(2015) 10 AP CK 0033

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22382 of 2015

Finacus Solutions Private Limited — APPELLANT

Vs

State of Andhra Pradesh and Others — RESPONDENT

Date of Decision : 01-10-2015

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 1 ALD 490 : (2016) 1 ALT 220

Hon'ble Judges : A. Ramalingeswara Rao, J.

Bench : Single Bench

Advocate : C.V. Mohan Reddy, Senior Counsel, for the Appellant

Final Decision : Allowed

Judgement

A. Ramalingeswara Rao, J.—This writ petition is filed for declaring the action of the respondents 2 & 5 in (a) allowing the third respondent company to participate in the financial bid of the tender No. APCOB/EFT/Switch, dated 19.03.2014 even though it had failed to satisfy the pre-qualification conditions as stipulated in the tender; (b) considering the third respondent as L-1 even when its financial bid was in violation of various terms and conditions prescribed in the tender; and (c) inviting the third respondent for negotiations on 22.07.2015 to finalize the tender process, as illegal and arbitrary and to pass a consequential direction to the respondents 2 & 5 to declare the third respondent to be disqualified from the tender process.

2. The petitioner company is an ISO 9001 and 27001 certified company and its products excel in providing innovative integrated software solutions and services. The second respondent-Andhra Pradesh State Cooperative Bank Limited (APCOB) had floated a Request For Proposal (RFP) inviting the bids from vendors for providing end-to-end ATM switching services on hosted application service provider on pay per transaction model basis through the tender. A pre-bid meeting was conducted on 04.04.2014 and due date for opening the technical bid was stated to be 16.04.2014, however, the said date was extended to

05.05.2014. But, the opening of the bid was kept in abeyance for a period of two months due to bifurcation of the State, and it was communicated that RFP would require certain modifications. The second respondent re-floated the same tender/ RFP by fixing 28.08.2014 as last date for submission of response to the said tender. The pre-bid meeting for the re-floated tender was held on 14.08.2014 and the due date for opening the technical bid was mentioned as 28.08.2014. On that date also, the technical bid was not opened and it was extended from time to time.

3. It is further stated that the technical bid was opened on 01.09.2014 and two vendors including the petitioner were short-listed for technical presentation. The technical presentation was given on 14.11.2014 in the office of the second respondent and the petitioner came to know that one vendor, M/s. Infrasoft Technologies was short-listed based on the eligibility criteria prescribed in the tender document. Subsequent to the technical presentation, the petitioner was surprised to notice that the representative of the third respondent was also present at the time of opening of financial bid which was held on 20.01.2015. The third respondent was not only present but it also participated in the financial bid. At the time of opening of financial bids, only the petitioner and the third respondent were present. The petitioner came to know that the second respondent relaxed the eligibility criteria for possessing valid ISO 9001 certification as prescribed in Clause 5-E of the tender for respondent No. 3 in order to enable it to qualify for opening its financial bid. The petitioner also came to know that the third respondent was made eligible after taking a written clarification from it and allowed it to participate in the financial bid. The review of the financial bid submitted by the third respondent shows that the financial bid of the third respondent was in violation of various terms and conditions prescribed in the tender and it was a conditional tender. In order to qualify the third respondent, the second respondent requested the third respondent to waive the conditions placed by the third respondent in its financial bid and in effect submitted a revised bid. Thus, the financial bid was a qualified bid and it was contrary to the terms and conditions of the tender.

4. The petitioner submitted a representation on 28.01.2015 requesting the second respondent to disqualify the third respondent by rejecting the technical bid as well as the financial bid. It was followed by another representation on 25.02.2015. In the meanwhile, the split in the second respondent bank took place by forming the fifth respondent in respect of the State of Telangana around 01.04.2015. The final balance sheet was prepared only by the end of May, 2015. The representative of the petitioner company met the second respondent on 12.06.2015 asking it to consider its representation submitted earlier. Thus, the petitioner came to know that the respondents 2 & 5 called the third respondent for negotiations on 22.07.2015 instead of disqualifying it. Challenging the same, the present writ petition is filed raising several grounds.

5. In view of the fact that the writ petition relates to the award of contract, when

the writ petition came up for

consideration on 21.07.2015, the petitioner was asked to take out personal notice to the third respondent by registered post and file proof of service and posted the matter to 03.08.2015. The learned Advocate General for the State of Andhra Pradesh appearing for the second respondent undertook not to finalize the contract till the decision is taken in the present writ petition.

