Expenditure, Ministry of Finance, Government of India. It is known as Government E-Procurement system of NIC. This is a generic software which can be used by the Central Government Departments and Organizations. All kinds of procurement activities such as goods, works and services can be processed through this portal. It enhances transparency in all activities relating to tendering process and non-discrimination amongst bidders.

79. The following facilities are made available on CPP portal (a) Online registration of procurement entities and vendors, (b) Tender creation and publishing, (c) Publishing of corrigendum and pre-bid meeting decisions, (d) Online bid submission, re-submission and withdrawal of bids, (e) Online tender opening, (f) Publishing technical and financial evaluation and (g) Award of the contract.

80. All the three writ petitions challenge the E-tender process of the first respondent. E-procurement will not guarantee the complete elimination of corrupt practices, but it can serve as a deterrent as an instrument towards effective and

efficient public administration. E-procurement system have proven themselves within various Government Organizations as an effective tool for instituting procurement reforms and establishing a fully transparent and open procurement environment. The business case for implementing an E-procurement system has also been undeniable through (a) Significant improvement in transparency: traceability of all transactions; effective for preventing fraud and corruption: provides audit trail, (b) enhances value for money: enhances competition through improved accessibility; reduces procurement cost and transaction cost; facilitates online catalogue based purchases, such as framework contracts; improved market intelligence and resource allocation management, (c) Improved work efficiency: reduces disputes; better enforcement of regulations; reduce procurement time; standardization and streamlining of procurement process.

81. From the above, it is clear that the scope of judicial review in tender matters through E-procurement is further restricted than through manual mode.

82. The learned counsel for the respective petitioners as well as the learned Advocate General and Additional Advocate General for the respondents relied upon various decisions of the Hon'ble Supreme Court and High Courts concerning tender matters. The following well settled principles emerge from those decisions with regard to scope of judicial review in tender matters:

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

(b) The Court does not sit as a Court of appeal but merely reviews the matter in which the decision was made.

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

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

(e) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by malafides.

(f) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

(g) The degree of care required to be taken by the decision making authority for large projects is greater than for small works. It is essential to maintain the sanctity and integrity of tender process. Adherence to the instructions cannot be ignored by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. Relaxation or waiver of a rule or condition, unless so provided under the terms and conditions of tender, the State or its Agencies showing concession in favour of one bidder alone would create justifiable doubts in the minds of other bidders which would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State Agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. The power to relax or waive a rule or condition if it exists under the rules, it has to be done strictly in compliance with the said rules.

(h) If in effect and substance, it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the Superior Courts would be as to whether exercise of such power was fair, reasonable and bonafide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the Writ Courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.

(i) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest will be given priority.

(j) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

(k) If a party has been consistently and bonafidely interpreting the standards prescribed by it in a particular manner, the Court should not interfere though it may be inclined to read or construe the conditions differently.

(l) The conditions and stipulations in a tender notice have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Mere disagreement with the decision-making process or the decision of the Administrative Authority is no reason for a constitutional Court to interfere.

(m) The fact that a document was belatedly entertained by one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed.

(n) The requirements in a tender notice can be classified into two categories- those which lay down the essential conditions of eligibility and others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the conditions in appropriate cases.

(o) "Legal certainty" is an important aspect of the rule of law which is the heart of Parliamentary democracy. If there is vagueness or subjectivity in the norms specified in the tender, it may result in unequal and discriminatory treatment and violate the doctrine of "level playing field".

(p) Relaxation of a non-essential condition in the tender will not cause injustice to other bidders since every bidder will get due and full consideration during tender evaluation. Essential conditions ought to be enforced rigidly, the ancillary clauses can be deviated in public interest.

83. In the writ petition filed by PACE DIGITEK, the issue that arises for consideration are as follows:

(a) Whether a consortium partner can submit EMD as per the terms and conditions of the tender.

(b) Whether the consortium agreement was executed on 10.11.2020 or on 06.11.2020. Whether the date of the consortium agreement i.e. on 06.11.2020 or 10.11.2020 has any significance since the date of the opening of the bids is only on 11.11.2020.

(c) Whether the reason given for rejection of the bid of PACE DIGITEK is technical in nature or is it merely a pre-qualification rejection. Whether the contention of PACE DIGITEK that FIBRENET having accepted the bid on 30.11.2020 ought not to have rejected the technical bid on 01.12.2020 on the ground that the EMD was submitted by the consortium partner instead of the lead bidder (PACE DIGITEK) and on the ground of discrepancy in the date of the consortium agreement is correct.

