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

WRIT PETITION NO. 1995 OF 2022

1. Universal Cables Ltd.
A Company incorporated
Under the provisions of
Companies Act, 1956 and
Continued as such under the
Provisions of Companies
Act, 2013, having its registered
Office at P.O. Birla Vikas, Satna,
Madhya Pradesh 485005 and
Its regional office at Industry
House, 159, Churchgate
Reclamation, Mumai 400 020.

2. Mr. Paresh Panchal
Constituted Attorney of
Petitioner No.1 abovenamed
Having his office at Industry
House, 159,
Churchgate Reclamation,
Mumbai 400 020. .. Petitioners

Versus

1. State of Maharashtra
Through its Principal Secretary
Ministry of Power and Energy,
Having its office at Mantralaya,
Mumbai 400 032.

2. City and Industrial Development
Corporation (CIDCO) of
Maharashtra Limited, 8^{th} Floor,
Raigad Bhavan, CBD-Belapur,
Navi Mumbai 400 614.

3. The Chairman & Managing
Director, CIDCO Limited,
CIDCO Bhavan, 6^{th} Floor,
CBD Belapur,
Navi Mumbai – 400 614.

4. The Chief Engineer (NM)
   3rd Floor, CIDCO Bhavan,
   CBD Belapur,
   Navi Mumbai 400 614.

5. The Superintending Engineer
   (Elect-NM), City and
   Industrial Development
   Corporation (CIDCO) of
   Maharashtra Limited,
   8th Floor, Raigad Bhavan,
   CBD-Belapur,
   Navi Mumbai 400 614.

6. Maharashtra State Electricity
   Transmission Company
   Limited, A company
   Incorporated under the
   Provisions of Companies
   Act, 1956, having its
   Registered office at 5th
   Floor, Prakash Ganga,
   Plot No. C-19, E Block,
   Bandra Kurla Complex,
   Bandra (East),
   Mumbai 400 051

7. Chief Engineer (Contracts
   And Monitoring), Maharashtra
   State Electricity Transmission
   Company Ltd., A Company
   Incorporated under the
   Provisions of Companies
   Act, 1956, having its registered
   Office at 5th Floor, Prakash
   Ganga, Plot No. C-19,
   E Block, Bandra Kurla Complex
   Bandra (East), Mumbai 400 051.

8. BNC Power Projects Limited
   A Company incorporated under
   The provisions of Companies
   Act, 1956, having its registered
   Office at B/27-28, Nilgiri Heights,
   Shivaji Housing Society,
   Pune 411 016. ..Respondents

Mr. Mayur Khandeparkar a/w Mr. Bhushan Deshmukh, Mr. Shiraj Salelkar, Ms. Anuja Abhyankar, Ms. Raksha Thakkar and Ms. Prachi Vasudeo i/by Lexicon Law Partners for petitioners.

Mr. Milind V. More, Addl. Govt. Pleader for State.

Mr. G. S. Hegde, Senior Advocate i/by Ms. P. M. Bhansali for respondents/CIDCO.

Mr. Ashok T. Gade a/w Ms. Riya John for respondent nos.6 and 7.

Mr. Sharan Jagtiani, Senior Advocate and Mr. Muthhar Khan i/by Mr. Suraj Dessai Almedia & Mr. Hrishikesh More, Sharmad Paikane for respondent no.8.

Mr. Prashant Kulkarni, Addl. Executive Engineer, MSETCL, present in court.

CORAM: S. V. GANGAPURWALA, ACTING CJ. &
SANDEEP V. MARNE, J.

RESERVED ON: MARCH 3, 2023
PRONOUNCED ON: MARCH 10, 2023

JUDGMENT [Per Sandeep V. Marne, J.]:

<u>The Challenge</u>:

1. Upon being declared L-2 in the tender process, Petitioners seek disqualification of rival bidder declared L-1 (Respondent No. 8). Petitioners challenge the decision of City and Industrial Development Corporation ("**CIDCO**") declaring respondent no.8 as technically qualified to participate in the tender process and seek rejection its bid for not meeting mandatory eligibility criteria and technical qualifying requirement under the tender.

<u>Facts</u>:

2. CIDCO proposed to free up some space occupied by overhead power corridor of Maharashtra State Electricity Transmission Company Ltd. (**MSETCL**) in Kharghar Node of Navi Mumbai with twin purposes of prevention of unauthorised occupation and utilisation of that space for public purposes and for sale of plots. CIDCO therefore decided to undertake the work of conversion of overhead power cables of MSETCL to underground cable system under supervision of MSETCL. On 3rd November 2021, CIDCO published Notice Inviting Bids for carrying out the work of conversion of existing 220kV and 33kV EHV/HT O/H lines of MSETCL and MSEDCL into underground cable system in Sector-5, Kharghar Node (**NIB**). The estimated cost provided in the NIB was Rs.50,77,79,970.04. Under the NIB, it was permissible for a bidder to collaborate with an Indian cable manufacturer and also with a foreign collaborator. The last date for submission of bids was 3rd December 2021. Petitioners submitted their online bid on 3rd December 2021. Respondent no.8-BNC Power Projects Limited (**BNC**) as well as one more company, viz. M/s. KEI Industries Limited also submitted their bids. BNC executed Manufacturer Authorization Form with Sterlite Power Transmission Ltd. (**Sterlite Power**), an Indian cable manufacturer who in turn has collaborated with Taihan Cables and Solutions Company Ltd., (**Taihan**) a Korean Company, as permissible under Clause 6H of the NIB. Under arrangement proposed by BNC, Sterlite Power would manufacture cable systems of requisite technical specifications at its facility in collaboration with Taihan and BNC would execute the work of laying the cable system. CIDCO opened technical bids on 6th December 2021 and found the three bidders, i.e., petitioners, BNC and M/s. KEI Industries Ltd. to be technically qualified. The technical bids of all the bidders were uploaded by the CIDCO on e-tender portal.

3. Petitioners noticed certain deficiencies in the bid documents submitted by BNC and therefore addressed letter dated 14th December 2021 to CIDCO pointing out such deficiencies. Tender Committee met on 2nd December 2021 and recorded its minutes and held BNC eligible. Upon opening the financial bids, the financial bid of BNC was the lowest and it was shortlisted in L-1 category, whereas petitioners were shortlisted as bidder under L-2 category. Petitioners have filed the present petition challenging the decision of CIDCO in holding BNC as eligible, despite the alleged deficiencies pointed out by them in BNC's bid. It is the case of the petitioners that in case BNC is disqualified, petitioners being L-2, would be awarded the contract.

