

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 16th FEBRUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 14388/2022 & CM APPLs. 43907/2022, 44578/2022, 44579/2022, 44603/2022**

KEC INTERNATIONAL LIMITED

..... Petitioner

Through: Mr. Jayant Mehta, Senior Advocate with Mr. Gaurav Tanwar, Ms. Shreya Jain, Ms. Kaveri Rawal, Ms. Shivani Purohit and Mr. Sandeep Mittal, Advocates.

versus

WESTERN RAILWAYS, & ANR.

..... Respondents

Through: Mr. Chetan Sharma, Additional Solicitor General with Mr. Vikrant Goyal, Mr. Amit Gupta, Mr. Saurabh Tripathi, Mr. Rishav Dubey and Mr. Sahaj Garg, Advs. for Western Railways.

Mr. Atul Nanda, Senior Advocate with Ms. Rameeza Hakeem, Mr. Martand Singh, Ms. Vartika Aggarwal, Mr. Jatin Sehgal, Mr. Ashish Garg and Ms. Ojaswini Rohatgi, Advocates for R-3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant writ petition has been filed under Article 226 of the Constitution of India, 1950, seeking the quashing of the process of re-

opening of Financial Bids as indicated in communication dated 06.10.2022 pertaining to Request for Proposal for Bid/Package No. RTM-NRD-DyCE-C-EPC-02 dated 30.03.2022 [revised on 09.06.2022]. The writ petition further prays for directions to the Respondents to act in terms of the RFP and rely on the results of the Financial Bid which have already been declared, and therefore, declare the 'Selected Bidder'.

2. The facts, in brief, leading to the instant petition have been stated to be as under:

- a) On 09.06.2022, the Respondent No.1, i.e. Western Railways, floated a Request for Proposal for "*Engineering, Procurement and Construction (EPC) Tender for Civil Engineering Works of Doubling of Track in Mid-Sections between Dalauda (305.15 kms) to Ratlam (374.46 kms) Stations of Ratlam Division of Western Railway in connection with Nimach – Ratlam Doubling Project*". The last date for submission of bids was 25.07.2022 and the estimated cost of project is Rs. 260.88 crores.
- b) Clause 1.2.1 of the RFP notes that single stage two packet system is to be adopted for selection of the bidder. The first stage is the "Technical Bid" which involves the assessment of the technical capacity of the interested parties and whether the documents submitted are in accordance with the RFP. The second stage pertains to the opening of the "Financial Bid" of the bidders who have qualified in the Technical Bid.
- c) It is stated that seven bidders, including the Petitioner herein, submitted their bids well before the last date for submission of bids. Thereafter, a detailed evaluation of the Technical Bids was carried out, and five out of seven bidders (including the

Petitioner herein) were considered eligible on 01.08.2022. However, the bid of one MBPL PGIPL JV was rejected and the said entity did not challenge the disqualification or make any representation towards the same. The Financial Bids of the technically qualified bidders were opened on the e-tendering portal (IREPS) on 05.09.2022 and the Petitioner herein was found to be L1 (inter-se rank). It is stated that the techno-commercial tabulation recording the same was obtained/downloaded by the Petitioner on 05.09.2022.

- d) Post opening of the Financial Bid and price discovery, a letter bearing No.WNC-623-0-EPC Policy/No.E71359 dated 22.09.2022 was issued by Respondent No.1 with regard to the evaluation of the Technical Capacity of a bidder. The letter noted that there was a confusion pertaining to the consideration of audited/unaudited balance sheets and issued the following clarification:

"Sub: Provisions in RFP regarding evaluation of "Technical Capacity".

Ref: Railway Board letter No. 201810E-VCT/36-EPC Contract Policy Pt-I Dated 20.12.2021. i

In RFP of the EPC Tenders, there is confusion regarding considering audited/unaudited balance sheets while evaluating "Technical Capacity".

With reference to Para 12 of Annex IV of Appendix IA of RFP of the EPC tenders, it is clarified that for calculating 'Technical Capacity', if certified by Statutory Auditor or its respective clients, the

amounts received in each eligible project in the Financial Year immediately preceding the Bid due date, shall be considered in the prescribed format even if the balance sheet is unaudited for that particular year.

This shall be followed for all future EPC Tenders including those under consideration.

This has approval of CAO(C)"

- e) It is stated that on 06.10.2022, around 6:00 PM, the Petitioner discovered on the IREPS portal that the new Financial Bid closing date/time was 10.10.2022 at 12:00 PM. Being aggrieved by the re-opening of the Financial Bid, the Petitioner submitted a detailed representation to the Respondent No.1 requesting to not reopen the Financial Bid as the same would amount to gross violation of the terms and conditions of the RFP as well as the Manual for Procurement of Works.
- f) Apprehending that the Respondents would carry out the re-opening of Financial Bid despite the representation of the Petitioner, the instant writ petition has been filed seeking directions to the Respondents to put an end to the re-opening exercise being conducted by the Respondents and to act in terms of the RFP. It is stated that the writ petition was mentioned before this Court on 10.10.2022 and this Court had directed for its listing on 11.10.2022. It is stated that the Petitioner immediately sent an email to the Respondent No.1 intimating them about the proceedings before this Court. It is stated that without responding to the emails of the Petitioner, around 12:00 PM on the same day itself, i.e. 10.10.2022, the Respondent No.1

revised the Financial Bid and declared MBPL PGIPL JV as the new L1 bidder and the Petitioner's ranking as L1 was altered to that of L2.

- g) Consequently, C.M. No. 44577/2022 under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure, 1908, was filed seeking permission to amend the writ petition filed, along with placing on record amended memo of parties. The same has been allowed by this Court *vide* Order dated 19.10.2022 and MBPL PGIPL JV has been impleaded as Respondent No.3 in the instant writ petition.

3. Mr. Jayant Mehta, learned Senior Counsel appearing on behalf of the Petitioner, submits that the reopening of the Financial Bid is grossly prejudicial to the interest of the Petitioner as well as the other bidders whose bid prices and inter-se ranks have already been disclosed. He states that Respondent No.1 has thrown the principles of fair play and transparency to the winds and is violating the provisions of the RFP. He draws the attention of this Court to Clause 1.2.7 and submits that the lowest bidder shall be the selected bidder, and in case the lowest bidder withdraws or is not selected for whatsoever reason except the reason mentioned in Clause 2..1.12 (e), the bidding process must be annulled and fresh bids must be invited. He also places reliance on Clause 3.3.3. Mr. Mehta submits that re-opening of bids, as has been done by Respondent No.1, is not envisaged by the RFP. Mr. Mehta states that Clause 3.3.3 (iv) of the Manual for Procurement of Works notes that technically non-compliant bidders should be returned unopened to the respective bidders.