6. The second respondent filed a counter affidavit stating that pursuant to the tender notification dated 19.03.2014, five tenderers submitted their tenders. The technical bid was opened on 09.09.2014 and the financial bid was opened on 20.01.2015. The financial bids of the petitioner as well as the third respondent were opened and the financial bids of the other bidders were not opened, as they did not fulfill the eligibility criteria. In the counter, it is further stated that the petitioner was given the benefit of Clause 5-M and when the benefit of Clause 5-E was given to the third respondent, the present writ petition is filed. Thus, the treatment was equal even to the petitioner as well as to the third respondent in relaxing the conditions and the petitioner having participated in the bid process cannot file the present writ petition. The price quoted by the third respondent was beneficial to the respondents than that of the petitioner. The technical bid was opened in the presence of the petitioner and the third respondent and the petitioner did not protest the acceptance of technical bid of the third respondent.

7. It is further stated that the second respondent appointed an independent consultant to review the bid documents and advise the second respondent. The preliminary evaluation of the bids was done by a committee consisting of the consultant and senior officers of the bank and marks were awarded. Basing on the same, the bids of two bidders were found to be technically unfit. The third respondent was found to have not fulfilled the eligibility criteria as mentioned in Clause 5-E and therefore, the bank sought for a clarification from three bidders including the petitioner as per Clause No. 10.9. After receiving clarification from the three bidders, it was noticed that the third respondent was not having ISO 9001 certification and therefore, the bank tentatively decided to call M/s. Finacus Solutions as well as M/s. Infrasoft Technologies for presentation. After going through the presentations, the consultant opined that merely because the third respondent does not have ISO 9001, it can be treated as a minor non-conformity in terms of Clause 10.21.5 and therefore, once again the bank called three bidders, as the bids of other two bidders were already rejected. Since presentations were completed by the petitioner and M/s. Infrasoft, the third respondent was also asked to give a presentation and after looking all the presentations of three bidders, it was decided that the bid of the third respondent can be considered. It is further submitted that all the parameters laid down in various decisions of the Supreme Court were followed and decision making was not vitiated.

8. Additional counter affidavit was filed by the respondents 2 & 5 stating that the law on the subject matter of instant case is well-settled in the matter of Tata

Cellular''s case. The eligibility criteria for participation in the said tender was covered under Clause 5 of the tender document. A meeting was held on 29.10.2014 and a decision was taken that the tender of the third respondent can also be considered as the non-possession of ISO 9001 certificate is only a minor non-conformity. Thus, the bids of three tenderers were taken into consideration. The technical bids were evaluated and it was found that only the petitioner and the third respondent got the requisite number of marks vis-?-vis the technical qualifications and after opening of the financial bids, it was noticed that the third respondent secured 85.36 marks out of 100, whereas the petitioner secured 78.85 marks out of 100.

9. The third respondent also filed a separate counter affidavit stating that the second respondent, through letter dated 06.11.2014 addressed the third respondent seeking clarification with regard to eligibility criteria and the third respondent by its letter dated 07.11.2014 submitted a clarification stating that for the kind of services sought by the second respondent, ISO 2001 and ISO 27001 are precisely applicable, since the same relates to IT services, security and service management and ISO 9001 is predominantly used in manufacturing and product selling industry and a more generic certification. A further clarification was given on 20.11.2014. The second respondent having been satisfied with the clarification asked the third respondent to give a technical presentation and accordingly the third respondent gave such presentation. After such presentation, the second respondent required the third respondent to be present for opening of commercial bid on 20.01.2015 and at the time of opening of the commercial bid, the petitioner and the third respondent alone were present, as they were only the two parties who were short-listed in the technical bids. After opening of the commercial bid, it was noticed that the third respondents quotation was 1/3rd lower than the price quoted by the petitioner. The second respondent sent a mail on 07.07.2015 to the third respondent for having discussion and negotiation on 22.07.2015. The allegation that only two tenders were short-listed for technical presentation was denied.