84. In order to get answers to the above issues, we need to first know the meaning of "technical specifications" in tenders. Technical specification is that part of the tender document which provides to the bidder technical details of the materials,

plant and equipment, services or site activities which the bidder is to supply if he becomes a successful bidder. The technical specification is the most important section of the tender document, both for the purchasing organization as well as for the bidders, since it is the specification which sets out precisely what characteristics are required from the materials, plant and equipment, services or site activities being sought by the purchasing organization. Technical specification is a comprehensive document which clearly, accurately and completely describes in detail what the purchasing organization wants a successful bidder to supply. Technical specification has five mandatory requirements mainly (a) Title of the specification, (b) Scope, (c) Statement of requirements, (d) Requirement for quality assurance and (e) Delivery schedule or implementation schedule.

85. In public procurement, the goals of fairness, competition and economic value are paramount. This includes incorporating adequate controls to promote competition. Transparency in tenders ensures maximum competition and maximum advantage in the utilization of public funds.

86. Under the subject tender which is under challenge, there are three stages in the tender process. They are (a) Pre-qualification criteria and (b) Technical qualification criteria and (c) Financial bid criteria. Clause 5.29.1 of the RFP reads as follows:

5.29 Opening of Technical bids by purchaser

5.29.1 The purchaser shall convene a bid opening session as per time schedule where one representative from the bidder, who has successfully submitted the bid, can participate with the authorization letter from the company. Subsequent to this, purchaser shall further evaluate the bids of only those bidder (s) who's EMD is found to be in order. The technical bid (cover1) will be opened at the place, date and times specified in Section 2 Tender Schedule.

87. As seen from the above Clause, it is clear that only after the successful submission of the bid by a bidder, his technical bid will be opened. In the case of PACE DIGITEK, the first respondent has rejected its technical bid on 01.12.2020 that means PACE DIGITEK had satisfied the pre-qualification criteria of submitting the bid along with the EMD in the form of a bank guarantee.

88. The rejection criteria under the RFP is contained in Clause 5.39 which reads as follows:

5.39 Rejection Criteria

5.39.1 Besides other terms & conditions highlighted in the tender, bids may be rejected under the following circumstances:

5.39.2 General Rejection Criteria

5.39.2.1 Bids submitted without or improper EMD.

5.39.2.2 Bids received through Telegraphic/Fax/E-mail/Hard copies except, wherever required.

5.39.2.3 Bids which do not conform to unconditional validity of the bids as prescribed in the Tender.

5.39.2.4 If the information provided by the Bidder (s) is found to be incorrect/misleading at any stage/time during or after the Tendering Process.

5.39.2.5 Any effort on the part of a Bidder to influence the Purchaser's bid evaluation, bid comparison or contract award decisions.

5.39.2.6 EMD/Bids received by the Purchaser after the last date and time for receipt of Bids prescribed by the Purchaser, pursuant to Section 2: Tender Schedule.

5.39.2.7 Bids without Power of Attorney and any other document consisting of adequate proof of the ability of the authorized signatory to bind the Bidder.

5.39.3 Technical Rejection Criteria

5.39.3.1 Technical Bid containing Price details.

5.39.3.2 Revelation of Prices in any form or by any reason before opening of the Financial Bid.

5.39.3.3 Failure to furnish all information mentioned in the Tender or submission of a bid not substantially responsive to the Tender in every respect.

5.39.3.4 Bidders not quoting for the complete scope of work as indicated in the Tender, corrigendum, addendum (if any) and any subsequent information given to the Bidder.

5.39.3.5 Bidders not complying with the material, specifications and General Conditions of the Contract as stated in the Tender.

5.39.3.6 The Bidder not conforming to unconditional acceptance of full responsibility of providing services in accordance with the Section 6 - General Conditions of Contract and Part 2 - Scope of work of this Tender.

5.39.3.7 Bidder imposing additional conditions.

5.39.3.8 If the bid does not conform to the timelines indicated in the Tender.

5.39.4 Financial Rejection Criteria

5.39.4.1 Incomplete Financial Bid.

5.39.4.2 Financial Bids that do not conform to the Financial bid format.

5.39.4.3 If there is an arithmetic discrepancy in the financial bid calculations, the Purchaser shall

rectify the same. If the Bidder does not accept the correction of the errors, it shall be rejected.

89. As seen from the rejection criteria, a bid can be rejected under any of the three criteria (a) General Rejection Criteria, (b) Technical Rejection Criteria and (c) Financial Rejection Criteria. The bid of PACE DIGITEK has been rejected by the first respondent under the Technical rejection criteria. As observed earlier, as per Clause 5.29.1 of the RFP, technical bid can be opened only after the bidder having submitted successfully the bid by submitting the EMD in order. The reasons given by the first respondent for rejecting the technical bid of PACE DIGITEK are as follows:

(a) While the consortium agreement is executed on 06.11.2020, the stamp paper has been purchased only on 10.11.2020.

(b) Place of execution of the agreement is conspicuously absent in the agreement and only one witness has signed the agreement.

(c) Performance Bank Guarantee has been wrongly furnished by the 2nd petitioner (Consortium partner) instead of the lead bidder viz 1st petitioner (PACE DIGITEK).

