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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
16.11.2021	26.11.2021

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO. 22894 OF 2021
AND
W.M.P. NO.24098 OF 2021

Ayesa Ingenieria - Korea National Railway
- Ayesa India JV, rep. by its
Authorised Representative
Mr. Mariano Matias Alvarez Arce
D-99, 4th Floor, Sector-2, Noida
Uttar Pradesh 201 301. .. Petitioner

- Vs -

1. Chennai Metro Rail Ltd.
Administrative Building, CMRL Depot.
Poonamallee High Road, Koyambedu
Chennai 600 107.

2. AECOM India Pvt. Ltd.
In Consortium with Oriental
Consultants Global Co. Ltd. &
Nippon Koei Co. Ltd.
9F, Infinity Tower C
DLF Cyber City, Phase II
Gurgaon - 122 002. .. Respondents
(R-2 impleaded vide order of this
Court dated 08.11.2021 in
WMP No.25032/2021)

Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus calling for the records of the evaluation process of the technical marks of the Consortium led by the petitioner culminating in the proceedings dated 29.09.2021, quash the same and consequently direct the respondent to re-evaluate the technical marking of the petitioner consider Mumbai Line 7 project as an eligible assignment fulfilling the criteria of similar projects (ongoing or completed) in last 10 years in India, where the fees received per project is above Rs.100 Crores and proceed accordingly.

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For Petitioner : Mr. AR.L.Sundaresan, SC, for
M/s.King & Partridge

For Respondents: Mr. P.S.Raman, SC, for
Mr. B.Jayeesh B.Dolia for R-1
Mr. P.H.Arvind Pandian, SC, for
M/s.Chennai Law Associates for R-2

ORDER

The Hon'ble Supreme Court in Uflex Ltd. - Vs - Government of T.N. & Ors. (2021 SCC OnLine SC 738) has broadly visualised about the process of tender and the limitations in judicial review in the said process and the same is quoted hereunder by this Court before embarking upon analysing the merits and demerits of the contentions put forth by the parties :-

> "The enlarged role of the Government in economic activity and its corresponding ability to give economic 'largesse' was the bedrock of creating what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the 'Constitution'), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation ('PIL') jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.
>
> 2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

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3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted."

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in Michigan Rubber v. State of Karnataka as under:

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

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure

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that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

2. It is evident from the above view of the Hon'ble Supreme Court, that fairness in action by the State, non-arbitrariness in essence and substance is the heartbeat of fair play, which are the basic requirements of Article 14 and that judicial review should not be for whimsical or ulterior purpose so long as the State acts within the bounds of reasonableness. The Hon'ble Supreme Court had gone on to tabulate the various factors that govern the tender process and the yardstick that needs to be adopted and the leeway that needs to be given to the State in the discharge of its constitutional obligations by resorting to fair play and showing bona fide intent.

3. The present petition has been filed by the petitioner, a joint venture/consortium, for re-evaluation of the technical marking in and by which the 1st respondent had denied awarding marks for the project completed by the petitioner in the last 10 years in India in which fees received per project was above Rs.100 Crores. Further, pending the petition, the tender having been finalised and contract having been awarded to the 2nd respondent, the said award of contract has also been challenged by impleadment of the 2nd respondent.

4. The facts of the case are that the 1st respondent issued "Notice Inviting Tender" (for short 'NIT') seeking proposals from prospective bidders for "Selection of General Consultant" (for short 'GC') for Chennai Metro Rail Phase-2 Project – Corridor 4 and part of Corridor – 3 and 5. The selection process was based on "Quality and Cost Based Selection" (for short 'QCBS') in which 70% weightage was allotted to technical bid score and 30% weightage was allotted to financial bid score. The project was to be awarded to the bidder getting the highest combined mark in both the technical and financial bid.

5. Subsequent to the NIT, addendum No.1, 2 and 3 were issued and revised NIT was issued on 20.7.2021 incorporating addendum 1, 2 and 3. The technical bid of the petitioner was opened by the 1st respondent and upon scrutiny, the 1st respondent had awarded the petitioner only 7.5 marks instead of 15 marks for criteria 1(b) – Indian Similar Projects and communication was addressed that the financial bids would be opened on 30.9.21.