4. The learned Senior Counsel cites Clause 3.1.9 to submit that the said clause notes that once the Technical Bids are evaluated, a list of technically

responsive bidders will be notified and their Financial Bids will be subsequently opened. He states that the clause explicitly observes that the queries and clarifications posed by those bidders whose bids are not technically responsive will not be entertained by the Respondent No.1 He submits that Respondent No.3 had been disqualified on the basis of being found to be not technically responsive and no problem was presented before the authorities regarding this assessment and disqualification. Further reliance is placed on Clauses 2.19 and 3.2 to submit that only the Financial Bids of the technically responsive bidders could be opened and that opening the bid of Respondent No.3, despite their bid not being technically responsive, is against the RFP as there is no provision allowing for the same.

5. The learned Senior Counsel submits that the clarification dated 22.09.2022 issued by Respondent No.1 is contrary to the terms of the tender and it was only meant to favour Respondent No.3. He refers to Clause 3.1.6.2 to state that the once a bidder is rejected for being non-responsive, then no request for alteration, modification, substitution or withdrawal can be entertained by the tendering authority with respect to that bid. He further refers to Clause 2.9 of the RFP to submit that while modification of the RFP is possible, but any such modification must be issued prior to the bid due date in the form of an addenda which will be hosted on the IREPS portal. Mr. Mehta submits that the “General Practice” of not considering unaudited balance sheets has been miscommunicated as the consideration of such unaudited balance sheets had been done in the case of other bidders prior to 05.09.2022 or 22.09.2022. He states that the unaudited balance sheets of Respondent No.3 had not been inadvertently disregarded as is claimed by the Respondents, but it was due to technical disqualification of Respondent

No.3 on the basis of other parameters, i.e. non-submission of information in the format at Annex-IV of Appendix-IA.

6. Mr. Mehta, appearing on behalf of the Petitioner, submits that the actions of Respondent No.1 betrays arbitrariness and illegality, and so violative of the settled law that it warrants the interference of this Court is by way of judicial review [Reference made to Afcons Infrastructure v. Nagpur Metro, (2016) 16 SCC 818, Tata Cellular v. Union of India, (1994) 6 SCC 651, and Union of India v. Dinesh Engineering Corporation, (2001) 8 SCC 491]. He states that the Petitioner is being unjustly deprived of the rights accrued by being declared as L1 in conformity of the terms and conditions of the RFP, and that being the State, the reasonability of the Respondent No.1's decision-making process requires to be reviewed. He further submits that the declaration of Respondent No.3 as L1 was done in a surreptitious manner and was not displayed on the portal, and that there was also no publication of an amended list of technically responsive bidders. He, thus, concludes his submissions on the note that the decision of Respondent No.1 to reopen the bid must be set aside on the grounds of infringing the tenets of Article 14 of the Constitution of India.

7. *Per contra*, Mr. Chetan Sharma, learned ASG appearing for Respondents No.1 and 2, submits that the tenders were floated under bid process management by M/s Konkan Railways Corporation Limited and that a total of five corrigenda were issued with respect to the RFP with the same incorporating all replies and pre-bid queries of the bidders, and thus, being in the knowledge of all bidders. He states that the technical bid was opened on 01.08.2022 and the evaluation of the "Technical Threshold Capacity" by the Tender Committee was done in accordance with Clause 2.2.2.1(i) and in terms of the supporting documents contained in Clause 2.2.2.6 read with

Annex-II and Annex-IV of Appendix IA. He states that these clauses do not enumerate a specific requirement for audited balance sheets. He further adds that evaluation of Financial Capacity under Clause 2.2.2.2 must be done as per documents submitted under Clause 2.2.2.7 which requires audited annual reports. However, if the audited annual reports are not available, then an undertaking to the same must be given by the bidder and the statutory auditor shall certify the same.

8. Mr. Sharma submits that the calculation of Respondent No.3's Threshold Technical Capacity by the Tender Committee was found to be Rs. 641.842 crores despite the same having been submitted to be Rs. 811.38 crores and with the minimum requirement for the same being Rs. 652.21 crores. He states that the Tender Committee had noted that the difference in calculation arose as Respondent No.3 had taken into account values of unaudited payments which was contrary to the requirements of Clause 2.2.2.7. The relevant extract of the 1st Tender Committee Recommendations dated 02.09.2022-03.09.2022 is as follows:

"Para 6.4.6 It is seen that the bidder M/s MBPL-PGIPL (JV)-JHANSI has submitted the Eligible Projects executed falling under Category-3 as per Para 2.2.2.4 & 2.2.2.5 (ii) of RFP. However, the JV has Threshold Technical Capacity (T) of Rs.641.842 Crs which is less than the required Threshold Technical Capacity of Rs 652.21 Crs (2.5 x NIT value of Rs.260.88 Crs) and hence, does not fulfil the criterion of "Threshold Technical Capacity" as per clause 2.2.2.1 (i) of REP."

9. The learned ASG submits that, thus, Respondent No.3 was found to not fulfil the required Threshold Technical Capacity of Rs. 652.21 crores and it was solely for this reason that it was found to not be technically

responsive. He submits that it was only thereafter that the clarification letter dated 22.09.2022 was issued with regard to the consideration of audited/unaudited balance sheets while evaluating Technical Capacity which stated that if an amount provided in the prescribed format was certified by a statutory auditor or its respective clients, it would be taken into consideration even if the balance sheet was unaudited for that particular year. Furthermore, this clarification was to be applicable to all future EPC tenders, including those under consideration. Accordingly, the recommendations preferred by the Tender Committee were to be reassessed in light of the letter dated 22.09.2022 and revised recommendations were to be submitted to the Competent Authority, i.e. CAO (C) CCG, Western Railways.

10. The learned ASG submits that the Tender Committee, after holding supplementary proceedings in wake of the letter dated 22.09.2022, came up with recommendations dated 3.09.2022/04.10.2022 which observed that during the first round of evaluation of technical capacity, only audited contractual receipts had been considered, and that now, in view of the letter dated 22.09.2022, technical bids of all offers would need to be considered again. The learned ASG argues that no special treatment was given to Respondent No.3 and that the ascertainment of Respondent No.3 as technically responsive was only in view of the clarification dated 22.09.2022 and that no bid parameters were affected or changed as has been contended by the Petitioner. He states that once Respondent No.3 was found to be technically responsive, its financial bid was opened at noon of 10.10.2022 and the price quoted by it, i.e. Rs. 2,11,31,57,997.13/-, was found to be the lowest.

11. Mr. Sharma further states that being a part of public works, it is incumbent upon the State to execute the tender with the most competitive price offered by technically compliant bidders, and that the price quoted by the Petitioner was significantly higher than that of Respondent No.3. Mr. Sharma concludes his submissions on the note that being a crucial project, the strict timeline of 2025 must be adhered to and any delay will cause heavy losses to the public exchequer.

12. Mr. Atul Nanda, learned Senior Counsel appearing on behalf of Respondent No.3, argues that the whole issue revolves around the erroneous calculation by Respondent No.1 of Respondent No.3's 'Threshold Technical Capacity'. He states that the calculation of threshold technical capacity as per Clause 2.2.2.1(i) does not require audited balance sheets and that only certified balance sheets were to be submitted by the bidders as per Clause 2.2.2.6 (iii) read with Para 12 of the Annex. IV of Appendix IA. He submits that the Tender Committee had mistakenly applied the requirement of Clause 2.2.2.7 (i), which pertains to evaluation of Financial Bid, and had disregarded the terms of the RFP which did not require audited balance sheets for calculation of threshold technical capacity.