4. This Court, by its order dated 12th December 2022, recorded the statement of the learned counsel for CIDCO that the work order shall not be issued till the next date. The said statement has been continued from time to time, in pursuance of which the work order has not yet been issued to BNC.

<u>Submissions</u>:

5. Appearing for petitioners, Mr. Khandeparkar the learned counsel would submit that the respondent no.8-BNC does not fulfill material and essential terms of tender and could not have been held technically qualified by CIDCO. He has taken us through the mandatory eligibility conditions of the NIB under various clauses, particularly Clauses 6 and 7, under which the bidder, manufacturer and collaborator are mandatorily required to meet the criteria stipulated therein.

He would then take us through the bid documents submitted by BNC (filed along with compilation of documents) to demonstrate that several of the mandatory and essential requirements under tender are not met by BNC. Since we propose to refer to each of the objection raised by Petitioners while recording our findings in later part of the Judgment, we are not burdening this judgment by recording detailed submissions canvassed by Mr. Khandeparkar in that regard.

Mr. Khandeparkar would then contend that though deviation from non-essential/non-material terms of tender by tendering authority could be acceptable, deviation from material and essential terms of the tender is impermissible. In support of this contention, he would rely upon the judgments in **Poddar Steel Corporation vs. Ganesh Engineering Works & Ors.**[1], **Rashmi Metaliks Limited & Anr. vs. Kolkata Metropolitan Development Authority & Ors.**[2], **Bakshi Security and Personnel Services Private Limited vs. Devkishan Computed Private Limited & Ors.**[3] and **Central Coalfields Limited & Anr. vs. SLL-SML (Joint Venture Consortium) & Ors.**[4].

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[1] (1991) 3 SCC 273
[2] (2013) 10 SCC 95
[3] (2016) 8 SCC 446
[4] (2016) 8 SCC 622

Mr. Khandeparkar would submit that CIDCO being public authority must act in a fair, reasonable and transparent manner and ought to have scrutinized the veracity and validity of documents submitted by BNC instead of overlooking the defects and discrepancies in its bid documents. That CIDCO and MSETCL have extended a favour to BNC by deliberately ignoring the deficiencies and defects in the bid documents, thereby exhibiting arbitrariness. In support of his contention, Mr. Khandeparkar would rely upon the judgments in **Tata Cellular vs. Union of India**[5], **Siemens Public Communication Networks Private Limited & Anr. vs. Union of India & Ors.**[6], and **Uflex Limited vs. Government of Tamil Nadu & Ors.**[7].

Mr. Khandeparkar would further submit that despite the objections about discrepancies and defects in the bid documents of BNC being specifically brought to the notice of CIDCO, the same were deliberately ignored and now justifications for doing so are sought to be pleaded in the form of affidavit-in-reply. That the reasons for rejection of objections raised by petitioners which are not to be found in the minutes of meeting of tender committee cannot now be supplemented in the form of affidavit-in-reply. In support of his contention, Mr. Khandeparkar would rely upon the judgment in **Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors.**[8].

[5] (1994) 6 SCC 651
[6] (2008) 16 SCC 215
[7] (2022) 1 SCC 165
[8] (1978) 1 SCC 405

Lastly, Mr. Khandeparkar would contend that CIDCO, who is a tendering authority, has virtually abdicated its functions and delegated the power of determining the eligibility of biddres to MSETCL. That there is complete non-application of mind on the part of CIDCO while holding BNC eligible as CIDCO relied upon recommendations of the third body, i.e., MSETCL for doing so. Even that recommendation of MSETCL is faulty as mere qualification of respondent no. 8 in alleged similar work at Shendra-MIDC and Seawood-TSS would not result in its automatic qualification in the present tender in absence of any material to show similarity of tender conditions in those works.

6. Mr. Hegde, the learned senior advocate appearing for CIDCO would oppose the petition and support the decision to hold respondent no.8 technically qualified. Mr. Hegde would take us through the justifications offered with regard to each objection raised by petitioners about eligibility of BNC by inviting our attention to the additional affidavit dated 10th January 2023. He would further submit that CIDCO is fully satisfied about BNC's eligibility, who meets all essential terms and conditions of NIB. That CIDCO, being the tendering authority, is the best judge to determine whether BNC is technically qualified or not and petitioners cannot seek to substitute its own opinion in place of CIDCO's opinion in that regard. That MSETCL is ultimately going to take over installation of cable systems and that therefore, MSETCL cannot be termed as a third party for ignoring its recommendations altogether. That the Chief Engineer of MSETCL was also a member of technical committee of the tender and since MSETCL is going to supervise the work on the basis of TQR provided by it, CIDCO is justified in relying on MSETCL's recommendation about BNC being held qualified for similar works at Shendra MIDC in Aurangabad Zone and at Seawood TSS.

That the financial bid of respondent no.8 is substantially lower (-7.75%) as compared to the one submitted by petitioners (+4.5%) and that CIDCO would be in a position to save substantial amount of over Rs.6 Crore by awarding contract to BNC, who is fully qualified by meeting all the technical terms and conditions of the NIB. Mr. Hegde would place on record International Standard – IEC 62067.

Lastly, Mr. Hegde would contend that even if two interpretations are possible about BNC's eligibility, the one placed by CIDCO, being the tendering authority, would prevail over the one sought to be placed by petitioners.

7. Mr. Jagtiani, the learned senior advocate appearing for respondent no.8-BNC would also oppose the petition. He would deal with each objection raised by petitioners about BNC's eligibility and by taking us through the relevant terms and conditions of the NIB, BNC's bid documents and IEC 62067, would demonstrate as to how BNC fully complied with all the essential and mandatory conditions of the NIB. Here again, instead of recording detailed submissions of Mr. Jagtiani about each objection raised by petitioners, we would refer to the same while recording our findings thereon in the later part of the judgment.