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6. Vide communication dated 30.9.21, the petitioner sent a representation expressing dissent with respect to the award of marks towards technical scoring for criteria 1(b) - Indian Similar Projects as according to the petitioner, it had fulfilled the criteria as required by the 1st respondent. It is the case of the petitioner that it has two similar projects (ongoing or completed), where the fees received per project is above 100 Crores in the last 10 years in India. It is the stand of the petitioner that the 1st respondent had arbitrarily not considered the Mumbai Metro Project for the purpose of evaluating its technical bid in the criteria 1(b). Inspite of the representative of the petitioner meeting and explaining to the 1st respondent, the 1st respondent did not agree to the contention of the petitioner. It is the case of the petitioner that the act of the 1st respondent in denying the petitioner technical marks is wholly unfair, arbitrary and unjustified and is against the terms of the NIT and, thereby, denying the petitioner an opportunity to be the successful bidder. Hence, the present petition is filed.

7. Learned senior counsel appearing for the petitioner submits that the 1st respondent has grossly erred in not awarding marks in line with the criteria 1 (b) of NIT. It is the submission of the learned senior counsel for the petitioner that criteria 1 (b) prescribe 7.5 marks for each INR 100 Crores similar project to a maximum of two projects (ongoing or completed) and that the additional criteria prescribe that the applicants may be single entity or Joint Venture (for short 'JV') with not more than 3 JV/Consortium partners and with minimum of 20% participation of each. The 1st respondent, though awarded 7.5 marks towards the Lucknow Project completed by the petitioner, however, for the Mumbai Metro Project, though the value of the JV put together was INR 100 Crores, however, the 1st respondent has not awarded 7.5 marks.

8. In this regard, learned senior counsel for the petitioner drew the attention of this Court to Question No.144 of the query raised in the pre-bid stage and the response of the 1st respondent thereto and submitted that the stand of the 1st respondent that subsidiary company can take the credentials of the parent company, then the parent company shall be a member of JV and vice versa and that being the case, the JV of the petitioner, being the parent company and its subsidiary, the total value of the project done by both the entities should be taken into account for the purpose of computing the value of INR 100 Crores and the JV of the petitioner having fulfilled the requisite criteria, the petitioner ought to be given 7.5 marks towards the second project as well. It is the further submission of the learned counsel for the petitioner that once the petitioner is given 7.5 marks towards the second project, the marks obtained in the financial bid and technical bid put together would put the petitioner over and above the 2nd

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respondent, as the petitioner would have obtained more marks than the marks secured by the 2nd respondent.

9. It is the vehement contention of the learned senior counsel for the petitioner that a query was raised in the pre-bid stage, viz., question No.144, as to whether the 100% subsidiary of the International Consultant/parent company, which are members of the JV, jointly have received more than INR 100 Crores as fees, could the subsidiary company be taken as eligible to bid as member of the JV. It is pointed out by the learned senior counsel for the petitioner that the 1st respondent, to the aforesaid query, has given a pointed reply that if the subsidiary company wishes to take credentials of the parent company, then parent company shall be a member of JV and vice versa. That being the stand of the respondent, the JV member is a 100% subsidiary of the parent company and, therefore, the fees put together is more than INR 100 Crores and, therefore, the petitioner is eligible not only for participating in the bid, but also equally entitled to the 7.5 marks. However, the 1st respondent, giving a go-by to its stand with regard to query No.144, has failed to give the requisite 7.5 marks to the petitioner, which is wholly unsustainable.

10. In support of his contention, learned senior counsel appearing for the petitioner, though placed before this Court very many decisions, but laid emphasis on the decision in Vidarbha Irrigation Development Corporation - Vs - Anoj Kumar Garwala (2019 SCC OnLine SC 89).

11. Per contra, learned senior counsel appearing for the 1st respondent submitted that the 1st respondent stands by the conditions prescribed in the NIT. Learned senior counsel appearing for the 1st respondent submitted that the selection methodology is Quality and Cost Based Selection (for short 'QCBS') for the main reason that rather than the cost, the quality of the project is given more importance, considering the nature of the project.