13. Mr. Nanda submits that the clarification letter dated 22.09.2022 was only a course correction on the part of Respondent No.1 and once the clarification was adopted, Respondent No.3 was found to be technically responsive. He states that the assertion on the part of the Petitioner that the tender is being awarded to a technically disqualified bidder is egregious and contrary to the structure of the tender. He further states that Respondent No.1 was well within its power, as envisaged by Clauses 2.8.3 and 6.2 of the RFP, to issue the clarification. He states that there was no favouritism that

had been demonstrated by Respondent No.3, in fact, the Respondent No.3 had been wrongly disqualified earlier.

14. The learned Senior Counsel appearing for Respondent No.3 relies upon Clauses 2.2.2.1 (i), 2.2.2.4 (i) and (ii), and Clause 2.2.2.1 (ii) to submit that Respondent No.3 clearly possessed the minimum requirements for the threshold technical capacity. He further states that Clause 2.2.2.6 read with Annex. II and IV of Appendix IA of the RFP stipulate the documents that are required to be looked into whilst assessing the technical capacity of a bidder and that there was no requirement for audited balance sheets under Clause 2.2.2.6. He states that accounts verified by a statutory auditor would suffice and the Respondent No.3 was in possession of the same. Mr. Nanda further submits that with Rs. 652.21crores being the minimum requirement, when the Tender Committee followed the terms of the RFP in wake of the clarification letter dated 22.09.2022, the correct value of Respondent No.3's technical capacity was found to be Rs .789.95 crores. It was only then that the Financial Bid of Respondent No.3 was opened and the price quoted was found to be Rs. 7.5 crores lower than that of the next lowest bidder, i.e. the Petitioner herein.

15. Mr. Nanda has lastly cited Ratnagiri Gas and Power Prime Ltd. v. RDS Projects Limited and Ors., (2013) 1 SCC 524 and Gulam Mustafa and Ors. v. The State of Maharashtra, (1976) 1 SCC 800, to submit that allegations of *mala fide* against the State are easily made, but are difficult to make out, and they are the last refuge of the losing litigant. He states that the actions of Respondent No.1 in awarding the contract to Respondent No.3 are not a sign of favouritism in any manner as the erroneous disqualification of Respondent No.1 by the Tender Committee at the first instance only

showcases that it was Respondent No.3 who had been made to face any form of difficulty.

16. Heard Mr. Jayant Mehta, learned Senior Counsel appearing for the Petitioner, Mr. Chetan Sharma, learned ASG, and Mr. Atul Nanda, learned Senior Counsel appearing for Respondent No.3, and perused the material on record.

17. At the outset, it is necessary to reproduce the relevant clauses of the RFP which have a bearing on the instant writ petition. The same have been listed as follows:

"1.2.6 Bids will be evaluated for the Project based on the lowest cost required by a Bidder for implementing the Project (the "Bid Price"). The total time allowed for completion of construction under the Agreement (the "Construction Period") and the period during which the Contractor shall be liable for rectification of any defect or deficiency in the Project after completion of the Construction Period (the "Defect Liability Period") shall be pre-determined and are specified in the draft EPC Agreement forming part of the Bidding Documents.

In this RFP, the term "Lowest Bidder" shall mean the Bidder who qualifies the Technical Bid criteria (Qualification Stage) and is quoting the lowest Bid Price, subject to the provisions of Clause 1.2.7, the Project will be awarded to the Lowest Bidder.

1.2.7 Generally, the Lowest Bidder shall be the selected Bidder. In case such Lowest Bidder withdraws or is not selected for whatsoever reason except the reason mentioned in Clause 2.1.12/ e, the Authority shall annul the Bidding Process and invite fresh Bids.

2.19 Correspondence with the Bidder Save and except as provided in this RFP, the Authority shall not entertain any correspondence with any Bidder in relation to acceptance or rejection of any Bid. However, the Authority would display the result of technical evaluation on the web portal for 7 days including reasons for non- responsiveness, if any, and the financial Bid will be opened thereafter.

3.1.6.1 As a first step towards evaluation of Technical Bids, the Authority shall determine whether each Technical Bid is responsive to the requirements of this RFP. A Technical Bid shall be considered responsive only if: (a) Technical Bid is received online as per the format at Appendix-IA including Annexure I, II, III, IV and V.....;

3.1.6.2 The Authority reserves the right to reject any Technical Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Bid.

3.1.7 In the event that a Bidder claims credit for an Eligible Project, and such claim is determined by the Authority as incorrect or erroneous, the Authority may reject/correct such claim for the purpose of qualification requirements.

3.1.8 The Authority will evaluate the Technical Bids for their compliance to the eligibility and qualification requirements pursuant to clause 2.2.1 & 2.2.2 of this RFP.

3.1.9 After evaluation of Technical Bids, the Authority will publish a list of technically responsive Bidders whose Financial Bids shall be opened. The Authority shall notify other Bidders that they have not been technically responsive. The Authority will not entertain

any query or clarification from Bidders who fail to qualify.

3.2 Opening and Evaluation of Financial Bids The Authority shall inform the venue and time of online opening of the Financial Bids to the technically responsive Bidders through e-procurement portal and e- mail. The Authority shall open the online Financial Bids of the technically responsive Bidders only on scheduled date and time in the presence of the authorised representatives of the Bidders who may choose to attend. The Authority shall publicly announce the Bid Prices quoted by the technically responsive Bidder. Thereafter, the Authority shall prepare a record of opening of Financial Bids.

3.3 Selection of Bidder

3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.1.6 and who quotes lowest price shall be declared as the selected Bidder (the "Selected Bidder").

3.3.2 In the event that two or more Bidders quote the same Bid Price (the "Tie Bids"), the Authority shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.

3.3.3 In the event that the Lowest Bidder is not selected for any reason except the reason mentioned in Clause 2.1.12 (e), the Authority shall annul the Bidding Process and invite fresh Bids.

3.3.4 After selection, a Letter of Acceptance (the "LOA") shall be issued in duplicate, by the Authority to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in

acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder and Original copy of Joint Venture/Consortium Agreement is/are not received by the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA

3.3.5 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Bidder to submit Performance Security within the period prescribed/extended by Authority and then execute the Agreement within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the Agreement.

3.3.6 The Bid security of other than selected Bidders shall be returned within 7 working days of issue of LOA. The Authority shall be responsible to return the Bid Security, as above, and the Bidders shall not be required to ask for the same.

3.3.7 In case, Selected Bidder is Consortium, then Selected Bidder have to deposit the original copy of Consortium Agreement duly registered as per prevailing Law within 45 days of the receipt of the LOA to Authority.