10. Separate reply affidavits were filed by the petitioner to the counter affidavit filed by the respondents 2 & 5 and to the counter affidavit filed by the third respondent. The petitioner in its reply to the counter filed by the respondents 2 & 5 stated that when an interested party, M/s. Sarvatra Technologies requested for removal of the condition of possessing ISO 9001 certification, the said request was denied and an opportunity to participating in the tender process was also denied to the said interested party. Thus, the possessing of ISO 9001 certification is an important eligibility criteria and the third respondent does not possess such certification. The third respondent without disclosing that it did not possess ISO 9001 certification sought for a clarification in the pre-bid meeting as to what would happen to a participant, who does not have a single eligibility criteria and the same was answered by the respondents saying that such participant could be disqualified. Hence, the technical bid of the third respondent ought not to have been entertained without ISO 9001 certification. Instead of

rejecting its bid, the second respondent sought for a clarification from the third respondent through its letter dated 06.11.2014 and the third respondent clarified on 07.11.2014 and 20.11.2014 stating that ISO 2001 is a better standard than that of ISO 9001 and the same was accepted by the second respondent.

11. It is also stated that in the pre-bid clarifications, M/s. Tata Communications also sought for removal of eligibility condition of ISO 9001 certification, but the same was denied. The third respondent in the clarification dated 20.11.2014 specifically mentioned that its Datacenter has all three certifications i.e., ISO 9001 2008, ISO 27001 2005 and ISO 20001 2011. The disaster recovery datacenter has two clarifications i.e., ISO 9001 and ISO 27001. But the third respondent does not possess the said certification even though its divisions got those certifications. The said relaxation was not provided to other participants and hence the relaxation in favour of third respondent alone is clearly illegal. The petitioner denied that it availed the benefit of relaxation of Clause 5-M of RFP. The petitioner in its communication dated 20.11.2014 only clarified that the petitioner participated in the tender as a consortium and therefore, the financials of the consortium should be considered and not that of the petitioner alone. The financials of the consortium satisfied the eligibility criteria provided under Clause 5-M and hence, it does not amount to any relaxation as alleged by the second respondent.

12. It is further stated that the technical presentation of the petitioner along with M/s. Infrasoft was held on 14.11.2014 at the head office of the second respondent and thereafter, after receiving clarification on 20.11.2014 from the third respondent, the third respondent was allowed to present technical presentation. The third respondent was allowed a special privilege to make presentation from its office at Mumbai. Though the second respondent relied on Clause 10.21.5 of RFP, it cannot be said that the important eligibility criteria of possessing ISO 9001 certification is a minor non-conformity, more so, in view of the clarification issued in the pre-bid meeting and hence, the reliance on Clause 10.21.5 is of no avail to the second respondent. The financial bid quoted by the third respondent is subject to certain conditions and it should have been rejected, but in response to the communication made by the second respondent, the third respondent through its letter dated 03.02.2015 withdrew the conditions. As per Clause 10.18 of RFP, the bidders are prohibited from withdrawing the proposals. As per Clause 10.27 of RFP, the respondents are indeed permitted to negotiate with the short-listed bidders.

13. The reply filed by the petitioner to the counter affidavit of the third respondent states that the averment made by the third respondent in the counter makes it clear that the price bid was varied/revised due to withdrawal of conditions enclosed to the price bid. The third respondent put condition Nos. 1 to 6 through its financial bid and those conditions were later withdrawn at the request of the second respondent on 03.02.2015. It was specifically pointed out that the contents of documents filed by the third respondent along with its

counter, which was marked as Ex. R-7 are different from the contents of documents filed along with the original financial bid. The reply reiterated the other averments made in the reply to the counter affidavit filed by the respondents 2 & 5.

14. Sri C.V. Mohan Reddy, learned Senior Counsel appearing for the petitioner submitted that the pre-bid meeting was held on 14.08.2014 and the third respondent specifically raised a query with regard to Clause 5-E pointing out that the possession of ISO 27001 certification is higher category of certification as compared to ISO 9001 and requested the second respondent to remove the ISO 9001 certification as it is a general certification but the said request was denied by stating that ISO 9001 is for quality certification standard and ISO 27001 is for national security standard, hence both are necessary. Having denied the said request, it is not open to the second respondent to relax that condition in favour of the third respondent. He further submits that if such relaxation was extended, there would be many vendors in the market who would have filed their tenders and in fact the Tata Communications raised the same query and a similar clarification was issued and it did not submit the tender. Similarly, Sarvatra Technologies also raised similar query and when its request was also denied though it filed the tender, the tender was rejected at the threshold. He further submits that the price bid/commercial bid submitted by the third respondent was a conditional bid and only after the second respondent requested the third respondent to remove the conditions, the third respondent withdrew those conditions. This request made by the second respondent is bad in law as the second respondent should have seen that the commercial bid of the third respondent is with conditions and should have rejected the same as it is a conditional one and contrary to the terms and conditions of tender notice. In support of his contentions, the learned senior counsel for the petitioner relied on the following decisions:

"i) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ,

ii) Larsen and Toubro Ltd. and Another Vs. Union of India (UOI) and Others, ,

iii) Air India Ltd., v. Cochin International Airport Ltd., and others , (2000) 2 SCC 617 ,

iv) N. Dolendra Prasad Vs. Government of Andhra Pradesh and Others,

v) M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , and

vi) West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, ."