12. Learned senior counsel appearing for the 1st respondent submitted that the petitioner is blatantly trying to misinterpret the clarification issued by the 1st respondent relating to eligibility criteria. In this regard, learned senior counsel appearing for the 1st respondent submitted that clarification has been issued with regard to eligibility in query No.144 and query No.194, which were pre-bid queries and the answer to the said queries would form part and parcel of the NIT. The petitioner, to the exclusion of certain queries, cannot take umbrage under answer to certain queries, which it has made, to sustain its case that the answer to query No.144 would allow the subsidiary company in the JV to take the credentials of the parent company.

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13. It is the further submission of the learned senior counsel for the 1st respondent that query No.144 relates to taking credentials by the subsidiary company of the parent company would not, by any stretch of imagination, be taken to the extent of taking the financial credentials of the parent company as giving such an interpretation would defeat the very purpose and intent of codifying the requisite financial criteria in condition 1 (b) of NIT. It is the further submission of the learned senior counsel for the 1st respondent that to query No.194, which also was a query raised at the pre-bid stage, in which the manner in which the members of the JV/consortium would be evaluated, the answer to the said query would clinch the issue as a categoric answer has been given that experience of each JV member will be considered individually. It is therefore the submission of the learned senior counsel for the 1st respondent that a harmonious reading of the answer to queries 144 and 194 would put to rest the allegations of the petitioner that arbitrariness has crept in the award of tender.

14. It is the submission of the learned senior counsel for the 1st respondent that the intention of the clarification given at the pre-bid stage is to avoid any subsidiary companies, not having the requisite credentials, but only taking umbrage under the parent company, to enter into the bidding process, which is based on QCBS system and, therefore, the interpretation given by the petitioner to the answer to query No.144 is wholly misconceived, as the credentials mentioned in query No.144 does not take within its fold the financial credentials of the parent company. Such an interpretation, if given, would render the whole condition 1 (b) of NIT redundant and would also make a mockery of the QCBS system.

15. In this regard, learned counsel drew the attention of this Court to the conditions 1 (a), (b) and (c) of NIT and submitted that the petitioner satisfied condition Nos. 1 (a) and (c), whereas, the petitioner failed to fulfill condition 1 (b). In this backdrop, learned senior counsel for the 1st respondent adverted to query No.194 and submitted that the answer to the said query would make it clear that the experience of each of the JV member will be considered individually, which clearly means that the individual members of the JV/Consortium should satisfy each and every condition stipulated in sub-clauses (a), (b) and (c) of condition 1. Therefore, only if each and every member of the JV has received 100 Crores per project in domestic, the said JV would be entitled to the 7.5 marks and merely taking the credentials of the member of the JV/Consortium does not pertain to taking the financial credentials and the answer to query No.194 would negative the said contention. However, the petitioner is trying to give an innocuous interpretation to condition 1 (b) only to stand benefited, which is untenable.

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16. It is the further submission of the learned senior counsel that the 1st respondent, keeping in mind that the project is a Quality and Cost Based project, has uniformly applied the conditions through all the bidders and the cost was only a secondary consideration, keeping in mind the quality, which is of paramount consideration and, accordingly, the 2nd respondent has been chosen as the successful bidder, having fulfilled all the conditions put forth in the NIT and having secured the maximum marks both in the technical and financial bids combined together. Therefore, the plea taken by the petitioner is only to thwart the whole project by giving fanciful interpretations, which were never envisaged nor followed by the 1st respondent with any of the bidders.

17. It is the further submission of the learned senior counsel for the 1st respondent that the pre-bid queries would also form part and parcel of the NIT, as all the queries have been raised before the consideration of the bid and the bids were opened only after all the necessary clarifications were issued and, therefore, the NIT and pre-bid queries should be read harmoniously in tandem with each other and, the petitioner, for his benefit, cannot split the same and give a different interpretation to the answers given to the queries. It is the further submission of the learned senior counsel that though the petitioner may not have raised query No.195, however, the answer given by the 1st respondent to the queries raised with regard to the NIT is for all bidders concerned and, therefore, the petitioner cannot insulate itself by saying that the answer given to query No.195, which has not been raised by him, cannot be made applicable to him as a uniform criteria has been adopted by the 1st respondent while finalising the tender. Therefore, it is submitted that considering the importance and nature of the project and the necessity for striving for quality, this Court may dismiss the petition filed by the petitioner.