(d) EMD/Bid Security ought to be furnished only by the lead bidder viz. 1st petitioner (PACE DIGITEK) whereas in the present case, it has been furnished by the 2nd petitioner (Consortium partner).

90. The above mentioned reasons do not come within the purview of any of the sub clauses of the technical rejection criteria which is found in Clause 5.39.3 of the RFP referred to supra. The reasons for rejection of the petitioner's bid fall only within the purview of the general rejection criteria found in 5.39.2 of the RFP referred to supra. 5.39.2.1 and 5.39.2.7 of the RFP makes it clear that the bids submitted without or improper EMD and bids without Power of Attorney and any other document consisting of adequate proof of the ability of the Authorized Signatory to bind the bidder falls under the general rejection category and not under the technical rejection category. Eventhough reasons for rejection of PACE DIGITEK's bid falls under the general rejection category, the first respondent has rejected their bid under the technical rejection category. Technical specification provides technical details of the materials, plant and equipment, services or site activities. The reasons given for rejection of PACE DIGITEK's bid do not come within any of these categories as they are purely administrative in nature as any person with little experience in tender scrutinization and who does not have any

expert knowledge about the technical specifications of the tender will be in a position to decide as to whether the bidder has satisfied the pre-qualification criteria or not.

91. Since the technical bid of PACE DIGITEK has been opened, it can be presumed that they have satisfied the pre-qualification criteria like submission of EMD and other documents like consortium agreement in the prescribed format of the first respondent. The reasons given by the first respondent for rejection of the technical bid submitted by PACE DIGITEK are arbitrary and irrational shocking the conscience of this Court as the reasons furnished cannot be considered as technical in nature as any person who has experience in tenders but does not have any expert knowledge about the procurement can give those reasons. The first reason given is that the consortium agreement is executed on 06.11.2020, whereas the stamp paper is dated 10.11.2020 is not a relevant criterion for the rejection of a bid. Admittedly, PACE DIGITEK has obtained the stamp papers from Hosur on 10.11.2020 and executed the agreement. The agreement has also been notarized by the Notary Public only on 10.11.2020. The parties of the consortium agreement have also attested the agreement only on 10.11.2020. Hence, the reason given by PACE DIGITEK that due to oversight, they did not correct the date of the agreement from 6th November 2020 to 10th November 2020 has to be accepted by this Court. Further, the date of opening of the bids by the first respondent is only on 11.11.2020 and therefore as rightly contended by the learned Senior Counsel for PACE DIGITEK, the discrepancy in the date is immaterial. There was also no necessity for the Tender Evaluation Committee to get a legal opinion with regard to this issue when on the face of it, the consortium agreement makes it clear that it was executed prior to the date of opening of the bids in accordance with the eligibility criteria.

92. As regards the second reason for rejection of PACE DIGITEK's bid namely the consortium agreement submitted by them is not as per the format prescribed in the RFP, the same also does not hold any weight for the following reason:

Form 28 of the RFP is the prescribed format for consortium agreement. PACE DIGITEK has submitted the consortium agreement only as per Form 28. This Court after perusing Form 28 notices that there is no requirement to mention the place of execution in the consortium agreement and one witness is sufficient. Further, the place of execution of the consortium agreement namely Bangalore is evident from the Notary Public's attestation. Therefore, this Court is of the considered view that the contention of the respondents that the consortium agreement submitted by PACE DIGITEK is not as per the prescribed format is unfounded, untenable and incorrect.

93.As regards the third reason for rejection of PACE DIGITEK's bid that the Performance Bank Guarantee has been wrongly furnished by the consortium partner (2nd petitioner) instead of the lead bidder (PACE DIGITEK, 1st petitioner) also does not hold water. The Performance Bank Guarantee has to be furnished only after the tender has been awarded to the successful bidder. The Performance Bank Guarantee Clause reads as follows:

v.To submit the contract security deposit in the form of an unconditional irrecoverable Bank Guarantee in the prescribed format and as per terms of the contract. It is clearly understood that the lead member shall ensure performance of the contracts(s) and if one or more member fail to perform their respective portion of the contracts(s), the same shall be deemed to be a default by all the members. It is expressly understood that this Power of Attorney shall remain valid binding and irrevocable till completion of the defect or liability period in terms of the contract.

94.It is clear from the above that the Performance Bank Guarantee is given only by the successful bidder who is likely to be awarded the contract as he has satisfied all the criteria for the award of the contract. Performance Bank Guarantee is given in the final stages when the respondent is about to award the contract to the successful bidder. Even before that stage has reached, the first respondent has rejected the bid of PACE DIGITEK on the ground that Performance Bank Guarantee has been wrongly furnished by the second petitioner instead of the lead bidder namely the 1st petitioner (PACE DIGITEK). This reason given by the first respondent for rejection of PACE DIGITEK's bid is arbitrary and unreasonable and once again shocks the conscience of this Court.