15. The learned Advocate General for the State of Andhra Pradesh appearing for the second respondent submitted that a consultant was appointed for evaluation of the bid documents and on his suggestion, the decisions were taking properly

at all levels. In support of his contention, the learned Advocate General relied on Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, .

16. Sri D.V. Seetharama Murthy, learned Senior Counsel appearing for the third respondent submitted that the technology possessed by the third respondent is much superior to the technology of ISO 9001 and hence, the existence of such technology in preference to ISO 9001 mentioned in the tender document cannot be said to be in violation of the tender conditions. Though some stipulations were mentioned along with the price bid they cannot be called as conditions attached to the price bid, but since the second respondent requested for removing those stipulations and when the third respondent complied with the same, it cannot be said that the commercial bid was a conditional bid and the same ought to be rejected.

17. In the light of the above pleadings, the points that arise for consideration are:

"i) Whether possession of ISO 9001 certification is a major eligibility condition or a minor condition and whether such condition can be relaxed by the second respondent in favour of the third respondent? and

ii) Whether the commercial tender submitted by the third respondent was a conditional tender and if so, whether such tender should have been rejected at the threshold?"

18. In view of the above, it is necessary to look into the terms and conditions of RFP issued by the second respondent on 19.03.2014. The second respondent invited the Request for Proposal for end-to-end ATM switching services on hosted/ application service provider/pay per transaction model. As per the request for proposal, participation in the pre-bid meeting was restricted to the purchasers of tender documents. Tender shall remain valid for a period of 180 days from the date of opening of the technical tender. The technical offer of the RFP response should be submitted in two copies. Envelope-I should contain technical offer and Envelope-II should contain commercial offer. The evaluation and comparison of tenders were mentioned in Clause 10.21 of request. Clause 10.23 provides for evaluation of technical tenders, which includes technical demonstration regarding the various aspects of the proposed solutions. Evaluation of the technical tenders will be based on the scores awarded to bids based on the evaluation by the bank in accordance with the schedule mentioned therein. The bidders can score maximum 70 points for the technical evaluation and those tenders, which have achieved not less than 50 points during technical evaluation, will be determined to be substantially responsive. As per Clause 10.24, the technically qualified bidders are requested to make presentations of their offerings. The eligibility criteria are mentioned in Clause 5 and it reads as follows:

"This invitation of bid is open to reputed companies/firms/consortiums who have proven experience in the field of successful implementation of EFT Switch and fulfill the eligibility criteria as laid down in this document. Hence forth Bidder(s) will mean companies/firms/consortium.

Eligibility criteria for the bidders are as under:

A. In case of a consortium bid, copy of agreement between consortium partners must be enclosed. The Switch OEM vendor must be a Leader of the consortium.

B. The Bidder/Consortium should have experience of implementing the Switch software on hosted model supporting ATM, POS, Micro ATM, and connected to NFS and providing services to a minimum of 5 Banks.

C. The Switch Software solution must be developed, customized, upgraded, maintained and implemented by the Bidder/Consortium.

D. Bidders/Consortium are requested to provide the contact persons email, address and mobile numbers of at least five scheduled/urban cooperative banks where the Switch software (of the version proposed only) has been implemented successfully.

E. The Bidder/Consortium partner for the Switch software must have a valid ISO 9001 and ISO 27001 in IT related enterprises or at least SEI CMM Level 3 certification. In addition, the solution must be PA-DSS complaint.

F. The Data Centre where the switch is hosted should be PCI-DSS, ISO 27001 and ISO 20001 complaint.

G. The Bidder/Consortium should have support center in India, and the same should be manned at least by 50 qualified functional as well as technical professionals.

H. All modules of the application software must work seamlessly through a single sign on.

I. The Bidder/Consortium must have experience in implementing delivery channels like ATM (with interface to NFS IMPS network.