18. Learned senior counsel appearing for the 1st respondent further submitted that the acceptance of bid and qualitative assessment is within the domain of the experts in the particular field and so long as there is no arbitrariness or unreasonableness in the award of the contract, the Courts shall not interfere with the decision in the award of the contract by substituting its views to that of the experts, which has been the consistent view of the Courts insofar as matters relating to award of tender is concerned. In the above circumstances, learned senior counsel appearing for the 1st respondent prayed for dismissal of the writ petition.

19. Learned senior counsel appearing for the 2nd respondent, who has been impleaded pursuant to the award of the tender as the 2nd respondent being the successful bidder, submitted that as per the additional criteria No.3, the condition stipulated therein is that the Lead Member of the JV/Consortium should have the highest share with not less than 34% and that the Lead

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Member must have atleast one similar project (ongoing or completed) with minimum fee receipt of INR 100 Crores or equivalent. Pointing out to the aforesaid provision, which forms part of the additional criteria, learned senior counsel for the 2nd respondent submitted that even according to the petitioner, the subsidiary company in the JV is shown as the Lead Member of the Consortium which was not having the requisite criteria of INR 100 Crores or equivalent in atleast one similar project (ongoing or completed). The petitioner having not fulfilled the said criteria, as even the materials placed before this Court by the petitioner reveals that the Lead Member of the JV/Consortium was not the recipient of INR 100 Crores or equivalent in atleast one similar project (ongoing or completed), the claim of the petitioner that it has fulfilled the conditions stipulated in the NIT falls like a pack of cards. It is therefore the submission of the learned senior counsel for the 2nd respondent that the bid of the petitioner is not liable even for basic consideration.

20. While on the other issues, learned senior counsel for the 2nd respondent adopted the submissions advanced by the learned senior counsel for the 1st respondent, to buttress his contention, learned senior counsel for the 2nd respondent, though placed reliance on very many decisions, however, to drive home his submission, placed reliance on the following decisions :-

i) Silppi Constructions Contractors – Vs – Union of India & Anr. (2020 (16) SCC 489); and

ii) Uflex Ltd. - Vs – Government of T.N. & Ors. (2021 SCC OnLine SC 738)

21. This Court gave its anxious consideration to the submissions advanced by the learned senior counsel on either side and perused the materials available on record.

22. The only issue that has been canvassed before this Court is that the petitioner ought to have been awarded with 7.5 marks for the second project in which the petitioner has fulfilled the condition stipulated in 1 (b) of NIT and the act of the 1st respondent not to award the 7.5 marks has relegated the petitioner to the second position in the merit list, thereby, robbing the petitioner of the tender to which it is entitled, as award of 7.5 marks would entail him as the highest aggregate marks holder. Therefore, the substantive issue in the present case is the interpretation to be given to condition 1 (b) of the NIT, which would decide the fate of the petitioner.

23. As the whole issue in the present case revolves around condition 1 (b) of NIT, for better appreciation, the same is extracted hereunder :-

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No.	Criteria/Sub-criteria	Marks	Notes on evaluation : Revised in Addendum-3 dated 20.07.2021
1)	Consultancy Firm's specific experience a) In the case of JV/Consortium, each member of the JV/Consortium should have received 25 Crores in last 10 years (till 31.03.2021) in similar project	10	i) If all JV/Consortium members have received at least INR 25 Cr in last 10 years in one similar project, they will be awarded full marks in this criterion ii) Consultant shall submit the certificate/es from the employer, which shall contain the details of amount received by each member and scope of work
	b) No. of similar projects (ongoing or completed), where the fees received per project is above 100 crores in last 10 years (till 31.03.2021) - India	15	i) 7.5 marks for each INR 100 cr similar project to maximum of two projects ii) Consultant shall submit the certificate/es from the employer, which shall contain the details of amount received and scope of works
	c) No.of similar projects (ongoing or completed), where the fees received per project is above 200 crores in last 10 years (till 31.03.2021) - International	25	i) 12.5 marks for each INR 200 cr project to maximum of two projects ii) Consultant shall submit the certificate/es from the employer, which shall contain the details of amount received and scope of works

24. A careful perusal of condition (1), which contains three sub-clauses, viz., (a), (b) and (c), reveals that the

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JV/Consortium is subject to satisfy certain conditions upon which particular marks are awarded, which is then aggregated to arrive at the total marks obtained by the tenderer.