95.As regards the fourth reason for rejection of PACE DIGITEK's bid namely that the consortium partner (2nd petitioner) has furnished the EMD instead of PACE DIGITEK (lead bidder) itself is also incorrect and unfounded for the following reason:

(a)Bidder has been defined in Sl.No.8 under the definition Clause as follows:

Bidder means the Sole Bidder or Lead Bidder and members of the Consortium
The tender therefore recognises each consortium member also as a bidder. Form 26 (EMD Format) as prescribed by the tender nowhere explicitly states that the EMD ought to be furnished by the lead bidder. The first respondent's argument is that Clause 9 of the consortium agreement states only lead bidder shall furnish the EMD does not hold water as that Clause is a part of the agreement between the lead bidder and the consortium partner and is not a condition in the tender document. Therefore, the

fourth reason for rejection of PACE DIGITEK's bid is also unsustainable and it is arbitrary and illogical.

96.It is not the case of the respondents that the consortium agreement between the first petitioner (PACE DIGITEK) and the second petitioner (consortium partner) is a void agreement. The opinion of the Additional Advocate General based on the request made by the Tender Evaluation Committee that the consortium agreement submitted by PACE DIGITEK "may not appear valid in the eyes of law" is not correct. As far as the reason for rejection given by the first respondent for rejecting PACE DIGITEK's bid is concerned, the Technical Evaluation Committee has no role to play. However, arbitrarily and by total non-application of mind, the Technical Evaluation Committee has sought the opinion of the Additional Advocate General. The reasons for rejection pertain to pre-qualification criteria which come within the purview of general rejection criteria and therefore when the tender conditions stipulate that technical bids can be opened only after the satisfaction of the pre-qualification criteria, there was no necessity for the Tender Evaluation Committee to get a legal opinion from the Additional Advocate General with regard to PACE DIGITEK's bid. As the reasons for rejection of PACE DIGITEK's bid is not technical in nature and does not form part of technical evaluation, the rejection of the PACE DIGITEK's technical bid on those grounds is arbitrary and issued by total non-application of mind.

97.All the decisions relied upon by Mr.Vijay Narayan, learned Advocate General and Mr.S.R.Rajagopal, learned Additional Advocate General states that the Courts can intervene in public interest when there is arbitrariness or irrationality in the tender process. Insofar as PACE DIGITEK's case is concerned, for the above mentioned reasons, these two elements are clearly established. Public interest also will not be affected if PACE DIGITEK's bid is accepted for the following reasons:

(a)If PACE DIGITEK's bid for the "B" Package is the lowest price bid, public expenditure will be reduced.

(b)As contract is yet to be awarded for "B" Package, permitting PACE DIGITEK to participate in the tender process will not be detrimental to public interest but instead may be to its benefit.

(c)When PACE DIGITEK has satisfied the pre-qualification criteria by submitting the EMD as well as other required documents, they should not be made to sit out of the tender process that too when it is not the case of the respondents that they are fly-by-night operators.

(d)The participation of PACE DIGITEK in the tender may enhance the value of the tender if they are selected as the L1 tenderer for "B" Package.

(e)No prejudice will be caused to the respondents and other bidders if PACE DIGITEK is allowed to compete with other bidders whose technical bids have already been accepted that too for no fault of theirs, their bids has been rejected arbitrarily and by total non-application of mind.

(f)The State is interested in getting the best deal in public interest. No prejudice will be caused to the State or public interest if PACE DIGITEK's bid is accepted for further evaluation in terms of the tender.

98.For the foregoing reasons, this Court is of the considered view that PACE DIGITEK's bid has been rejected arbitrarily and by total non-application of mind to the tender conditions and hence, the impugned communication dated 01.12.2020 issued by the first respondent rejecting the petitioner's bid and the subsequent communication dated 03.12.2020 giving reasons for rejection are hereby quashed and the first respondent is directed to consider the petitioner's bid for further evaluation on merits and in accordance with law and the writ petition is allowed.

99.STERLITE's bid was rejected by the Technical Evaluation Committee of the first respondent on the ground that they have not complied with the minimum eligibility criteria fixed under Sl.No.7 in the RFP which reads as follows:

#	Minimum Eligibility Criteria	Supporting documents to be submitted
7	The Sole Bidder or the lead bidder of the Consortium should submit valid letter from At-least 1 OEM up to a maximum of 3 OEMs for each of the Passive components at NOC, Block & GP level Maximum 1 OEM for all IP-MPLS Routers at Core, Block & GP Levels, Maximum 1 OEM for GPON equipment Maximum 1 OEM for each of the remaining components including Hardware and Software at NOC, Block, GP & Revenue Village Level Confirming the following: OEMs' shall ensure that all equipment/components/subcomponents being supplied by them shall be supported for entire contract period. If the same is de-supported by the OEM for any reason whatsoever, the bidder shall replace it with an equivalent or better substitute that is acceptable to Purchaser without any additional cost to the Purchaser and without impacting the performance of the solution in any manner whatsoever.	Documentary evidences such as Authorization letters MAF (Manufacturers Authorization Form) from all OEM/Vendors whose products are being quoted by the Bidder need to be attached in the bid. Copy of Technical Specification Evaluation Certificate (TSEC)/others as mentioned in the tender from each OEM whose products are being quoted by the Bidder