Mr. Jagtiani would further submit that awarding of contracts being commercial function performed by CIDCO, this Court would be loath in interfering with its decision, particularly with regard to holding a particular bidder as technically qualified. He would submit that the well settled principle of impermissibility to supplement reasons through affidavit-in-reply propounded in **Mohinder Singh Gill** (Supra) would have no application to the present case where CIDCO is entitled to demonstrate before this Court as to how BNC meets all the eligibility criteria. Mr. Jagtiani would further submit that it is CIDCO who has ultimately applied its mind on technical qualifications of bidders and has not, in any manner, abdicated or delegated the function to MSETCL as sought to be alleged by petitioners. Inviting our attention to the minutes of the tender committee, he would submit that a reference was required to be made to MSETCL only on account of objections raised by petitioners. That the decision taken by CIDCO, therefore, does not suffer from the vice of non-application of mind. In support of his contention, Mr. Jagtiani would rely upon judgments of the Supreme Court in **Silppi Constructions Contractors vs. Union of India & Anr.**[9], **Agmatel India Private Limited vs. Resoursys Telecom & Ors.**[10], **Galaxy Transport Agencies, Contractors, Traders, Transports and Supplies vs. New J. K. Roadways, Fleet Owners and Transport Contractors & Ors.**[11] and **N. G. Projects Limited vs. Vinod Kumar Jain & Ors.**[12].

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9 (2020) 16 SCC 489
10 (2022) 5 SCC 362
11 2020 SCC OnLine SC 1035
12 (2022) 6 SCC 127

<u>Reasons and Analysis</u>:

8. Power corridors set up by transmission companies involve utility of large stretch of lands beneath such corridors. When such power corridor passes through an urban area, there is tendency to encroach upon public land beneath the power corridor. With the novel objective of preventing encroachment of land covered by power corridor in Sector-5, Kharghar as well as for using that land for public utilities and for plotted development, CIDCO decided to undertake the work of shift/conversion of overhead lines into underground cable system. The land freed by such conversion is to be utilized for development of plots for cultural complex, art gallery, center for performing arts as well as commercial plus residential plots in Sector 5, Kharghar, Navi Mumbai. Since overhead lines of MSETCL and MSEDCL are proposed to be converted into underground cable system, the work is to be carried out under the supervision of MSETCL. The technical specifications are also provided by MSETCL.

9. For appointing a contractor to execute the work of conversion of overhead lines of MSETCL and MSEDCL into underground cable system in Sector 5, Kharghar node, CIDCO invited NIB. NIB estimated cost of the work at Rs.50,77,79,970.04. The bidders possessing valid electrical contractor license and registered with CIDCO or with State Government of Maharashtra and its undertaking were permitted to submit their bids. Some relaxation is given in condition of registration. Since the execution of work involves laying of cables, which could be manufactured by third parties (**manufacturer**), technical eligibility criteria for manufacturer is also spelt out in the NIB, in addition to the eligibility criteria for bidders. Under the NIB, it is permissible for such Indian cable manufacturer to have technical collaboration with a foreign firm (**collaborator**) subject to submission of manufacturer authorization form to the bidder. Such collaborator is also required to meet some of the terms and conditions (Clauses B to D) in the NIB.

10. The relevant terms and conditions of the NIB are reproduced thus: -

"2) The bidder should have experience of work of **"Supply, Erection, Testing & Commissioning of 220 KV EHV underground cable work"** completed during the last 5 years.

a) One similar completed work of costing not less than the amount equal to 50% of the cost put the Bid:

OR

b) Two best similar completed works adding to a total cost of minimum 80% of the cost put to the Bid.

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3) Joint Venture/Consortiums are not permitted.

4) <u>FINANCIAL CRITERIA</u>: The Prospective Bidders will be qualified only if they have minimum financial capabilities as below: -

(A) Working Capital (Current Assets – Current Liabilities): Working Capital (Net Cash Flow) of the Prospective Bidders during last audited financial year should be greater than Rs.8.46 Crores.

(B) Profitability: Profit after Tax should be Positive for "Any Three Years" out of last five consecutive financial years. The profit shall not be negative for last two consecutive financial years.

(C) New Worth: Net worth of Prospective Bidder during last audited financial year should be greater than Rs.5.08 Crores.

(D) Average Annual Turnover: The average annual turnover of last three financial years should be equal to or greater than Rs.33.85 Crores.

NOTE:

i) The information regarding Financial Criteria and Average Annual Turn Over Certified by Chartered Account will be only considered.

ii) If bids are called between 1st April & 30th September of the year then latest audited financial year shall be a year before previous year for financial criteria (for e.g. if bids are called between 1st April 2021 & 20th September, 2021. Then latest audited financial year shall be a year before previous year for financial criteria i.e. 2019-20). However, the audited statement if submitted by the bidder for 2020-21 it will be accepted.

5) <u>BID CAPACITY CRITERIA</u>:

The Prospective Bidder will be qualified only if their available bid capacity (Certified by Chartered Account) is more than the Cost put to the Bid (For item rate percentage bid) / block estimated cost worked out by the department (for lump sum bid) of the work as per notice inviting Bid. The available bid capacity will be calculated base on the following formula:
Available Bid capacity= 1.25 x A x N – B

where,

A= Average Annual Turn Over for last Three financial years.
N = No. of years prescribed for Completion of the work.
B = Value of existing commitments and ongoing works to be completed during the period of Completion of work.

6) <u>Technical Eligibility Criteria for 220 KV Cable Manufacturer</u>:

A. The 220kV Cable manufacturer should be an Indian cable manufacturer having manufacturing facility in India for 220kV or above voltage grade.

B. Manufacturer should have experience of manufacturing & supplying of 220kV XLPE cable for at least 5 years.

C. The manufacturer should have carried out Design, Engineering, manufacturing, Type & PQ Testing on cable system as per relevant IEC along with accessories.

D. The manufacturer must have Designed, supplied, erected, tested and commissioned or supervised erection, testing and commissioning at least 10 km of 220 kV or higher voltage class EHV XLPE cable of lead/Corrugated Al./Poly Al. laminated sheath with accessories and the cable supplied by manufacturer should have been in satisfactory operation for a minimum period of 2 years.

E. All the type test and PQ Test should be within the Last 10 years.

F. Cable laying, jointing and termination shall be carried out under supervision from respective manufacturers only. For erection work, jointer of 220kV cable should be certified by accessory manufacturer.

G. The EHV cable and accessories of offered voltage class 220KV or above of size as mentioned in the scope of tender or above should have been successfully PQ & Type tested earlier. Such type test should be within last 10 years. The PQ test & type test should have been certified by any of the following National/International Accredited Laboratories.