25. Pursuant to the NIT, pre-bid queries were entertained and to the queries posed by the prospective bidders, answers/clarifications were given by the 1st respondent. While the petitioner relies on answer to query No.144 to further its case, the said contention is countered by the 1st respondent submitting that the answer to query No.194 should be read along with the answer to query No.144 and all the answers to the respective queries should be read in totality along with the NIT as the NIT and the answers to the pre-bid queries would form part and parcel of NIT and should be read as a whole.

26. To appreciate the entire issue, the relevant portion of query No.144 and query No.194 are tabulated hereunder :-

144)	Section 2 Instructions to Consultants (ITC)	..... No. of similar projects (ongoing or completed), where the fees received per project is above 100 crores in last 10 years (till 31.03.2021) - India i) JV/Consortium with highest number of projects will be given full marks and others pro-rata reduction	.... b) If an International Consultant parent company has worked in India and their 100% Subsidiary is also part of JV with them and they together has more than 100 Crores fees, can it be considered as Eligible Assignment. Here in the Subsidiary is 100% company of the parent company who will be bidding. Please clarify.	a) Please refer to Annexure-I of Addendum-I b) If subsidiary company wishes to take credentials of parent company, then parent company shall be a member of JV and vice cersa.

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194	Page16, Section 2 Instructions to Consultants Point 20, 1 (b)	..... b) No. of similar projects (ongoing or completed) where the fees received per Project is above 100 crores in last 10 years (till 31.03.2021) - India Notes for Evaluation JV/Consortium with highest number of projects will be given full marks and other pro-rata reduction ii) Consultant shall submit the certificate/es from the employer, which shall contain the details of amount received and scope of work	In an event, if consortium members executed a similar project in past and if the same consortium has formed to bid in the project. In such cases, past project experience is counted once or twice for each partner. Please clarify	Experience of each JV member will be considered individuall y

27. It is to be pointed out even at the threshold that the pre-bid queries, whether it emanated from the petitioner or from any of the other bidders, are composite and the answers/clarifications given to the said queries is applicable to all the bidders, who partake in the particular tender process. In such a backdrop, the answer given by the 1st respondent to query Nos.144 and 194, be it by the petitioner or any other bidder, would squarely cover the petitioner as well as the other bidders and, therefore, the petitioner cannot feign ignorance of the answer to the said query No.194.

28. What is the interpretation to the combined reading of condition 1 (b) and the answer to query Nos.144 and 194, in that, whether the total fees received by the JV/Consortium members should be INR 100 Crore or the fees received by the

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individual member of the JV/Consortium should be INR 100 Crore in the last 10 years is the moot question that lies before this Court for its answer.

29. Condition 1 (b) stipulates that the fees received per project of similar nature should be above 100 Crores in the last 10 years for projects executed in India and the total number of projects is limited to 2 with 7.5 marks for each project. The INR 100 Crores, according to the petitioner, pertains to the entire JV/Consortium and does not pertain to individual members of the consortium. To this end, the answer to query No.144 is taken aid of by the petitioner.

30. However, the answer to query No.194, reveals that the 1st respondent has categorically stated that experience of JV members will be considered individually. Though the petitioner claims that answer to query No.144 reveals that the credentials of the parent company can be taken by the subsidiary and vice versa, however, read in consonance with the answer to query No.194, it clearly shows that there will be individual appraisal of the JV members. A harmonious construction of the above would only lead to the irrefutable inference that there will be appraisal of the individual members of the JV even if they take the credentials of the parent company. Further, according to the 1st respondent, qualitative analysis of the credentials would not be relatable to the financial aspects of the members of the JV/Consortium.