100. Since the additional SFP Modules quoted by STERLITE were from two different OEMs i.e. CISCO and PROLABS, STERLITE's bid for Packages "A", "B", "C" and "D" was rejected by the Technical Evaluation Committee. According to the respondents, the additional SFP Modules should also be from the same OEM as that of IP-MPLS Routers. According to them, IP-MPLS Routers and SFP Modules are a unified product (one single equipment as SFP is part of the Router) as the same is evident from the technical specifications for routers, wherein the specifications of SFP Modules are incorporated as part of the Routers and no separate specifications for SFP Modules have been given in the published documents as part of the RFP. But according to the

petitioner, IP-MPLS Routers and SFP Modules are two different active components and cannot be treated as a unified product. It is the case of the petitioner that the SFP Modules are separate active components as they can be used for other active components such as GPON, Spine switch, Leaf switch and Firewall.

101. In order to understand the issue of the controversy better, the terminologies Routers, SFP Modules and GPON will have to be understood first. We need to know what are their functions in networking.

Router:

A router is a networking device that forwards data packets between computer networks. Routers perform the traffic directing functions on the internet...When a data packet comes in on one of the lines, the router reads the network address information in the packet header to determine the ultimate destination.

SFP Modules:

SFP Module, also known as small form-factor pluggable or mini GBIC (gigabit interface converter), is a compact, hot-pluggable optical transceiver module which is widely used for both telecommunication and data communications applications. Its SFP port accepts both optical modules and copper cables.

GPON:

GPON stands for Gigabit Passive Optical Networks. GPON is a point-to-multi point access mechanism. Its main characteristic is the use of passive splitters in the fibre distribution network, enabling one single feeding fibre from the provider's central office to serve multiple homes and small businesses.

102. The technical specifications of the SFP Modules (pre-loaded or additional) are incorporated within the Router specifications under Part iv - technical requirements Clause No.1.4.1 core router Sl.No.14 which reads as follows:

1.4.1 Core Router

...

Sl.No.14

The Router shall support optics for 100 GE, 40 G, 10 GE, 1 GE interfaces with maximum distance of 10 Km. and 40 Km. without any additional regenerators. As seen from the tender document, no separate technical specification is mentioned for additional SFP Modules. Additional SFP Modules have been asked in all Packages. However, active components other than IP-MPLS Routers are there in only Package "A". In all the remaining Packages, there is no active component other than IP-MPLS Routers.

Therefore, the contention of the petitioner as per Sl.No.7 of the RFP referred to supra that IP-MPLS Routers and SFP Modules are two separate active components and cannot be treated as a unified product has to be rejected by this Court.

103.For Package "A", which has Spine switch, Leaf switch and Firewall, it is clear from the technical specification that no additional SFP Modules can be added as they are fully pre-loaded. Therefore, the contention of the petitioner that they can be used for other active components is not applicable and has to be rejected by this Court.

104.The SFP Modules were asked in the tender document published on 01.10.2020. However, GPON equipment was only added vide corrigendum dated 14.10.2020. The first respondent post addition of GPON equipment made no change or addition in the quantities of additional SFP Modules. Therefore, the contention of the petitioner that additional SFP Modules can be used for GPON equipment is not valid.

105.The network infrastructure for Bharat Net comprises two types of products, active and passive. Active components require a source of energy, typically in the form of direct current, in order to perform a specific function. Passive components can influence the flow of electricity running through them for example, they can resist its flow, store energy for later use or produce inductance. However, they cannot control or amplify electricity themselves. In the Bharat Net Project, IP-MPLS Routers, GPON equipment and SFP Modules are all active components and OFC cables and accessories are all passive components. The tender was originally published for providing connectivity to only 12525 villages. However, post directions from DoT, and in line with the vision of providing connectivity to all villages, an additional 5137 villages were also added.

106. As seen from Corrigendum 03 published on 14.10.2020, GPON technology was opted for the additional 5137 villages only.

List of active components, based on Corrigendum in Package "B", "C" & "D"

RFP Publication 01 Oct 2020	Corrigendum 03 14 Oct 2020	Corrigendum 08 29 OCT 2020
Block Router	Block Router	Block Router
GP Router	GP Router	GP Router
	8 Port & 4 Port GPON OLT at GP	8 Port & 4 Port GPON OLT at GP
	GPON ONT at Additional Villages	GPON ONT at Additional Villages

RFP Publication 01 Oct 2020	Corrigendum_03 14 Oct 2020	Corrigendum_08 29 OCT 2020
		Element Management System including hardware & Software for GPON
		Element Management System including hardware & Software for UPS
		Element Management System including hardware & Software for IP-MPLS Routers

107.We shall now see the changes made to the tender conditions based on Corrigendum in Package "A", "B", "C" & "D".