1) CPRI, India 2) KEEMA, Holland

3) CESI, Itali 4) F.G.H., Germany

5) CERL, UK 6) EDS, France

7) Hydro-Quebec, Candada 8) KERI, Korea

9) CRIEPI, Japan 10) EDF, France

11) IPH, Germany 12) STRI, Sweden

The type test should have been conducted on the cable as well as accessories manufactured in the plant from where the manufacturer is proposing to supply the tender cable system.

H. Indian manufacturers who have established plant in India and have Technical Collaboration with a foreign firm (collaborator) are also eligible to give MAF (Manufacturer authorize form) to eligible Bidders/Contractors, provided the said Collaborator meets the experience as mentioned in clause no. B to D above provided Indian manufacturer has conducted PQ & type test as per IEC on cable system. Following documents shall be submitted by the Indian manufacturer

a. The Indian manufacturer shall submit Technical Collaboration agreement confirmation from their collaborator.

b. Indian manufacturer shall be duly authorized by collaborator to install the cable system in India.

c. The Collaborator/Parent Company/ Principals should ensure backup support for 5 years for successful operation of the offered cable and accessories.

d. PQ test & Type test for 220kV Cable conducted for cable manufactured in Indian Plant.

7) <u>Technical Eligibility Criteria for 220 KV Cable Accessories</u>:

A. The manufacturer of accessories should have designed, manufactured, types test & PQ tested as per IEC and supplied the joints & termination for 220kV or higher-class cable system in last 10 years as on the date of opening of bids.

B. Cable accessory manufacturers to give assurance that hot spares will be supplied within 10 days from the date of order and the bidder/contractor has to ensure the availability of jointer/supervisor within 10 days from date of intimation.

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NOTES:

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5) Bidders will not eligible to participate for bidding, if

i. The bidder is deemed by law unable to pay his debts as they fall due, or enters into voluntary or involuntary bankruptcy, liquidation or dissolution (other than a voluntary liquidation for the purpose of amalgamation or reconstruction), or become insolvent, or makes an arrangements with, or assignment in favor of, his creditors, or agree to carry out the bidding under a committee of inspection of his creditors, or if a receiver, administrator, trustee or liquidator is appointed over any substantial part of his assets, or if, under any law or regulation relating to reorganization, arrangement or readjustments of debts, proceedings are commenced against the bidder or resolutions passed in connection with dissolution or liquidation or if any steps are taken to enforce any security or interest over a substantial part of the assets of the bidder, or if any act is done or event occurs with respect to the bidder or his assets which, under any applicable law has a substantially similar effect to any of the foregoing acts or events, then the bidder is not eligible to participate in bidding process.

ii. Blacklisted / debarred/ convicted contractors (s) are not eligible to participate the bidding process.

Intending bidders should furnish the affidavit duly notarized on an appropriate value of stamp paper as per Sr.No.5 of NIB.”

11. Petitioners submitted their bid on 3rd December 2021. The exact details of manufacturer and collaborator, if any, in respect of petitioners’ bid are not available. However, in view of the fact that eligibility of petitioners is not questioned, such details are otherwise unnecessary. Respondent no.8-BNC submitted its bid in which Sterlite Power was shown as an Indian cable manufacturer. Along with its bid, BNC produced Manufacturer Authorization Form of Sterlite Power. The manufacturer-Sterlite Power has technical collaboration agreement for design, manufacturing, engineering and testing of 220 KV cable with Taihan Electric Wire Company Ltd., which is a company incorporated under the laws of South Korea. In support of such collaboration arrangement, a certificate dated 12th January 2021 issued by Taihan was filed along with the bid documents.

12. The technical bids were opened by CIDCO on 6th December 2021 and tender summary was published on its e-portal showing three bids to be technically compliant, namely, BNC, Universal Cables Ltd. (petitioners) and KEI Industries Limited. It appears that CIDCO also uploaded the technical bids of all three bidders on its e-tender portal. This is where petitioners undertook the exercise of examining the documents submitted by BNC in support of its technical eligibility. By their letter dated 14th December 2021, petitioners pointed out various alleged discrepancies in BNC's technical bid. Petitioners however did not choose to challenge BNC's technical qualification till opening of financial bids. Before opening of financial bids, the tender committee met on 2nd December 2021. The tender committee considered the objections raised by petitioners to BNC's bid. In its first meeting, the tender committee had decided to submit all the technical documents for scrutiny of MSETCL as the work is to be executed on behalf of the MSETCL as per their sanctioned estimate and technical specifications. It was therefore decided to include Chief Engineer EHV PC, MSETCL, Vashi Zone as member of technical committee. The views of MSETCL were accordingly obtained on technical documents, especially in the light of the objections raised by petitioners. Based on the report submitted by MSETCL, an opinion was formed by the tender committee that there was no doubt on technical requirements of Sterlite Power for manufacturing of cables as per specifications. It would be appropriate to reproduce the relevant minutes of the second Tender Committee meeting held on 2nd February, 2022, which read thus: -

> "1. During the technical scrutiny of the documents, letter is received from M/s. Universal Cables Ltd. & they have raised some technical observations on the documents submitted by M/s. BNC Power Projects Ltd. and their proposed manufacturer of 220 KV Cables M/s. Sterlite Power Transmission Ltd.
>
> ****
>
> 1. As decided in the 1st tender committee meeting the subject work is to be executed on behalf of MSETCL as per their sanction estimate & technical specifications, it is decided to forward the technical documents for scrutiny to MSETCL authorities and obtain their views on the technical documents submitted by bidders. It is also decided that the Chief Engineer EHV PC, MSETCL, Vashi Zone is to be included as the member of technical committee for the subject tender.
>
> Accordingly, the technical documents and technical observation raised by M/s. Universal Cables Ltd. were sent to Chief Engineer EHV PC, MSETCL, Vashi Zone (pls ref C/49). CE MSETCL has sent the detailed report on verification of technical bid documents of M/s. BNC Power Projects Ltd. in view of the objection raised by M/s. Universal Cables Ltd. In the report it is clarified that CIDCO has floated the tender for the subject work which is to be executed under supervision of MSETCL by using TQR provided by MSETCL. Hence the bidder

M/s. BNC Power Projects Ltd. collaboration with M/s. Sterlite Power Transmission Ltd. for 220KV cable manufacturer may be qualified as per mentioned TQR as have been qualified by corporate office, MSETCL, Mumbai for same work of 220KV Shendra MIDC under Aurangabad Zone and also, they had executed the work successfully for 220KV Seawood TSS and substation was charged on 31.03.2019 and till date working satisfactorily. Hence there is no doubt on M/s. Sterlite Power Transmission Ltd. for manufacturing of cables as per specification.