31. The above view of this Court assumes particular significance when a proper and harmonious interpretation to the answers to query Nos.144 and 195 is given. The answers to query Nos.144 is that the subsidiary is permitted to take the credentials of the parent and vice versa. This answer fortifies the stand of the 1st respondent on the basis of the additional criteria, which finds place below condition 1 of NIT, more specifically clause (3) of the additional criteria, which prescribes that the members shall identify the Lead Member, who shall have the highest share with not less than 34% and Lead member must have at least one similar project (ongoing or completed) with minimum fee receipt of INR 100 Crore or equivalent in any currency in last 10 years. From the above clause (3) of additional qualification, it is implicitly clear that the Lead Member of the JV/Consortium should have received a minimum fee of INR 100 Crore in a similar project in India in the last 10 years. In this backdrop, the answer to query No.194, when read in conjunction with the answer to query No.144, clearly signifies that each and every member of the JV/Consortium will be considered individually, which would only mean that each and every member of the JV/Consortium should have received a minimum fee of INR 100 Crore in one similar project (ongoing or completed) in India. Any other interpretation would defeat the harmonious construction as also the intent of the tender inviting authority to the conditions prescribed in NIT.

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32. In the light of the additional criteria, which supports the stand of the 1st respondent, the construction of condition (1) clearly spells out the intent of the 1st respondent. Condition (1) contains three sub-clauses and in sub-clause (a), therein, Consultancy Firm's specific experience is dealt with, which pertains to the receipt of INR 25 Crores by each of the member of the JV/Consortium in the last 10 years in similar project. Sub-clause (a) specifically starts with the words that "in the case of JV/Consortium, each member of the JV/Consortium". In this backdrop, a careful look at sub-clause (b) of condition (1), it states about the number of similar projects (ongoing or completed), where the fees received per project is above INR 100 Crores in the last ten years. Harmonious interpretation of the said condition, in the wake of sub-clause (a) is that each member of the JV/Consortium, in the case of similar projects (ongoing or completed), should have received fees of INR 100 Crores in the last 10 years. Clause (b) is a continuation of clause (a) insofar as it relates to the specific experience of each member of the JV/Consortium is concerned. Therefore, when clause (a) of condition (1) stipulates a criteria for each member of the JV/Consortium, the same applies to clause (b) of condition (1) as well as any other interpretation would not be in consonance with the other clauses specified under condition (1).

33. Holistically considered, condition (1) of NIT coupled with the answer to query Nos.144 and 194 would only mean that each member of the JV/Consortium should have received Rs.25 Crores in last 10 years and that the number of similar projects (ongoing or completed), each member of the JV/Consortium should have received a fees of above INR 100 Crores.. Only if such an interpretation is given, the same would satisfy the conditions in the NIT as also the additional criteria as also the answers to the pre-bid queries. As already pointed out above, the pre-bid queries forms part and parcel of the NIT and neither the pre-bid queries nor the NIT could be read in isolation, as such reading would not only create complications and confusions, but it is wholly impermissible.

34. Further, as pointed out by the Hon'ble Supreme Court in Afcons Infrastructure Ltd. - Vs – Nagpur Metro Rail Corporation Ltd. (2016 (16) SCC 818) has expounded that the decision making process in accepting or rejecting the bid should not be interfered with. Interference is permissible only if the decision-making process is arbitrary or irrational to an extent that no responsible authority, acting reasonably and in accordance with law, could have reached such a decision. The Hon'ble Supreme Court has further cautioned that Constitutional Courts are expected to exercise restraining in interfering with the administrative decision and ought not to substitute their view for that of the administrative authority. The Hon'ble Supreme Court has further emphasised that the author of the

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document is the best person to understand and appreciate its requirements.