J. The Bidder/Consortium must not have been barred/black listed by any regulatory/statutory or government body.

K. The Bidder/Consortium must warrant that there is no legal action being taken against it for any cause in any legal jurisdiction. If such an action exists and the bidder considers that it does not affect its ability to deliver the RFP requirements, it shall provide details of the action(s).

L. The Bidder/Consortium should have experience of minimum two years of implementation and maintenance of the Switch software integrated to NFS network in a bank having not less than 50 branches.

M. The Bidder/Consortium should have minimum Turnover of Rs. 10 Crores and profit making in each of the last three years.

N. IT is mandatory for the bidder to quote for all the mentioned in the RFP, failing to do so would result in the disqualification of proposal/bidder.

O. The total cost to the Bank must be clearly specified in format provided. No claims of errors in calculation will be entertained.

(Documentary proof for each of the above is to be provided)

Clause 10.21.5 is also relevant for the purpose of the present case and it reads as under:

10.21.5. The Bank may, at its discretion, waive any minor non-conformity or any minor irregularity in the offer.

This waiver shall be binding on all the bidders and the bank reserves the right to exercise such waivers."

19. After inviting tenders on 19.03.2014, the second respondent held a pre-bid conference to the participating tenderers wherein the third respondent raised a point with regard to the strict compliance with the tender conditions and pointed out whether single ineligibility of any tenderer would make a tender ineligible and the second respondent answered in the affirmative stating that the tender would be rejected.

20. The relevant point raised by the petitioner and answered by the second respondent is as follows:

S.No.

Description of Query sought by the Bidder

Response from APCOB

11.

Page No. 30: Clause No. 10.22 Wanted to know the outcome of a vendor who has nly one non-compliant in eligibility. Will the vendor be disqualified?

Yes

21. With regard to Condition No. 5-E, the Tata Communications raised the following query and answer from the second respondent is as under:

S.No.

Description of Query sought by the Bidder

Remarks/Response from APCOB

05.

Page 9, 5 E

We are offering switching services on an ASP model our infrastructure is PA DSS and PCIDSS complaint and switch is hosted in a Data centre which is ISO 27001 and 20001 certified. We request the bank to remove the requirement of ISO 9001 certificate and SEICMM Level 3 certification.

ISO 27001 is for information security standard.

ISO 9001 for quality standard.

SEICMM for software development standard.

22. When Sarvatra Technologies raised a query with regard to Condition No. 5-E, it was answered by the second respondent, which is as under:

S.No.

Description of Query sought by the Bidder

Remarks/Response from APCOB

2.

Page 9, 5. Eligibility Criteria,

Point E

As the APCOB has asked for ISO 27001 Certification, which is much higher category of certification as compared to ISO 9001, we request APCOB to remove the ISO 9001 certification requirement as it is a general certification.

ISO 9001 is for Quality Certification standard and ISO 27001 is for Information Security standard. Hence both are necessary. Request denied.

23. In view of the above clarifications and stand taken by the second respondent, the possession of ISO 9001 certification is a major one and cannot be called as a minor eligibility so as to invite the exercise of power under Clause 10.21.5 by treating it as a minor non-conformity and is clearly illegal. The second respondent cannot have any discretion in respect of the same.

24. Regarding the commercial bid, the third respondent submitted its bid in Annexure-Q with the following terms and conditions:

"1. Card dispatch, Kit dispatch or PIN dispatch by courier costs to be borne by the bank at actuals or bank to assign a courier agency for pick up from Euronet or assigned Card vendor of Euronet.

2. The above card commercials are for Magstripe cards only.

a. Minimum Lot size for Rupay Kisan Debit Card/Rupay ATM Card is assumed to be 10,000 per batch.

b. Card personalization costs to be over and above per card commercials and will be discussed and charged to the Bank separately.

c. Minimum batch size for personalized cards is 1,000 cards and will be deliverable in 15 working days (from date of placement of the order).

3. Term of contract assumed to be 5 years. Any change to contract term to have corresponding impact on commercials.

4. The commercials are valid for issue of 73.1 lakh non-personalized cards or 5 years (whichever is earlier). Any additional card issuance to be charged separately which will be discussed with the Bank.

5. The ATMs, Micro ATMs & POS are as per the numbers given in RFP. Any additional devices during the 5 years term will be charged separately.