3.3.8 In case, Selected Bidder is a Joint Venture, then on issue of LOA, the Joint Venture Agreement between members of the Joint Venture to whom work has been awarded, with the same shareholding pattern as was declared in the Joint bidding agreement document submitted along with RFP, shall be got registered before the Registrar/Sub- Registrar under “The Indian Company Act-2013 (in case of Company) or before the Registrar/Sub- Registrar under the “ The Indian Partnership Act-1932 (in case of Partnership firm) or

under LLP Act-2008 (in case of LLP) and deposit the Original copy of Joint Venture Agreement within 45 days of the receipt of the LOA to Authority.

3.4 Contacts during Bid Evaluation Bids shall be deemed to be under consideration immediately after they are opened and until such time the Authority makes official intimation of award/ rejection to the Bidders. While the Bids are under consideration, Bidders and/ or their representatives or other interested parties are advised to refrain, save and except as required under the Bidding Documents, from contacting by any means, the Authority and/ or their employees/ representatives on matters related to the Bids under consideration.

2.2.2.1 Technical Capacity- For demonstrating Technical Capacity and experience (the “Technical Capacity”), the Bidder shall, over the past 5 (five) Financial Years preceding the Bid Due Date,

(i) Have received payments for construction of Eligible Project(s) or has undertaken construction works by itself in a PPP project, such that the sum thereof, as further adjusted in accordance with clause 2.2.2.4 (i) & (ii), is more than 2.5 (two and half) times the Estimated Project Cost (the “Threshold Technical Capacity”).

Provided that at least one fourth of the Threshold Technical Capacity shall be from the Eligible Projects in Category 1 and/ or Category 3 specified in Clause 2.2.2.4 (i) & (ii)

(i) Undertaken at least one Eligible Project of Railway Sector as mentioned in clause 2.2.2.4/iii of value of not less than [35% (thirty-five) per cent] of the Estimated Project Cost and have received payments for not less than 75 (seventy-five) per cent value of such project

Note: - For composite works of new lines, Gauge Conversion, Doubling, 3rd line, 4th line etc. with Railway electrification and/or signalling and telecommunication works

2.2.2.2 Financial Capacity: The Bidder shall have a minimum Net Worth⁴ (the “Financial Capacity”) of Rs 13,04,41,851.71/- (5% of the tender value) at the close of the preceding Financial Year.

2.2.2.6 Submission in support of Technical Capacity

(i) The Bidder should furnish the details of Eligible Experience for the last 5 (five) Financial Years immediately preceding the Bid Due Date.

(ii) The Bidder must provide the necessary information relating to Technical Capacity as per format at Annex-II of Appendix-IA.

(iii) The Bidder should furnish the required Project-specific information and evidence in support of its claim of Technical Capacity, as per format at Annex - IV of Appendix-IA.

2.2.2.7 Submission in support of Financial Capacity

(i) The Technical Bid must be accompanied by the Audited Annual Reports of the Bidder (of each member in case of a Consortium/Joint Venture and of associates if any) for the last 5 (five) Financial Years, preceding the year in which the Bid is submitted.

(ii) In case the annual accounts for the latest financial year are not audited and therefore the Bidder cannot make it available, the Bidder shall give an undertaking to this effect and the statutory auditor shall certify the same. In such a case, the Bidder shall provide the Audited Annual Reports for 5 (five) years preceding the

year for which the Audited Annual Report is not being provided.

(iii) The Bidder must establish the minimum Net Worth specified in Clause 2.2.2.2, and provide details as per format at Annex-III of Appendix-IA.

6.2 The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;

(a) Suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;

(b) Consult with any Bidder in order to receive clarification or further information;

(c) Retain any information and/ or evidence submitted to the Authority by, on behalf of, and/ or in relation to any Bidder; and/ or

(d) Independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Bidder."

18. The simple contention of the Petitioner herein is that once the tendering authority had declared its L1 bidder after opening of the Financial Bid, it did not have the authority or the legal basis to re-evaluate the technical bids and thereafter re-open the Financial Bid. It has been submitted that re-opening of the Financial Bid exposes gross prejudice against the Petitioner and betrays the Respondent No.1's attempt to allow the backdoor entry of Respondent No.3 which had been categorically disqualified on the

parameters of technical qualification. Further, all actions taken by the Respondent No.1 after declaration of the L1 bidder, including the clarification letter issued on 22.09.2022, are illegal and arbitrary in nature, and deserve to be reviewed by way of judicial interference.

19. The material on record reveals to this Court that the Tender Committee for the present RFP comprises of i. CE (C) III-CCG, ii. FA & CAO (C) II – CCG, and iii. CEE (C) – CCG, which are persons nominated by the Competent Authority. It was this Tender Committee that was in charge of evaluating the technical capacity of the bidders as per Clause 2.2.2.1(i) and in terms of the supporting documents contained in Clause 2.2.2.6 read with Annex-II and Annex-IV of Appendix IA, and neither of those clauses mention a specific requirement for audited balance sheets. However, for evaluation of Financial Capacity, Clauses 2.2.2.2 and 2.2.2.7 state that if there are reports that are unaudited, they shall be considered if an undertaking is given by the bidder and the statutory auditor shall certify the same.

20. The material on record demonstrates that the minimum requirement for the threshold technical capacity was Rs. 652.21 crores and that the threshold technical capacity of Respondent No.3 that had been submitted was Rs. 811.38 crores. However, the Tender Committee calculated the threshold technical capacity of Respondent No.3 to be Rs. 641.842 crores, below the minimum requirement of Rs. 652.21 crores. It was observed by the Tender Committee that the reason for the difference in calculation was due to the fact that, contrary to what was stipulated in Clause 2.2.2.7, the Respondent No.3 had taken into account the values of unaudited payments received in various projects. Clause 2.2.2.7 being applied to Respondent

No.3 had led to the lower calculation of threshold technical capacity and this was the reason for the disqualification of Respondent No.3.

21. The Counter Affidavit dated 28.10.2022 filed on behalf of Respondents No.1 and 2 records the rationale behind the approach of the Tender Committee at the first instance and states that, in Western Railway, while calculating the 'Threshold Technical Capacity', there was a general practice of not taking into account contractual receipts unless supported by audited balance sheets. It was only found later that this general practice was not in accordance with the terms of the RFP itself and clarification was issued on the same. The relevant portion of the Counter Affidavit stating the same has been reproduced as under:

"15. The rationale for this approach is that such EPC (Engineering, Procurement and Construction) tenders have been recently adopted in Western Railways, after securing an assured commitment of funding by the Ministry of Railways. In Western Railway, while calculating the 'Threshold Technical Capacity', there was a general practice of not taking into account contractual receipts unless supported by audited balance sheets. It came to light that this general practice was not in accordance with the terms of the RFP itself, namely clause 2.2.2.7 and Para 12 of instructions for Annexure- IV of Appendix IA as set out above. This being the case Respondent No. 1, issued clarification bearing Letter No. WNC-623-0-EPC Policy I No. E 71359 dated 22.09.2022 bringing the tender evaluation approach in line with the terms of the REP, wherein it was clarified that for calculating 'Technical Capacity', the amounts received in each eligible project in the financial year immediately preceding the Bid due date, shall be considered in the prescribed format, even if the balance sheet is unaudited provided it was certified by the Statutory Auditor. This letter further mentioned that "This should

be followed for all future EPC tenders including those under consideration".