35. Further, the Hon'ble Supreme Court in the case of Tata Cellular - Vs - Union of India (1994 ((6) SCC 651) has elucidated the following principles :-

> "94. The principles deducible from the above are:
>
> (1) The modern trend points to judicial restraint in administrative action.
>
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. 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.
>
> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

36. The decision of the House of Lords in Trollope & Colls Ltd. - Vs - North West Metropolitan Regional Hospital Board (1973 (1) WLR 601 (HL), which finds place in the decision of the Hon'ble Supreme Court in Uflex case (supra) has eruditely dealt with on the contract between the parties and for more clarity, the relevant portion is quoted hereunder :-

> "…the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret

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> and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings : the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

37. The Hon'ble Supreme Court, in Silppi Constructions Contractors – Vs – Union of India & Anr. (2020 (16) SCC 489) has succinctly pointed out that the Court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. Authority which floats the contract or tender, and has authored the tender documents is the best Judge as to how the documents have to be interpreted. If two interpretations are possible, then the interpretation of the author must be accepted and the Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

38. A careful perusal of the ratio laid down on the question of appreciation and interference by the Courts in matters relating to contracts/tenders, it is clear that the Courts should be very much circumspect, while interfering in the tender process, as it is a qualitative analysis to be made by experts in the particular field. Suffice for the Court to see that no unreasonableness, arbitrariness, bias or mala fides has crept in, in the tender process. The Hon'ble Supreme Court has also cautioned that the awarding of contracts by the Government and the Public Sector should not be made a cumbersome exercise in a long drawn out litigative battle.

39. The decision in Vidharbha's case (supra) relied on by the petitioner would in no way advance the case of the petitioner. In the said decision, the Hon'ble Supreme Court, after analysing a catena of decisions on the subject and following the ratio laid down in Poddar Steel Corporation – Vs – Ganesh Engg. Works (1991 (3) SCC 273) has held that the requirements in a tender notice can be classified into two categories – those which lay down the essential conditions of eligibility and the 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

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required to enforce them rigdly. 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 condition in appropriate cases.

40. In the case on hand, the criteria prescribed in condition 1 (b) is a mandatory condition to be enforced. However, it is to be pointed out that the interpretation of the said condition is covered in the pre-bid query Nos.144 and 194 and, as already pointed out above, the answers to the said pre-bid queries should be read as a whole along with the conditions prescribed in NIT and cannot be read in isolation. Once it is read in conjunction with the NIT, then the necessary inference that is to be given is that each of the member of the JV/Consortium should have received fees of INR 100 Crore in one similar project in the last 10 years. Giving any other interpretation would be wholly inconsistent with the NIT and also the answers to the pre-bid queries.

41. In the light of the above, a careful perusal of the tender process reveal that it is based on Quality and Cost Based appraisal, with quality being placed in the higher rostum rather than the cost, as the nature of the work to be executed and the cost implication involved in the said work requires the consultants to be more qualitative so that the employer, who awards the tender is not made to suffer for the delayed execution of the project. Considering the cost implication involved in the present work and also the other criteria and the need for expertise in the field, the tender inviting authority has thought it fit to impose certain conditions, which require to be fulfilled by the bidders and any infraction of the conditions is impermissible.

42. In the present case, as already held by this Court above, the non-award of marks to the petitioner for non-fulfilment of the condition stipulated in sub-clause (b) of condition (1) is in consonance with the tender conditions as well as the answers to the pre-bid queries and the petitioner cannot claim that the answer to query No.144 alone would govern him in exclusion to the answer to query No.194. On a holistic consideration of the entire materials available on record, it is clear that the 1st respondent has considered the technical qualifications of the petitioner in line with the NIT and also the answers to the pre-bid queries and has rightly rejected the claim of the petitioner for the award of marks and this Court. Further, this Court keeping in mind the scope of the Court in the matter of judicial review of contracts and taking into consideration the fact that there exists no arbitrariness or unreasonableness or mala fides in the award of contract to the 2nd respondent by the 1st respondent, this Court, sitting under Article 226 of the Constitution is not inclined to inject its view to that of the experts in the field as it is within the domain of the 1st respondent, and at the risk of repetition it is to be stated that the authority, which has floated the tender

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and has authored the tender documents is the best Judge as to how the documents have to be interpreted, more so when the contract itself is a Quality and Cost Based Selection.

43. For the reasons aforesaid, the present petition at the behest of the petitioner lacks merit and, accordingly, the same is dismissed. Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

GLN

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