RFP Publication 01 Oct 2020	Corrigendum_03 14 Oct 2020	Corrigendum_08 29 OCT 2020
The Sole Bidder or the lead bidder of the Consortium should submit valid letter from at-least 1 OEM up to a maximum of 3 OEMs for all Passive components at NOC, Block & GP level and maximum 1 OEM for all other active components including Hardware and Software	No change	At-least 1 OEM up to a maximum of 3 OEMs for each of the Passive components at NOC, Block & GP level Maximum 1 OEM for all IP-MPLS Routers at Core, Block & GP Levels, Maximum 1 OEM for GPON equipment Maximum 1 OEM for each of the remaining active components including Hardware and Software at NOC, Block GP & Revenue Village Level

108.As per the Corrigendum_08 dated 29.10.2020, GPON equipment and additional SFP Modules were asked in all the Packages. As per the Corrigendum, the first respondent asked for a maximum of one OEM for IP-MPLS Routers, maximum of one OEM

for GPON equipment and maximum of one OEM for each of the remaining active components. The tender document contains common guidelines regarding compliance of equipment/system. As per the guidelines, all IP-MPLS Routers shall be from same OEM. The guidelines were not amended in both the Corrigendums issued by the first respondent. Only under the Corrigendum dated 29.10.2020, GPON equipment and other new active components were introduced. The common guidelines would have been amended by a Corrigendum, if the intention of the tender inviting Authority (FIBRENET) was to permit the bidders to offer two different OEMs for the additional SFP Modules under the Corrigendum dated 29.10.2020. Since common guidelines issued at the time of the original tender notification has not been amended, the guidelines issued under the said notification shall continue to apply for the Corrigendum dated 29.10.2020. In tender matters, while interpreting tender conditions one way or other, unless and until the interpretation given by the tender inviting Authority is arbitrary and irrational which a man of ordinary intelligence will never give, the scope of judicial review is barred. Whenever two interpretations over a tender condition is possible, it is always the interpretation given by the tender inviting Authority that has to be accepted by Courts. In the case on hand, several bidders have participated in the e-auction and in respect of some of them bids were accepted by the first respondent who have all submitted bids quoting prices for all active components only through a single OEM.

109.It is also not the case of STERLITE that other bidders whose bids are accepted have submitted different OEMs for each of the active components namely (a) IP-MPLS Routers at Core, Block & GP Levels, (b) GPON equipment and remaining active components including Hardware and Software at NOC, Block, GP and Revenue Village Level. Therefore, it is clear that the first respondent has not acted with malafides to deprive STERLITE from participating in the tender.

110.The Bharat Net Project in the State of Tamil Nadu entails providing high speed broad band connectivity to 17662 villages in the State of Tamil Nadu. The Project is a huge networking Project providing internet connectivity to several villages in the State of Tamil Nadu. In all these large projects, technical specifications can be rarely compromised/relaxed. All the components both active and passive are complementary to each other. In many situations, the complementarity between different types of components is inevitable because it is a direct result of technical or other necessities. However, in many situations, complementarity is feasible but not inevitable. It has also to be noted that compatibility does not make combined products feasible, but it also defines the quality and variety features of the composite goods. In some products, the quality of one of the products can

determine the overall quality of the composite goods. With fragmented ownership, co-ordination to a specific quality level may be very difficult because of different costs and effectiveness. The case on hand involves internet networking between villages in the State of Tamil Nadu. Therefore, in networks of fragmented ownership, there may be significant co-ordination problems on the specifics of the standard to be adopted. When all the other bidders have understood Sl.No.7 of the Corrigendum dated 29.10.2020 in the same way, as expressed by the first respondent before this Court, the interpretation given by STERLITE that different OEMs can be given for each of the active components cannot be accepted by this Court. This Court after perusing and examining Sl.No.7 of the Corrigendum dated 29.10.2020 also does not find any infirmity in the interpretation given by first respondent to Sl.No.7.

111.Admittedly, there were pre-bid meetings conducted by the first respondent on 16.10.2020. If STERLITE had any doubt over any of the tender conditions, they could have very well clarified the same during the pre-bid meetings. As seen from the queries/remarks made by many interested parties during the pre-bid meetings which are hosted in the website, none of them have raised the question which STERLITE is raising in this writ petition. Infact as seen from the queries raised during the pre-bid meetings, STERLITE has not raised any specific query as to whether pursuant to the Corrigendum dated 29.10.2020, the bidders are permitted to give their quotations through different OEMs for each of the active components. Infact before this Court, STERLITE has only relied upon queries raised by other bidders during pre-bid meetings to substantiate their case. Even those queries have no significance in support of STERLITE's case.