22. Material on record states that the clarification bearing Letter No. WNC-623-0-EPC Policy/No.E71359 dated 22.09.2022 was issued with regard to the evaluation of Technical Capacity. This letter specifically notes that with reference to Para 12 of Annex IV of Appendix IA of the RFP, if the amounts received in each eligible project in the Financial Year immediately preceding the bid due date has been certified by a statutory auditor or its respective clients, then it shall be considered *even if the balance sheet is unaudited for that particular year*. The letter further notes that the clarification shall be followed for all future EPC tenders, including the ones under consideration, i.e. the tender in the instant matter. It was only in pursuance of this letter that the Tender Committee was requested to revise its recommendations and reassess the bids, and it was after holding supplementary proceedings that the Tender Committee rendered the following recommendations dated 30.09.2022/04.10.2022:

"Para 2.4. As mentioned in Para 2.3 above, TC for Technical bid of this tender was submitted to Competent Authority and was accepted on 04.09.2022. Financial bids were opened on 05.09.2022 and was under consideration of TC. However, it was noticed that while evaluating Technical Capacity, only audited contractual payments were considered as per general practice in Western Railway as envisaged in letter no WNC- 623-0-FPC Policy/ No. E7.1359 dated 22.09.2022 issued by Dy. CE(C) W&G/CCG (attached as document), it is clarified that for calculating 'Technical Capacity, if certified by Statutory Auditor or its respective clients, the amounts received in each eligible project in the Financial Year immediately preceding the Bid due date, shall be considered in the prescribed format, even if the balance sheet is

unaudited for that particular year. Accordingly, it is decided to reconsider all the bids for evaluating all the offers in Technical bid. CRIS was requested on 22.09.2022 attached as document) to enable Technical bid mode of TC on IREPS so as to re-evaluate all the of in the Technical Bid mode of TC on IREPS so that all the offers can be reconsidered in view of the above mentioned policy letter, CRIS enabled Technical Bid mode of TC on IREPS on 27.09.2022. In this 7C, technical bids of all the offers are reconsidered in view of above policy letter." Para 4.1.1. TC for Technical bid of this tender was submitted to Competent Authority and was accepted on 04.09.2022. Financial bids were opened on 05.09.2022 and was under consideration of TC. However, it was noticed that while evaluating Technical Capacity, only audited contractual receipts were considered as per general practice in Western Railway. As envisaged 117 letter no 147NC-623-0-LPC Policy/ No. £71359 dated 22.09.2022 issued by Dy 02(C) W&G/CCG ('attached as document,), it is clarified that for calculating 'Technical Capacity', if certified by Statutory Auditor or its respective clients, the amounts received in each eligible project in the Financial Year immediately preceding the Bid due date, shall be considered in the prescribed format, even if the balance sheet is unaudited for that particular year. Accordingly, it is decided to reconsider alt the bids for evaluating all the offers in Technical bid. CRIS was requested on 22.09.2022 (attached as document) to enable Technical Bid mode of TC on IREPS so that all the offers can be reconsidered in view of the above mentioned policy letter. CRIS enabled Technical Bid mode of TC on IREPS on 27.09.2022. In this TC, technical bids of all the offers are reconsidered in view of above policy letter."

23. Material on record further demonstrates that once the clarification letter dated 22.09.2022 was taken into account and the general practice

adopted by Respondent No.1 was abandoned for adherence with the terms and conditions of the RFP, it was found that the newly calculated threshold technical capacity of Respondent No. 3 was Rs. 789.95 crores as against the earlier reduced figure of Rs. 641.842 crores arrived at by the Tender Committee. This new calculation of Rs. 789.95 crores is more than the minimum requirement, i.e. Rs. 651.21 crores. Thus, once Respondent No.3 was found to be technically responsive, its financial bid was opened at noon of 10.10.2022 and the price quoted by it, i.e. Rs. 2,11,31,57,997.13/-, was found to be the lowest, and the tendering authority proceeded to issue it the Letter of Acceptance.

24. Flowing from the above, this Court is of the opinion that there is weight and rationality in the submissions of the Respondents, and that the actions of Respondent No.1 were not intended to cause prejudice to the Petitioner or to favour Respondent No.3 and that it was merely the misapplication of Clause 2.2.2.7, which is for evaluation of the financial capacity of the bidder, to Respondent No.3 whose technical capacity was being assessed. Further, a perusal of Clauses 2.8.3 and 6.2 of the RFP (as can be read above), indicates that the tendering authority was empowered to issue a clarification in case the same was required as well as to consult with the bidders if needed. Allegations of special treatment being accorded to Respondent No.3 are unfounded and merely demonstrate the grievance of a jilted bidder whose bid has been found to be unsuccessful.

25. It is pertinent to note that the declaration of the Petitioner being L1 was on the basis of a mistake committed on the part of the Respondent No.1 and clearly does not arise from *mala fide* intent. An erroneous parameter had been made applicable to Respondent No.3 and any actions taken pursuant to the same were merely a rectification of the anomaly. Considering the fact

that the instant matter pertains to public works, this Court does not deem it prudent to interfere as contractual matters do not envisage the concepts of principles of natural justice or balancing of equities. Respondent No.3 was declared to be ineligible solely based on an assumed general practice which was later rectified with the issuance of the clarification letter dated 22.09.2022.

26. Furthermore, there is strength in the contention of Respondent No.1 that no right is inhered in the Petitioner to be awarded the tender as it was merely declared *inter se* L1 and was not the “Selected Bidder” under Clause 3.3.1 read with Clause 3.3.4 of the RFP. Prior to the declaration of “Selected Bidder”, the bids were still under consideration as per Clause 3.4 and the clarification letter dated 22.09.2022 was legally and rightly issued in terms of Clause 2.8.3 read with Clause 6.2 of the RFP. The learned ASG has submitted that the possibility of Respondent No.3 providing a new Financial Bid after the issuance of the clarification is preposterous in wake of the single-stage two-packet system. This Court is inclined to agree with the learned ASG that the tender process was still in continuance as no Letter of Acceptance/no official intimation of acceptance or rejection had been issued.

27. Having arrived at the conclusion that the actions of Respondent No.1 do not expose any illegality or irrationality or arbitrariness, this Court deems it necessary to examine the scope of judicial review in tender matters which has time and again been held to be extremely limited. The Supreme Court in Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd. and Ors., (1997) 1 SCC 738, had observed that any judicial review of contractual matters conducted by Courts must be exercised in the larger public interest or if it is brought to the notice of the Court that in the matter

of award of a contract, power has been exercised for any collateral purpose. It is the larger public interest that must be borne in mind while taking any judicial decision that has the effect of hampering or delaying a project in the nature of public works.