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Tender committee after reviewing the details of mandatory eligibility criteria and minimum qualifying marks as per NIB and satisfied with the clarification of the grievances received and recommended for opening of the financial bids of 3 nos. of bidders who are qualifying mandatory eligibility criteria and minimum qualifying marks as per NIB is as below.

i) M/s. KEI Industries Ltd.

ii) M/s. BNC Power Projects Ltd.

iii) M/s. Universal Cables Ltd."

13. The financial bids were opened on 4th February 2022. Thus, for a substantial period from 6th December 2021 (when technical bids were opened and uploaded) till 4th February 2022, petitioners did not challenge technical qualification of BNC, except addressing letter dated 14th December, 2021. The financial bids of the three companies are as under:

Sr. No.	**Name of Bidder**	**Quoted Percentage**	**Quoted Amount**	**Grade**
1	M/s. KEI Industries Ltd.	(+) 8.00%	Rs.54,75,16,979.593	L3
2	**M/s. BNC Power Projects Ltd.**	**(-) 7.75%**	**Rs.46,76,70,753.403**	**L1**
3	M/s. Universal Cables Ltd.	(+) 4.5%	Rs.52,97,73,373.773	L2

14. Upon opening the financial bids, petitioners realized that BNC emerged as L-1, while they came at L-2. Petitioners also went through the minutes of tender committee meeting held on 2nd February 2022, which was also uploaded on e-tender portal a day prior to opening of financial bids. Petitioners thereafter started strenuous efforts to challenge BNC's technical qualification by addressing advocate's letters dated 11th February 2022 and 22nd March, 2022 and later filed the present writ petition on 31st March, 2022.

15. Before we proceed to examine various objections raised by petitioners about technical qualification of respondent no.8, it would be appropriate to first examine the scope of judicial review in tender matters.

16. In **Tata Cellular** (Supra), the Supreme Court has summarized the principles of juridical review in tender/contractual matters as under: -

> "94. The principles deducible from the above are:
>
> (1) The modem 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.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

2. Whether the selection is vitiated by arbitrariness?"

17. In **Silppi Constructions Contractors** (Supra), the Supreme Court has held that evaluating tenders and awarding contracts are essentially commercial functions and the Court should normally be loath to interfere in contractual matters, unless a clear-cut case of arbitrariness or *mala fides* or bias or irrationality is made out. That if two interpretations are possible, then the interpretation of the author must be accepted. Paragraphs 12, 13, 14, 15, 16, 19, 20 and 25 of the judgment read thus: -

"12. In B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. (2006) 11 SCC 548 it was held that it is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefor; the same ordinarily being within its domain. Therefore, the court's interference in such matters should be minimal. The High Court's jurisdiction in such matters being limited, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

13. In Jagdish Mandal v. State of Orissa (2007) 14 SCC 517, it was held: (SCC p.532, para 22)

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. 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. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

14. In Michigan Rubber (India) Ltd. vs. State of Karnataka & Ors. (2012) 8 SCC 216, it was held that if State or its instrumentalities acted reasonably, fairly and

in public interest in awarding contract, interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

15. In Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818, it was held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision. **The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.**

16. In Montecarlo vs. NTPC Ltd. (2016) 15 SCC 272, it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. **The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.**

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness,

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

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. **The authority which floats the contract or tender, and has authored the tender documents is**

> **the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted**. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.
>
> 25. That brings us to the most contentious issue as to whether the learned single judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. We must remember that we are dealing with purely administrative decisions. **These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a state within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. The Respondent nos. 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done**."
>
> *(emphasis ours)*

18. In **Agmatel India Private Limited** (Supra), the Supreme Court held that the author of the tender document is the best person to understand and appreciate its requirements and if its interpretation is manifestly in consonance with the language of the tender document, the Court would prefer to keep restraint. In paragraphs 26 and 34, the Supreme Court has held thus: -

> "26. The above-mentioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further

> to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the Constitutional Court, that, by itself, would not be a reason for interfering with the interpretation given.
>
> 34. The High Court, while supporting its process of reasoning, has referred to such principles which, with respect, we find entirely inapposite and beyond the periphery of the question involved in the present case. As noticed, in such matter of contracts, the process of interpretation of terms and conditions is essentially left to the author of the tender document and the occasion for interference by the Court would arise only if the questioned decision fails on the salutary tests laid down and settled by this Court in consistent decisions, namely, irrationality or unreasonableness or bias or procedural impropriety."

19. In **Galaxy Transport Agencies** (Supra), the Supreme Court held that the interpretation placed by the tendering authority should not be second-guessed by a Court in judicial review proceedings. In paragraph 14, it is held as under: -

> "14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings….."

20. Having considered the contours of power of judicial review in tender and contractual matters, we shall now proceed to examine various objections raised by the petitioners about technical qualification of respondent no.8.

(I) Petitioners have objection about PQ test & Type test reports submitted by BNC. Tender Condition No.6G requires the offered cable and accessories to be successfully PQ and Type tested earlier, the type test being conducted within last

10 years. The names of laboratories whose test certificates are acceptable are also stated in Clause 6G. Type test is a short duration test (2-3 months), whereas PQ is a long duration test (upto one year). Both the tests are required to be carried out on the entire cable system, i.e., cable with accessories (joints and terminations). BNC has relied upon test reports of Central Power Research Institute (CPRI), which show that PQ test is carried out with cable of Sterlite Power and accessories of Pfisterer (Germany) and type test being carried out with cable of Sterlite Power and accessories of G&W (China). Petitioners' objection is that type test and PQ test are required to be conducted on same combination of cable and accessories and, therefore, the type test and PQ test conducted on cable systems of Sterlite Power with accessories of different brands clearly amounts to violation of mandatory condition under Clause 6G.

Mr. Jagtiani, on the other hand, has contended that tender document nowhere requires use of a particular 'brand' of accessories. What is required is mere use of accessories as per relevant IEC. He places reliance on Clause 12 of IEC 62067, relevant portion of which reads thus: -

> "12 Type tests on cable systems
>
> ****
>
> NOTE 3 Cables and accessories of similar construction are those of the same type and manufacturing process of insulation and semi-conducting screens. Repetition of the electrical type tests is not necessary on account of the differences in the conductor or connector type or material or of the protective layers applied over the screened cores or over the main insulation part of the accessory, unless these are likely to have a significant

effect on the results of the test. In some instances, it may be appropriate to repeat one or more of the type tests (e.g. bending test, heating cycle test and/or compatibility test).