112.Infact, CISCO when it came to their own manufactured product, they have given unconditional warranty for a period of seven years as per their letter dated 11.11.2020 which reads as follows:

We, Cisco Commerce India Private Limited ("Cisco"), hereinafter referred to as OEM are an established manufacture of the following items quoted by M/s.Sterlite Technologies Limited having it's registered office at E1, MIDC Industrial Area, Waluj, Aurangabad-431136, Maharashtra, India., hereinafter referred to as Bidder.

We confirm that we have understood the delivery & installation timelines defined in the tender. We confirm that we have worked out all necessary logistics and pricing agreement with M/s Sterlite Technologies Limited and there won't be any delay in delivery, installation and support due from our side. Our full

support as per pre-purchased support contract is extended in all respects for supply, warranty and maintenance of our products. We shall provide technical Support, spares and service support as pre-purchased for the supplied equipment for a period of 7 years from the date of Go-Live as per tender terms.

However, when it came to products supplied by other vendors, CISCO has issued a letter dated 10.11.2020 giving support for those products also only on commercial terms and the relevant paragraph reads as follows:

We shall take responsibility of ensuring interoperability of IP-MPLS and other equipment supplied by us with those supplied by other vendors for the above mentioned opportunity based on IETF Open standard RC's. Cisco will take commercially reasonable efforts to assist the Bidder in case of any problems/ issues arising due to integration of components supplied by us with any other component(s)/ product(s) under the purview of the overall solution.

113.SFP Modules and GPON equipment quoted by STERLITE are admittedly from different OEMs. CISCO has made it clear in their letter dated 10.11.2020 that only on commercial terms, they will be able to provide service support for products manufactured by other vendors. No separate warranty letter from PROLABS and TEJAS for the other products namely SFPs and GPON has also been produced before this Court by STERLITE. In all these big Projects, each and every item is very important. They must not alone be compatible but at the same time service friendly and must be able to function harmoniously without any hitches. The Bharat Net Project gives internet connectivity to 17662 villages. Unless the networking is perfect in all respects, the object of the Project will get defeated. The Technical Evaluation Committee is a group of Experts which includes Scientists, Professors and Experts in the field of Information Technology and Networking. They have taken an unanimous decision to reject STERLITE's bid on the ground that it is not in accordance with Sl.No.7 of the Corrigendum dated 29.10.2020. Infact the Project Management Consultant (PMC) M/s.RITES Ltd. are also of the same opinion.

114.This Court after examining the documents filed by STERLITE before this Court is of the considered view that the decision taken by the Technical Evaluation Committee to reject STERLITE's technical bid cannot be treated as unfair, unreasonable or irrational. This Court cannot substitute the view of Technical Experts when there is no material to show that the said view is arbitrary or irrational.

115.The Hon'ble Supreme Court has been consistently holding that if a tender inviting Authority has been consistently and bonafidely interpreting the Standards prescribed by it in a particular manner, there is no scope for judicial review. In the case of STERLITE also, there is nothing arbitrary or irrational on the first respondent rejecting their bid as remaining bidders whose bids have been accepted have understood in the same way as interpreted by the first respondent.

116.For the foregoing reasons, there is no merit in the writ petition filed by STERLITE.

117.In the case of MANTRA, they have challenged the tender process on the ground that they have been prevented from participating in the tender since they were unable to upload the tender document in the format prescribed by the first respondent under the tender conditions. Before analyzing their case, we need to see what is the objective of pre-bid meetings and Corrigendums in tender matters for the purpose of deciding whether the contention of MANTRA before this Court is correct or not.

118.The objective of pre-bid meetings is to explain the details of the solicitation documents to interested bidders. Prospective bidders are permitted to request clarifications on the invitation for bids or request for proposals by a stipulated date and the pre-bid meeting is held within that period.

119.Corrigendum is alteration done in the original. In terms of tenders, if a tender inviting Authority who had floated a tender wants to do some changes in some or whole part of the tender, a Corrigendum is issued. Say for example, a Company or Department has issued a tender for a particular work or service with all the technical and financial details. All the important dates and deadlines have been mentioned in it. Now due to some or other reason, if the company feels like extending the due date or any other date, they can do so. They need to re-publish the tender with the necessary amendments and this is called as Corrigendum. Corrigendum can only be issued before the due date and time for submission of tender. Against a tender, any number of Corrigendums can be issued. As a paid member of an E-portal in many cases, the bidders will receive alerts about the Corrigendums. MANTRA who is the writ petitioner in W.P.No.16736 of 2020 has raised the issue that they were unaware of the Corrigendum which prescribed a different format for uploading the tender document by the bidders. Being a registered member of the E-portal through which auction was conducted by the first respondent, MANTRA cannot feign ignorance of the modified format for uploading the tender documents.

120. In the subject tender, all contractors, suppliers and service providers were put on notice about the requirements and scope of the tender, closing date for submission of bids, proposals or informations, evaluation and selection criteria, details on how and where bids/proposals should be submitted, number of copies, point of contact for additional information and response to queries (clarifications) deadline for submission of queries, schedule of pre-bid/proposal meeting and site visits and any other pertinent details have all been disclosed. Corrigendums issued by the first respondent have also been circulated through E-portal so as to reach all the bidders in the same way as was done while floating the tender.