28. While ascertaining the scope of judicial review being involved in matters relating to tenders or award of contracts, the Supreme Court in Jagdish Mandal v. State of Orissa and Ors., (2007) 14 SCC 517, had observed that a contract is a commercial transaction and that power of judicial review should not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. Further, it was held that 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 as such interferences can hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. The relevant portion of the said Judgement observing the same is as follows:

"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. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships

and franchises) stand on a different footing as they may require a higher degree of fairness in action."

29. In National High Speed Rail Corporation v. Montecarlo Limited and Anr., (2022) 6 SCC 401, though the Supreme Court was specifically looking into the scope of judicial interference in projects funded by foreign entities, it had categorically observed that delay in execution of projects of public importance may have a cascading effect on the project cost and ultimately may increase the project cost. The Supreme Court observed as follows:

"47. It is submitted that the reasonableness in administrative law means to distinguish between proper use or improper use of power. The test is not the court's own standard of reasonableness. This Court has reiterated this proposition in G.B. Mahajan v. Jalgaon Municipal Council [(1991) 3 SCC 91 (para 43-46)] . There is a possibility of fallibility inherent in all fact-findings. To insist upon a strict compliance with each and every tender document is not the law. This Court upheld the waiver of technical, literal compliance of the tender conditions in Poddar Steel Corpn. v. Ganesh Engineering Works [(1991) 3 SCC 273] . In the present case, the short-listing at the first stage, the allotment of cities at the second stage and the selection of franchisees qua cities at the third stage were after evaluating the financial bid by a collectivity of persons at different level. Therefore, possibility of elimination of arbitrariness is conceived in the system itself. Further, the High Court has analysed properly and come to the proper conclusion. That being so, this Court will not interfere by exercising its powers under Article 136 of the Constitution of India. The argument about hidden criteria would not affect or benefit this respondent directly or indirectly. Even otherwise, the hidden criteria cannot be impugned. There is no mention of any particular criterion on the basis of which the selection was to be made. At the second stage what was required to be kept in mind were the

parameters mentioned in paragraph 2.4. The criteria for selection to each of the four cities had to be provided inter alia because the tenderers did not tender for one city alone but for more than one. The allegation of bias on the part of Mr Nair is without substance. It is submitted, whenever disqualification on the ground of personal involvement is alleged:

(i) the person involved (for example related) must be the decision-maker;

(ii) there must be sufficient nexus between the decision-maker and the party complaining in order to justify the real likelihood of bias.

48. After a decision is reached the standard of proof of bias is higher as laid down in Vassiliades v. Vassiliades [AIR 1945 PC 38 : 221 IC 603 : 1945 All LJ 34] . This decision has been referred to by this Court in Ranjit Thakur v. Union of India [(1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113 : (1988) 1 SCR 512] . The learned counsel after referring to the relevant case law submits that cases of bias and ostensible bias had to be regarded in the light of their own circumstances. In this case Mr Subhash Nair is only one of the officers in BPL, which has over 5500 employees and 89 officers of his rank in 27 offices all over India. Mr Nair was not the decision-maker at all. He was one of the recommending authorities. His involvement in the approval and selection of the tender was indispensable. He was originally the Member (Services) on 29-5-1992. Thereafter he became Director General, Telecommunications by a notification issued by 28-7-1992 by the President of India. As such, he was to exercise all powers of Telegraph Authority under Section 3(6) of the Act. Therefore, the High Court was right in applying the doctrine of necessity. This doctrine has come up for discussion in Charan Lal Sahu v. Union of India [(1990) 1 SCC 613] ."

30. The aforementioned observations in Jagdish Mandal v. State of Orissa and Ors. (supra) and National High Speed Rail Corporation v. Montecarlo Limited and Anr. (supra) have been referred by the Supreme Court in N.G. Projects Limited v. Vinod Kumar Jain and Ors., (2022) 6 SCC 127. In this ruling, the Supreme Court was deliberating upon principles underlying the Specific Relief Act, 1963 and cited the report submitted to the Union Law & Justice Minister on 20.06.2016 by the Expert Committee that was set up to examine the Specific Relief Act, 1963. It was noted that the Expert Committee had observed that discretion granted to Courts for intervening in public works should be limited. The judgement further cements the judicial understanding of how Courts must recognise their limitations and the havoc which their intervention in commercial matters may cause. The portion of the said Judgement delineating the above observations has been reproduced as follows:

"13. This Court sounded a word of caution in another judgment reported as Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489] , wherein it was held that the courts must realise their limitations and the havoc which needless interference in commercial matters could 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. The courts must also not interfere where such interference would cause unnecessary loss to the

public exchequer. It was held as under : (SCC p. 501, paras 19-20)

“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.”(emphasis supplied)*

14. *In National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd. [National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd., (2022) 6 SCC 401] , this Court sounded a word of caution while entertaining the writ petition and/or granting stay which ultimately may delay the execution of the mega projects. It was held as under : (SCC para 48)*

“48. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be

extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved.”

15. In Uflex Ltd. v. State of T.N. [Uflex Ltd. v. State of T.N., (2022) 1 SCC 165] , this Court stated that 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 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 Court held as under : (SCC pp. 173-74 & 189-90, paras 2-3 & 42)

“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 fides. 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. [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517]

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’. [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517]

42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or

more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.”(emphasis supplied)

16. In *Galaxy Transport Agencies v. New J.K. Roadways* [*Galaxy Transport Agencies v. New J.K. Roadways*, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , a three-Judge Bench again reiterated 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. It was observed as thus : (SCC paras 17-18 & 20)

“17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench [*New JK Roadways v. UT of J&K*, 2020 SCC OnLine J&K 733] ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in

Condition No. 31 of the NIT. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the NIT prescribing work experience of at least 5 years of not less than the value of Rs 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , this Court noted : (SCC pp. 531-32, 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. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.'

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the Appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own.”(emphasis supplied)

17. Therefore, the position of law with regard to the interpretation of terms of the contract is that the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. Applying the aforesaid position of law to the present case, it has been the contention of Respondent 1 that the format for bank guarantee was not followed strictly by the State and that the relaxation given was not uniform, in that Respondent 1 was singled out. The said contention has found favour with the courts below.

19. The Specific Relief Act, 1963 was amended by Central Act 18 of 2018 when clause (ha) was inserted in Section 41 of the said Act to say:

“41. (ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant

facility related thereto or services being the subject-matter of such project.”

20. *Such amendment was in pursuance of the report submitted on 20-6-2016 of the Expert Committee. The report is as under:*

“The Expert Committee set on examining the Specific Relief Act, 1963 submits its Report to Union Law & Justice Minister recommends modifications for ensuring ease of doing business.

The Expert Committee set on examining the Specific Relief Act, 1963 today submitted its Report to Union Law & Justice Minister Shri D.V. Sadananda Gowda here in New Delhi. In its report the committee has recommended modifications in the Specific Relief Act, 1963 for ensuring the ease of doing business.

In the context of tremendous developments which have taken place since 1963 and the present changed scenario involving contract based infrastructure developments, public private partnerships and other public projects, involving huge investments; and changes required in the present scheme of the Act so that specific performance is granted as a general rule and grant of compensation or damages for non-performance remains as an exception, the committee decided—

(i) To change the approach, from damages being the rule and specific performance being the exception, to specific performance being the rule, and damages being the alternate remedy.