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The type tests on cable components (see 12.5) need not be carried out on samples from cables of different voltage ratings and/or conductor cross-sectional areas unless different materials and/or different manufacturing processes are used to produce them. However, repetition of the ageing tests on pieces of complete cable to check compatibility of materials (see 12.5.4) may be required if the combination of materials applied over the screened core is different from that of the cable on which type tests have been carried out previously."

Thus, the tender conditions nowhere specify that the accessories used for conducting Type test and PQ test must belong to same brand. What is required are accessories of 'similar construction' and of 'same type' and 'manufacturing process of insulation and semi-conducting screens'. Thus, if cable systems (cable + accessories) are of same rated voltage group, the type test conducted using accessories of different brands can still be acceptable.

This is highly technical matter. We have still made an attempt to satisfy us about absence of prohibition in NIB for using accessories of different brands for PQ Test and Type Teat. We do not propose to delve any further in this area as CIDCO has taken a decision to accept Type test and PQ test reports submitted by BNC. Applying the ratio of judgments discussed above, we would proceed to accept the interpretation placed by the tendering authority.

(II) The second objection of petitioners is that the certificate issued by collaborator (Taihan) does not evidence that it has designed, engineered, or manufactured the required type of cables. The objection is referable to conditions in Clauses 6B, 6C and 6D of the tender document, which even collaborator is required to meet under Clause 6H.

We have perused the certificate of collaboration of Taihan dated 12th January 2021, in which Taihan has stated that the manufacturing of cables of 220 KV would be done by Sterlite Power as per design and manufacturing system and product quality of Taihan. Also relied upon is the experience certificate dated 10th October 2016 issued by the Ministry of Electricity and Water, Kuwait, showing execution of work of supply and installation of 400 KV underground power cable and accessories. BNC has thus produced experience of Taihan of execution of contract of higher voltage cable (400 KV) in Kuwait. CIDCO does not seem to have any doubt about the cables used in that project being designed, engineered, or manufactured by Taihan. Therefore, the objection deserves to be repelled.

(III) The third objection of petitioners is that the documents produced by BNC along with its bid show that it has technical collaboration with two different entities viz. Taihan Cables and Solutions Company Ltd. and Taihan Electric Wire Company Ltd. Though BNC has essentially relied upon the technical collaboration certificate issued by Taihan Electric Wire Company Ltd., petitioners have apparently noticed letter dated 24th November 2021 issued by Taihan Cables and Solutions Company Ltd., confirming technical collaboration agreement with Sterlite Power.

Mr. Jagtiani has submitted that both Taihan Cables and Solutions Company Ltd. and Taihan Electric Wire Company Ltd. are same companies and there has been a change in the name of Taihan Electric Wire Company Ltd. to that of Taihan Cables and Solutions Company Ltd. In support of his contention, Mr. Jagtiani placed on record document evidencing resolution adopted by Taihan Electric Wire Company Ltd. changing its name to Taihan Cables and Solutions Company Ltd.

We again do not wish to delve any further in this issue as petitioners have merely thrown a doubt/suspicion of existence of two different collaborator companies merely on the basis of BNC's bid documents and has not produced any concrete evidence of existence of two different companies. Petitioners have set up this case in the rejoinder which was totally absent both in the various letters submitted by them as well as the writ petition. CIDCO has not raised any doubt about collaboration between Sterlite Power and Taihan nor has arrived at a conclusion that Sterlite Power has collaborated with two different companies. Apart from one certificate dated 24th November, 2021 of Taihan Cables and Solutions Company Ltd., petitioners have not been able to produce any other document to show experience of any other collaborator company being relied upon by BNC in any manner. Therefore, we would tend to accept the submission of Mr. Jagtiani that both Taihan Cables and Solutions Company Ltd. and Taihan Electric Wire Company Ltd. are a same company.

(IV) The next objection of petitioners is that as per Clause 6G, the type test should have been conducted on the cable as well as the accessories manufactured in the plant from where manufacturer is proposing to supply the tender cable system. It is submitted that there is no evidence showing type test being conducted on the cable as well as accessories 'manufactured in the plant' from where the Sterlite Power is proposing to supply the cable system.

We do not find any merit in this objection as BNC's manufacturer-Sterlite Power has disclosed the location of its plant. There is no doubt that Sterlite Power is the manufacturer of cable systems. The Type test and PQ test on cable systems of Sterlite Power have been conducted and certified by CPRI. Therefore, the suspicion sought to be raised by the petitioners that the cable and accessories on which type test is performed is not proved to be manufactured in the plant of Sterlite Power is too far-fetched and deserves to be outrightly rejected.

(V) The next objection of petitioners is about absence of documentary evidence of Sterlite Power having any manufacturing facility. The objection does not allege absence of any manufacturing facility of Sterlite Power but highlights non-production of any 'documentary evidence' to that effect. Thus the attempt is to dig some or the other technical flaw in BNC's bid documents to oust its bid.

This objection is again baseless as CIDCO has no doubt in its mind that Sterlite Power has a manufacturing plant/factory. Address of its manufacturing plant is mentioned in the manufacturer authorization form (MAF) dated 24th November 2021 as "Sector 5, Vardhman Industrial Estate, Behind Patanjali Yogpeeth, Haridwar - 249 402, Uttarakhhand". The same is again mentioned in several other documents such as PQ and Type test reports of CPRI. The objection therefore deserves rejection.

(VI) The next objection of petitioners is non-production of any documents by respondent no.8 showing that the collaborator (Taihan) fulfills the requirement of designing, engineering and manufacturing cable system as required under Clauses 6B to 6D. That the certificate dated 10^{th} October, 2016 of Ministry of Electricity and Water, Kuwait, only certifies supply and installation and does not certify criteria of designing, engineering and manufacturing of cable.

This objection is quite similar to Objection No. II dealt with hereinabove. BNC has relied upon certificate dated 10^{th} October, 2016 issued by Ministry of Electricity and Water, Kuwait to Taihan in respect of execution of the contract for supply and installation of 400 KV underground power cable and accessories. CIDCO and MSETCL have accepted the said experience of Taihan. Petitioners cannot be permitted to undertake microscopic inquiry into that certificate of experience and seek to derive advantage of absence of the words "designing, engineering and manufacturing" in that certificate. Petitioners haven't come out with a positive case that Taihan deployed cables manufactured by another entity in execution of that project. Since CIDCO and MSETCL have accepted the said experience certificate of Taihan and since petitioners does not dispute execution of that contract by Taihan, the objection raised by them in this regard is clearly misplaced.