121. This Court from the available records placed before it and also after perusing the pleadings of the respective parties does not doubt the transparency measures adopted by the first respondent in the tender process. Pre-bid meetings have also been conducted by the first respondent to clear the doubts of the prospective bidders. The pre-bid meetings are held to clarify the technical and procurement aspects of the solicitation documents. The first respondent has conducted pre-bid meeting in relation to the subject tender on 16.10.2020 and the prospective bidders if they had any doubts on the tender documents to be submitted by them, can raise the same during these pre-bid meetings. Infact, helpdesk numbers were also given in the E-portal. Any bidder having any clarifications can contact the helpdesk number. Apart from the helpdesk numbers, pre-bid meetings were conducted by the first respondent and admittedly number of prospective bidders had participated in the said meeting. According to the respondents, there were 104 participants in the pre-bid meeting and there were more than 2000 queries received by the first respondent from various interested bidders. However, MANTRA has not participated in the pre-bid meeting conducted by the first respondent. There is also no proof placed before this Court by MANTRA to show that they were prevented from participating in the pre-bid meeting.

122. The subject tender is an E-tender and the scope of malpractice by the tender inviting Authority is limited when compared to tenders conducted manually where the chances of malpractice is much higher. The advantages of E-tender has already been highlighted by this Court in the beginning of the discussion part of this judgment.

123. MANTRA has raised the following contentions before this Court:

(a) They could not upload its tender documents on-line before 3.00 P.M. on 11.11.2020 due to technical difficulty on website.

(b)After four days of follow-up with the second respondent's call centre representatives, they had confirmed that the technical difficulty was due to the fact that the petitioner was attempting to upload a excel document in .xlsx format whereas the website only supports .xls format.

(c)Clause 5.12.1.2 of the tender document requires submission of financial bid (BOQ) in .xlsx file format only.

124.MANTRA's contentions cannot be accepted by this Court for the following reasons:

(a)Corrigendum is a public document notifying amendments to the previous tender notification. Any registered bidder in the E-portal of National Informatics Centre (NIC) can have access to the Corrigendum through the website. Corrigendum_08 dated 29.10.2020 has revised the file format from .xlsx to .xls. MANTRA as an interested bidder ought to have noticed the Corrigendum. If they noticed the Corrigendum, they could have very well downloaded the file in .xls format and after filling up the details uploaded the same in the E-portal which they have admittedly not done so. Infact admittedly the first written query raised by MANTRA to the first respondent with regard to the file format under which they have to upload the tender documents was raised only on 11.11.2020 at 3.15 P.M. i.e. after the last time and date of submission of bids which was on 11.11.2020 at 3.00 P.M. MANTRA has also sent an e-mail to the National Informatics Centre (NIC) only on 15.11.2020 i.e. four days after the last time and date of submission of bids requesting information about the correct format for uploading its tender documents. NIC has also responded to MANTRA's mail stating that "the present system will support .xls format only". They have also stated that MANTRA will have to download the BOQ uploaded by the first respondent in the portal and complete the details as required without changing the format. There is also no evidence placed before this Court by MANTRA to show that they were unable to contact the officials of the first respondent before the tender opening date for the purpose of submitting their bid though they contend that they were unable to contact the helpdesk number. As seen from the queries raised by various interested bidders and the responses received from the first respondent, there is no specific query raised by MANTRA on the file format for uploading the tender documents.

125.The degree of care taken by the first respondent in the invitation of bids from the available records cannot be considered to be non-transparent. Insofar as MANTRA's case is concerned, this Court is of the considered view that there is no arbitrariness, bias or malafides on the part of the respondents. A party who has not participated in the tender despite the fact that the tender inviting Authority has not put a spoke in its

wheel from participating in the tender cannot challenge the tender process under law. MANTRA falls in the said category and therefore, there is no merit in their writ petition.

126.For the foregoing reasons, the writ petitions filed by STERLITE and MANTRA in W.P.Nos.18036 & 16736 of 2020 respectively are dismissed and the writ petition filed by PACE DIGITEK in W.P.No.18302 of 2020 is allowed and the impugned communication dated 01.12.2020 issued by the first respondent rejecting the petitioner's bid and the subsequent communication dated 03.12.2020 giving reasons for rejection are hereby quashed in so far as PACE DIGITEK is concerned and the first respondent is directed to consider the PACE DIGITEK's bid for further evaluation on merits and in accordance with law. No costs.

Sd/-
Assistant Registrar(CS IV)

//True copy//

Sub Assistant Registrar

NL/PAM

To

1.The Secretary,
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2.The Managing Director,
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Pre Delivery Order in
W.P.Nos.18302, 16736 & 18036 of 2020

PPA (CO)
KKV/04/03/2021