(ii) To provide guidelines for reducing the discretion granted to courts and tribunals while granting performance and injunctive reliefs.

(iii) To introduce provisions for rights of third parties (other than for government contracts).

(iv) To consider addressing unconscionable contracts, unfair contracts, reciprocity in contracts, etc. and implied terms.

The committee observed that there is a need to classify diverse public utility contracts as a distinct class recognising the inherent public interest/importance to be addressed in the Act. Any public work must progress without interruption. This requires consideration whether a court's intervention in public works should be minimal. Smooth functioning of public works projects can be effectively managed through a monitoring system and regulatory mechanism. The role of courts in this exercise is to interfere to the minimum extent so that public works projects will not be impeded or stalled.”

21. Since the construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the writ court while exercising its jurisdiction under Article 226 of the Constitution of India.

22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the

Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder."

31. As can be discerned from the above, not only is the scope of judicial review in contractual matters severely limited, but in the field of public works, due deference must be given to the decisions of the State as the activities that are undertaken are of such nature that any delay or any hampering of the same can lead to an impediment of the country at large. The project in the instant case relates to the doubling of railway tracks in mid-sections between Dalauda (305.15 kms) to Ratlam (374.46 kms) stations of Ratlam Division of Western Railway. In a country where majority of persons travel by way of trains and transportation of goods also takes place via trains, it becomes tremendously necessary to ensure that such infrastructure projects are executed without any hindrance. The social and economic development of many small towns and cities in the country is dependent upon the access to such regions, and speedy trains are an impetus to such development. Until and unless there is in existence gross irregularity, illegality and/or arbitrariness on the part of the tendering authority, the Courts must stay their hands and not interfere so as to not end up obstructing the public works projects that are being executed in good faith by the State and are of national importance. It must be conceded that whether or not a bidder satisfies the terms and conditions of the RFP is a decision that resides with the authority inviting bids, and Courts must not needlessly interfere.

32. The claim of the Petitioner that being L1 he had to be automatically selected also cannot be accepted. The Apex Court in Meerut Development Authority v. Association of Management Studies, (2009) 6 SCC 171, has observed that a tender is basically an offer and an invitation, and an invitation to tender functions in the realm of contract and the person who makes an offer has the right of withdrawing it before acceptance, in the absence of condition to the contrary supported by consideration. It has been consistently held that no right is accrued to the highest bidder until and unless there has been acceptance of the same and the contract has been concluded. The contract gets concluded only when a letter of acceptance is given by the tenderer. The said observation has been quoted and followed by the Apex Court in State of Punjab and Ors. v. Mehar Din, (2022) 5 SCC 648, wherein the Apex Court has observed as under:

“18. From the Scheme of Chapter III of the 1976 Rules, it is apparent and explicit that even if the public auction has been completed to the highest bidder, no right is accrued till the confirmation letter is issued to him as the acceptance of the highest bid is provisional, subject to its confirmation by the competent authority. Undisputedly, the competent authority (Sales Commissioner) has failed to confirm the bidding process and after recording its satisfaction cancelled the auction bid under its order dated 2-7-1993.

19. This Court has examined right of the highest bidder at public auctions in umpteen number of cases and it was repeatedly pointed out that the State or authority which can be held to be State within the meaning of Article 12 of the Constitution, is not bound to accept the highest tender of bid. The acceptance of the highest bid or highest bidder is always subject to conditions of holding public auction and the right of the highest bidder is always provisional to be examined in the

context in different conditions in which the auction has been held. In the present case, no right had accrued to the respondent even on the basis of statutory provisions as being contemplated under Rule 8(1)(h) of Chapter III of the Scheme of the 1976 Rules, and in terms of the conditions of auction notice notified for public auction.

26. Undisputedly, the provisional bid, in the instant case, was not confirmed by the competent authority (Sales Commissioner) and not being accepted after recording its due satisfaction by an order dated 2-7-1993 and the decision of the authority in passing the order of cancellation of the auction bid was scrutinised/examined by the appellate/revisional authority and the discretion exercised by the competent authority in taking decision of cancellation was upheld at later stages.

27. This being a settled law that the highest bidder has no vested right to have the auction concluded in his favour and in the given circumstances under the limited scope of judicial review under Article 226 of the Constitution, the High Court was not supposed to interfere in the opinion of the executive who were dealing on the subject, unless the decision is totally arbitrary or unreasonable, and it was not open for the High Court to sit like a court of appeal over the decision of the competent authority and particularly in the matters where the authority competent of floating the tender is the best judge of its requirements, therefore, the interference otherwise has to be very minimal.”

33. The Apex Court in U.P. Avas Evam Vikas Parishad v. Om Prakash Sharma, (2013) 5 SCC 182, while holding that no contract is concluded till

the bid is accepted and that without final acceptance of the bid, no vested right is acquired by the highest bidder, has observed as under:

“30. In support of the said proposition, the learned Senior Counsel for the defendant, Mr Rakesh Dwivedi has also placed reliance upon another decision of this Court in State of U.P. v. Vijay Bahadur Singh [(1982) 2 SCC 365] . The learned Senior Counsel has rightly placed reliance upon the judgment of this Court in Rajasthan Housing Board case [(2007) 1 SCC 477] which reads as under: (SCC p. 483, para 9)

“9. This being the settled legal position, the respondent acquired no right to claim that the auction be concluded in its favour and the High Court clearly erred in entertaining the writ petition and in not only issuing a direction for consideration of the representation but also issuing a further direction to the appellant to issue a demand note of the balance amount. The direction relating to issuance of the demand note for balance amount virtually amounted to confirmation of the auction in favour of the respondent which was not the function of the High Court.”

The law laid down by this Court in the aforesaid paragraph in support of the proposition of law that so long as an order regarding final acceptance of the bid had not been passed by the Chairman of the Housing Board, the highest bidder acquire no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled. Further, he has placed reliance on another decision of this Court in Laxmikant [(1996) 4 SCC 208] referred to supra. In support of the proposition of law this Court has rightly pointed out that the “State” or the authority, which can be held to be “State” within the meaning of Article 12 of the Constitution, is not bound to accept the highest tender/offer or bid and the Government could validly retain its power to accept or reject the highest bid in the interest of public revenue.