(VII) The next objection of petitioners is referable to Note-1 under which the bid is supposed to be accompanied, *inter alia*, by list of plants, machinery and equipments, list of works of similar nature and magnitude executed in last five years along with work completion certificate. Failure to attach the requisite documents would render the bidder not eligible for qualification of bid. It is petitioners' case that BNC did not produce any document to evidence list of plants, machinery and equipments or that it had executed work of similar nature/magnitude for last five years along with work completion certificate.

However, we find that respondent no.8 has produced "details of tools/plant and infrastructure available" with its bid, copy of which is available at pages 394 to 398 of compilation of documents filed by Petitioner It has also produced "details of experience staff employed by the bidder". So far as the list of works of similar nature/magnitude and experience certificate is concerned, BNC relied upon letter of award dated 6th January 2018 issued by MSETCL for the work of establishment of 220 KV end-bays and laying of 220 KV EHV underground power cable for 220 KV power supply for proposed railway TSS at Seawood. The work completion certificate in respect of that work dated 25th November 2021 was also submitted BNC with its bid. Thus, this objection raised by petitioners is totally misplaced.

(VIII) Petitioners allege non-compliance of technical eligibility criteria for 'cable accessories' by respondent no.8. This objection is referable to Clauses 7A and 7B of the NIB. It is alleged that BNC has not identified the manufacturer of cable accessories.

However, perusal of Type test and PQ test certificates submitted BNC would indicate the manufacturer of cable accessories as well. So far as assurance under Clause 7B is concerned, the tender document does not require any specific document to be submitted in support of such an assurance. Therefore, non-submission of document evidencing assurance under Clause 7B would not be a reason to disqualify BNC.

(IX) Petitioners allege absence of 'technical collaboration agreement', being produced along with BNC's bid documents by. However, Clause 6H of the NIB would indicate that production of "technical collaboration agreement" is not a mandatory condition. What is required to be submitted is Manufacturer Authorization Form. BNC has produced the certificate of collaboration dated 12th January 2021 issued in the name of manufacturer Sterlite Power. Therefore, this objection also deserves to be rejected.

(X) Petitioners presume that there is a joint venture/ consortium between BNC and Sterlite Power. This presumption stems out of a statement in reply filed by respondent no.8 stating that it has a consortium partner i.e., M/s Sterlite Power Transmission Ltd. By relying upon Clause 3 of the NIB, petitioners submit that joint venture consortium is specifically prohibited.

Mr. Jagtiani has, however, clarified that this is merely an infelicitous drafting error in the affidavit and that there is no such joint venture/consortium agreement between the BNC and Sterlite Power. Petitioners have failed to produce on record any such joint venture/consortium agreement between

BNC and Sterlite Power. It is common ground that the bid has been submitted by BNC in its own name and not as a joint venture/consortium with any other entity. Therefore, this objection raised merely on the basis of an error in the affidavit in reply is otherwise completely baseless.

(XI) Petitioners allege non-compliance by BNC with provisions as to financial criteria. Relying on Clause 4 of NIB, petitioners allege that BNC failed to submit audited balance-sheet certified by chartered accountant demonstrating fulfillment of financial criteria. That BNC filed merely a turnover certificate certified by the charter accountant.

In paras 7(g) and (i) of its affidavit in reply, respondent no.8 has asserted that all financial statements have been submitted, which are certified and audited. We find various chartered accountant certificates being submitted along with the bid by respondent no.8, which include turnover certificate and net-worth certificate dated 2nd December 2021 as well as certificate dated 20th August, 2021 of Sterlite Power showing turnover/net-worth details. The auditor's reports are also submitted along with BNC's bid, from which various details such as working capital, profitability etc. could be gathered. CIDCO has considered all these documents and has satisfied itself about the financial criteria being met by BNC. We do not propose to sit in appeal over the said opinion of the CIDCO. The objection, therefore, deserves rejection.

(XII) Petitioners allege non-application of mind by CIDCO and handing over the function of determining technical qualification of BNC to MSETCL. However, perusal of the minutes of the second tender committee meeting dated 2nd

February 2022 would indicate that a mere reference was made to MSETCL about objections raised by petitioners with regard to BNC's qualifying the technical criteria in the bid. CIDCO has stated in its affidavit, and it is also recorded in the minutes of the tender committee that the work is to be executed by CIDCO on behalf of MSETCL and as per sanctioned estimate and technical specifications of MSETCL. That the work would be executed under the supervision of MSETCL as per their TQR. It is because of these reasons that CIDCO thought it appropriate to obtain views on objections raised by petitioners. We are of the view that by doing so, it cannot be contended, by any stretch of imagination, that CIDCO has either abdicated its functions or delegated the power to determine the eligibility of bidders to MSETCL. In fact, the minutes of the tender committee meeting show that the scrutiny of documents as well as consideration of mandatory eligible criteria and evaluation of marks is undertaken by tender committee of CIDCO. It is not done by MSETCL. Therefore, the objection raised by petitioners is completely misplaced and deserves to be rejected.

(XIII) Petitioners allege violation of integrity pact of respondent no.8 on account of the fact that BNC faced debarment order dated 7th May, 2018 of MSETCL, under which it was debarred from participating in future tenders of MSETCL for one year. It is contended that since the debarment period operated for one year i.e., upto 7th May 2019, it is covered by 'previous transgressions occurred in the last three years' of BNC's integrity pact. While BNC contends that the 'debarment order' dated 7th May 2018 was beyond the period of three years of the date of issuance of NIB, petitioners contend that the 'debarment period' fell within such three years' period. Both CIDCO and MSETCL (which issued debarment order) have decided not to disqualify BNC on the basis of the debarment order dated 7th May 2018. Whether the date of passing of debarment order (7th May 2018) is to be considered or whether the debarment period (7th May 2018 to 6th May, 2019) is required to be taken into consideration is a matter of interpretation. The tendering authority has already interpreted the debarment order as not to constitute disqualification of BNC. We do not wish to replace such interpretation of the tendering authority with that of the petitioners. Therefore, this objection also deserves rejection.