6. NAC for POS Driving is assumed to be provided by the Bank."

25. It is submitted by the learned Senior Counsel for the petitioner that in view of the said conditions, the commercial bid of the third respondent should have been treated as non responsive and should have been rejected at the threshold. But, the second respondent has addressed a letter contrary to the Clause 10.9 of the RFP and after receiving the said letter dated 03.02.2015, the third respondent withdrew the said conditions. The withdrawal of the conditions subsequent to the opening of financial bid by the third respondent is of no avail and the commercial bid of the third respondent should have been rejected at the threshold, as it is contrary to Clause 10.21.4 of RFP. The commercial bid was opened on 20.01.2015 and at the time of opening of the said commercial bid, the commercial bid of the third respondent contained conditions in Annexure-Q. In view of the same, the commercial bid of the third respondent should have been treated as non-responsive.

26. The learned Senior Counsel appearing for the third respondent tried to impress upon this Court by reading the terms and conditions to Annexure-Q stating that they are not conditions. When his attention was drawn by this Court to the condition No. 4, the learned Senior Counsel was unable to answer the nature of the said condition to show that it was not a condition but stated that these conditions were later withdrawn. Such conditional bid ought not to have been considered by the second respondent. Though the bid of the petitioner is more than the bid of the third respondent by 1/3rd, in view of the infirmities in accepting the bid of the third respondent by the second respondent, this Court is constrained to hold that acceptance of the process of bid of the third respondent is vitiated, based on the ratio laid down in the following decisions.

27. In Ramana Dayaram Shettys case, it was clearly held that the standard of eligibility laid down in the notice for tenders cannot be departed from arbitrarily. Such departure from the standard would amount to denial of equality of opportunity to those who felt bound by the standard of eligibility and did not submit their tenders. In the instant case, the Tata Communications did not submit its tender, in view of the clarification in the pre-bid conference, but the relaxation was extended to the third respondent in respect of Condition No. 5-E contrary to the clarification issued in the pre-bid conference.

28. In Larsen and Toubro Limited''s case, it was held that a non-responsive bid should not be considered even though it was a lowest bid. Since the commercial bid of the third respondent was conditional, the subsequent withdrawal of condition and the acceptance of second respondent do not make the bid as

responsive.

29. In Air India Ltd.s case, it was held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned and cautioned the Courts that while exercising the discretionary power under Article 226 of the Constitution of India, exercise of such discretionary power should be in larger public interest only.

30. In N. Dolendra Prasad''s case, this Court considered the power of the employer to relax the conditions and when it was not reserved to relax the essential criteria, the relaxation of such essential conditions after opening of the bids was held illegal. Poddar Steel Corporations case is also to the same effect. In W.B. State Electricity Boards case also, it was held that merely because bid is revised, the requirement of compliance with rules and conditions may not be ignored.

31. In Michigan Rubber (India) Limited''s case, which was relied on by the learned Advocate General for A.P. for the second respondent, it was held that this Court must be circumspect in the matters relating to tenders and court should not interfere merely because the issuance of tender would have been wiser or more logical. In the instant case, such exercise is not done by this Court by commenting upon the conditions to the tender, but is reviewing the decision of the second respondent as to whether the second respondent has fairly applied the same parameters to all the parties or not.

32. On the above facts and law, the acceptance of the bid of the third respondent is vitiated on the following grounds:

"a) In view of the clarification issued in the pre-bid conference, it cannot be said that ISO 9001 certification is not an essential condition and in the absence of any power to relax such an essential condition, it is not open to the second respondent to relax such condition. Many bidders including Tata Communications and Sarvatra Technologies were made to understand that ISO 9001 is necessary.

b) The bid of the third respondent is a conditional bid as could be seen from the conditions attached to the Annexure-Q, which were later on withdrawn at the instance of the second respondent. In view of the nature of the bid, the third respondent should have rejected the bid at the threshold."

32. In view of the above, the writ petition is liable to be allowed and is accordingly allowed declaring the action of the second respondent in accepting the bid of the third respondent as illegal and arbitrary.

33. However, it appears that the second respondent lacked clarity with regard to technology. The technology is changing fast and the technology that was available around March, 2014 might have undergone a change. Consequent to the allowing of the writ petition, the bid of the petitioner alone stands. It appears that there is vast difference in pricing of the petitioner when compared to the bid of the third respondent. In the circumstances, it is open to the second

respondent to take a decision for cancellation of the tender and issue a fresh tender including the latest technology in the tender conditions and opening offer to various other tenderers.

34. The miscellaneous petitions pending, if any, shall stand closed. There shall be no order as costs.