In support of this contention, he has placed reliance on State of Orissa v. Harinarayan Jaiswal [(1972) 2 SCC 36] case, relevant paragraph of which reads as under: (SCC pp. 44-45, para 13)

“13. Even apart from the power conferred on the Government under Sections 22 and 29, we fail to see how the power retained by the Government under clause (6) of its order, dated 6-1-1971, can be considered as unconstitutional. As held by this Court in Cooverjee B. Bharucha case [Cooverjee B. Bharucha v. Excise Commr., AIR 1954 SC 220], one of the important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of every State's revenue. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction-sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids (see

Union of India v. Bhim Sen Walaiti Ram [(1969) 3 SCC 146]). By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government—nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. The High Court was wholly wrong in thinking that purpose of Sections 22 and 29 of the Act was not to raise revenue. Raising revenue as held by this Court in Cooverjee B. Bharucha v. Excise Commr. [Cooverjee B. Bharucha v. Excise Commr., AIR 1954 SC 220] case was one of the important purposes of such provisions. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue. Assuming that the question of arbitrary or unguided power can arise in a case of this nature, it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority in the State i.e. the Government which is expected to safeguard the finances of the State. Such a power cannot be considered as an arbitrary power. If that power is exercised for any collateral purposes, the exercise of the power will be struck down. It may also be remembered that herein we are not dealing with a delegated power but with a power conferred by the legislature.

The High Court erroneously thought that the Government was bound to satisfy the Court that

there was collusion between the bidders. The High Court was not sitting on appeal against the order made by the Government. The inference of the Government that there was a collusion among the bidders may be right or wrong. But that was not open to judicial review so long as it is not proved that it was a make-believe one. The real opinion formed by the Government was that the price fetched was not adequate. That conclusion is taken on the basis of Government expectations. The conclusion reached by the Government does not affect any one's rights. Hence, in our opinion, the High Court misapplied the ratio of the decision of this Court in Barium Chemicals Ltd. v. Company Law Board [AIR 1967 SC 295] and Rohtas Industries Ltd. v. S.D. Agarwal [(1969) 1 SCC 325] .””

34. Similarly, the Division Bench of this Court vide Order dated 21.07.2020 in **W.P.(C) 3811/2020**, titled as Manmeet Singh v. South Delhi Municipal Corporation, has held that a bidder cannot insist that since they were declared as H1 bidders, a vested right had accrued in their favour and the tendering authority has all the right to pause and re-examine the tender process. Relevant portions of the said judgment reads as under:

“42. In the present case too, the petitioners cannot insist that since they were declared as H1 bidders, a vested right had accrued in their favour and the respondent/SDMC had no option but to issue Allotment Letters and hand over possession of the parking sites in question in their favour. The respondent/SDMC was well within its right to pause and re-examine the entire tender process, which it did on receiving complaints from some quarters. The Committee constituted by the Commissioner, SDMC has looked into the matter in depth and recommended the tender to be withdrawn for plausible reasons. The court cannot delve into the

sufficiency of the reasons that prevailed with the respondent/SDMC for taking such a step. The material placed on records justifies the rationality of the decision taken by the respondent/SDMC to scrap the tender process.

43. Another argument advanced by learned counsel for the petitioners was that once the petitioners had complied with all the terms and conditions stipulated in the Offer letters dated 15.5.2020 issued by the respondent/SDMC, the contract between the parties stood concluded and issuance of the allotment letters in terms of Clause 12 of the tender documents and handing over possession of parking sites in question were mere formalities, which submission learned counsel for the respondent/SDMC has vehemently disputed and cited the very same Clause 12 to urge that it clearly stipulates that a formal allotment letter will be issued to the H1 parking contractor and in the instant case, admittedly, no such letters were issued to the petitioners and nor was the physical possession of the parking sites handed over to them. Instead, the entire tender process was cancelled.

44. On the aspect as to whether the contract between the parties stood concluded or not, we may profitably refer to the observations made by the Supreme Court in Rishi Kiran Logistics Pvt. Ltd. (supra). In the said case, taking note of an earlier decision in Kisan SahkariChini Mills Ltd. v. Vardan Linkers, reported as (2008) 12 SCC 500, the Supreme Court held that enforcement of a contract entered into between the parties would fall in the realm of 'law of contract' and cannot be made the subject matter of adjudication in a petition filed under Article 226 of Constitution of India and observed as below:—

“37. The questions before the Supreme Court in Kisan SahkariChini Mills Ltd. case [(2008) 12 SCC 500] were:

(i) *Whether the High Court was right in concluding/assuming that there was a valid contract? and*

(ii) *Whether the High Court was justified in quashing the order of the Secretary (Sugar)? This Court answered the aforesaid questions in the negative and set aside the judgment of the High Court holding that:*

“Ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages. He would be entitled to the relief of specific performance, if the contract was capable of being specifically enforced in law. The remedies for a breach of contract being purely in the realm of contract are dealt with by civil courts. The public law remedy, by way of a writ petition under Article 226 of the Constitution, is not available to seek damages for breach of contract or specific performance of contract. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 may be invoked.”

It is clear that the aforesaid case is closest to the facts of the present case.

38. It thus stands crystallised that by way of writ petition under Article 226 of the Constitution, only public law remedy can be invoked. As far as contractual dispute is concerned that is outside the power of judicial review under Article 226 with the sole exception in those cases where such a contractual dispute has a public law element.

40. Insofar as the issue regarding concluded contract in the present case is concerned, this falls squarely in the realm of the contract law, without any hue or shade of any public law. In fact, that is not even pleaded or argued. At the same time, whether there was a concluded contract or not is seriously disputed by the

respondents and, therefore, in the first instance it was not even necessary for the High Court to go into this issue and could have relegated the appellant to ordinary civil remedy. We are conscious of the position that merely because one of the authorities raises a dispute in regard to the facts, it may not be always necessary to relegate the parties to a suit. This was so stated in ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. [(2004) 3 SCC 553] in the following manner:

“37. In our opinion, this limited area of dispute can be settled by looking into the terms of the contract of insurance as well as the export contract, and the same does not require consideration of any oral evidence or any other documentary evidence other than what is already on record. The claim of the contesting parties will stand or fall on the terms of the contracts, interpretation of which, as stated above, does not require any external aid.”

41. At the same time, as already noted in Kisan Sahkari [(2008) 12 SCC 500] this Court had taken a view that where the question whether there was a contract or not is seriously disputed, the court is not to assume that there was a valid contract and on that basis examine the validity of the administrative action. Therefore, keeping in view the aforesaid understanding of the law, a very limited inquiry on this aspect is permissible.””

35. What flows from the above judicial pronouncements is that it is the discretion of the State/tendering authority to award the contract to the bidder who is deemed most suitable for the project at hand and this does not

necessarily imply that the Selected Bidder will be the Highest or Lowest Bidder, as the case may be. No right is accrued in favour of such a bidder until and unless a Letter of Acceptance is issued and the contract stands concluded. In any case, the fact that the contract stood concluded and that the Petitioner in the instant matter had a vested right in being awarded the tender for the reason that it had been declared as an L1 bidder post the first opening of the Financial Bids is not an event that a writ court can delve into or interfere with on the ground that the same constitutes a matter of contractual nature and is outside the scope of judicial review. In the instant case, no Letter of Acceptance had been issued by Respondent No.1 to the Petitioner herein and the Petitioner cannot now claim as a matter of right that the same must be issued to it as the contract had not been concluded.

36. Accordingly, the Writ Petition is dismissed, along with the pending application(s), if any. The Respondents may execute the work expeditiously.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

FEBRUARY 16, 2023
Rahul/RR