(XIV) It is also contended that BNC is held technically qualified only because it has been held qualified in a similar tender/work of MSETCL at Shendra-MIDC and Seawood-TSS. That the exact terms and conditions of those tenders are unknown. However, on perusal of the entire records of the case, we are satisfied that BNC cannot be said to be lacking in any material requirements of the tender. MSETCL has merely opined that BNC has been held eligible for execution of similar works of laying underground 220 kV cable systems at Shendra-MIDC (Aurangabad) and Seawood-TSS. This however does not mean that BNC is held technically qualified for the present tender only for that reason. Its qualification in similar tenders floated by MSETCL is considered just as an additional factor to deal with the objections raised by Petitioners.

21. We, therefore, find all objections raised by petitioners about BNC's technical qualifications to be totally unfounded.

Even if some minor aberrations/ deviations can still be proved by undertaking a deeper scrutiny, this Court would not interfere in the decision of tendering authority in its power of judicial review. Petitioners have contended that the justifications sought to be given by CIDCO in support of BNC's technical qualification are after thought and applying the settled principle in **Mohinder Singh Gill** (Supra), such reasons sought to be subsequently supplemented in the form of affidavit in reply, deserve to be rejected. However the principle propounded in **Mohinder Singh Gill** (Supra) would essentially operates in relation to an administrative decision and would possibly have no application to a decision taken in contractual matters. In fact, in **Silppi Constructions Contractors** (Supra), the Supreme Court has held that while rejecting a tender, the authority inviting tender is not required to give reasons, even if it is a State within the meaning of Article 12 of the Constitution. That such decisions are neither judicial nor quasi-judicial. It has further held that if reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. That the respondents in that case were entitled to give reasons in the counter to the writ petition. Thus, the objection raised by petitioners about justifications sought to be given in affidavit in reply of CIDCO deserves to be repelled.

22. We must also bear in mind that the financial bid of the petitioners is for Rs. 52,97,73,373.773, which is way higher than BNC's financial bid of Rs. 46,76,70,753.403. There is a gap of over Rs.6 Crores which the public authority like CIDCO would be able to save by awarding contract to BNC. Even after undertaking detailed scrutiny to some extent in respect of each objection of the petitioners, we are not able to arrive at a conclusion that there has been any arbitrariness, bias or irrationality in the decision taken by the CIDCO. Reliance of various judgments by Mr. Khandeparkar on permissibility by this court to interfere in contractual and tender matters involving arbitrariness or irrationality have therefore no application to the facts of the present case.

23. We cannot sit as an Appellate Authority over the decision of the respondents/CIDCO. The evaluating committee consists of experts. They are the best judge to consider the compliance of technical and financial conditions. We would be more concerned with due adherence to decision making-process. In this case, the decision-making process cannot be faulted.

24. MSETCL has also filed its affidavit dated 2nd December 2022, referring to the letter dated 23rd December, 2021 of its Chief Engineer, EHV PC – O&M, Zone Vashi, which reads thus:-

> "4. I say that vide letter no. CIDCO/CE (NMIA)/2021/3052 dated 20/12/2021 CIDCO referred to respondent no.6 and 7 herein for verification of technical bid documents of Respondent No.8 in view of objection raised by the Petitioner. I say that the Chief Engineer, EHV PC-O&M/ Zone/VSH/EE/Tech/02947 dated 23/12/2021 responded to the Chief Engineer (NMIA) CIDCO with observation and recommendation as reproduced as under `*considering above observation this office has taken advise from corporate office because, corporate office has already finalized the tender for same work for 220 KV Shendra MIDC under Aurangabad Zone, where as M/s BNC Power Projects Ltd in collaboration with M/s Sterlite Power Transmission Ltd.*

for 220 KV Cable manufacturer has qualified as per below TQR.'

"2.1.1 (C) The EPC agency not meeting at 2.1.1 (A) above i.e., who is not manufacturer of cable or accessories can also participate as a sole bidder with the undertaking from cable & accessories manufacturer, who meets the criteria as mentioned at 2.1.2. The bidder should also have experience of supply, laying, joining, termination & commissioning of aggregate length of 10 Ckt Kms (3Ph Ckt Kms) of 220 Kv and above EHV Cable of size as mentioned in the scope of tender or above with accessories and the same should be in satisfactorily operation for period of 2 years as on the date of bid opening. In case the EPC bidder shall submit the letter of undertaking and scan copies of original documents meeting the qualifying requirement mentioned in clause no 2.1.2 from the cable manufacturer. The EPC Bidder shall be solely responsible for the quality of the cable as well as accessories."

As such CIDCO has floated the tender for the same work which is to be executed under supervision of MSETCL by using TQR provided by MSETCL. Hence considering the above facts the bidder M/s : BNC Power Projects Ltd. in collaboration with M/s Sterlite Power Transmission Ltd. for 220 KV Cable manufacturer may be qualified as per above mentioned TQR as have been qualified by corporate office, MSETCL, Mumbai for same work of 220 KV Shendra MIDC under Aurangabad Zone and also, they had executed the work successfully for 220 KV Seawood TSS , which is charged on 31.03.2019 and till date working satisfactorily.

This is for your information and further decision at your end."

25. MSETCL was consulted by CIDCO, both on account of the fact that the project has been undertaken by CIDCO on behalf of MSETCL as well as execution of the same under supervision of MSETCL. MSETCL's Chief Engineer was also a part of technical committee. MSETCL has also satisfied itself about the technical qualification of respondent no.8. CIDCO has, in fact, acted more than in a fair manner by inviting views of MSETCL on objections raised by petitioners with regard to the alleged non-meeting of technical criteria by BNC. Far from holding such an action to be in any manner erroneous, we find the same to be absolutely fair and transparent.

26. Resultantly, we do not find any error being committed by CIDCO in holding respondent no.8-BNC to be technically qualified. The writ petition is devoid of merits. It is dismissed without any order as to costs.

(SANDEEP V. MARNE, J.) **(ACTING CHIEF JUSTICE)**

27. At this stage, learned counsel for the petitioners seeks continuation of the interim order passed on 12th December, 2022.

28. Considering the fact that the interim order was operating, the same is continued for a period of two weeks from today. Needless to state that on the lapse of two weeks, the said interim protection shall come to an end.

(SANDEEP V. MARNE, J.) **(ACTING CHIEF JUSTICE)**

PRAVIN DASHARATH PANDIT

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Date: 2023.03.10 18:54:06 +0530