(2019) 10 TEL CK 0008

In the Telangana High Court

Case No : Writ Petition No. 34231, 35812 Of 2018

M/s. Sabhari Electricals And KCP Engineers Pvt. Ltd. APPELLANT

Vs

State Of Telangana, Department Of Municipal RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:
Constitution Of India, 1950 — Article 14, 32, 226

Citation : (2019) 10 TEL CK 0008

Hon'ble Judges : P. Naveen Rao, J

Bench : Single Bench

Advocate : D.V. Sitarama Murthy, Manohar Reddy

Final Decision : Allowed

Judgement

1. Heard Sri D.V.Sitarama Murthy, learned Senior counsel for petitioner in W.P.No.35812 of 2018 and Sri O.Manohar Reddy, learned counsel for petitioner in W.P.No.34231 of 2018, learned Additional Advocate General for Hyderabad Metro Development Authority and HGCL and learned Government Pleader for Municipal Administration and Sri D.Prakash Reddy for unofficial respondents in W.P.No.34231 and 35812 of 2018 respectively.

2. Tender notification dated 31.1.2018 was issued by the respondent no.1 calling for Design, Supply, Installation, Testing, Commissioning of illumination of the Outer Ring Road, Hyderabad for the Main Carriage Way/ Inter changes/ Junctions/ Service Roads at junctions and Under Pass areas from Kokapet to Shamshabad (0.00 km to 136 km) total 136 Km length and Operation & Maintenance of illumination with connected switch gear for a period of five years from the date of Operational Acceptance Certificate being taken up with HGCL funds. The petitioners have responded to the same. Three bids were filed including that of petitioners.

3. On 4.4.2018 the tender committee scrutinized the three bids of Bajaj Electricals, HPL Electricals and Power Ltd and Sabhari Electrical and declared bids

of Bajaj Electricals and Sabhari Electricals as technically qualified, whereas HPL Electricals & Power was disqualified as it was blacklisted.

4. While so, vide communication Letter No.CGM(T)/HGCL/ DGM(Ele)/8036/2015-16 dated 16.4.2018 the respondent no.1 informed that the offline tender was cancelled and it was decided to notify the same on e-procurement platform. On 17.4.2018 vide BID Notice No.42/CGM(T)/HGCL/ DGM(Elec)/8036/2017-18 tender notification was issued on e-Procurement Platform for the same work. Certain key parameters are changed in the qualification requirement.

5. Bajaj Electricals, Sabhari Electricals and KMV Projects Limited responded to the second tender notification through e-Procurement Platform.

6. Bajaj Electricals Limited was declared as technically unqualified and unsuitable. After conducting Mockup tests and evaluation of financial bid contract was awarded to KMV Joint Venture.

7. Aggrieved by awarding of contract to M/s. KMV Joint Ventures, M/s Sabhari Electricals and KCP Engineers Private Limited filed W.P.No.34231 of 2018. Bajaj Electricals filed W.P.No.35812 of 2018 challenging the tender notification dated 17.4.2018. As the issue in both writ petitions concern awarding of contract for illumination of Outer Ring Road (ORR), these two writ petitions are heard and disposed of by common order.

8. Heard learned senior counsel Sri D.V.Seetharam Murthy for petitioner in W.P.No.35812 of 2018, learned counsel Sri O.Manohar Reddy for petitioner in W.P.No.34231 of 2018, learned senior counsel Sri D.Prakash Reddy for M/s.KMV Joint Venture, private respondent in both writ petitions and learned Additional Advocate General for HMDA and HGCL in both writ petitions.

W.P.No.35812 of 2018 :

9. Learned senior counsel Sri D.V.Seetharam Murthy made following submissions:

9.1. The nature and scope of the work specified in the tender dated 31.1.2018 and the tender dated 17.4.2018 being the same without any sort of variation in the scope of work, changing eligibility criteria/minimum key quantities is arbitrary and whimsical. No justification is shown either in the tender document or in the counter affidavit filed by the respondents. This was deliberately done only to eliminate petitioner from the competition, more so, as petitioner was the successful bidder in the earlier tender process.

9.2. The action of HGCL is in gross violation of Central Vigilance Commission guidelines notified vide Office Memorandum dated 17.12.2002. As per the Office Memorandum no bidder should be denied prequalification/post qualification for reasons unrelated to its capability and resources to successfully perform the contract. Therefore, on this ground alone the entire process is vitiated.

9.3. It is further submitted that petitioner was illegally disqualified. As per the eligibility criteria for opening the price bid, the bidder should have satisfactorily completed as a contractor of similar works of value of not less than 50% in any one year during the last 10 years. As per tender notification the work was to be executed in 15 months. Since the estimated contract value of the work was shown as 107.50 crore and period of completion of work was 15 months, therefore total value of executing contract of similar work has to be assessed by dividing the total value of 107.50 by 15 months and normalize to 12 months. This is also clear from the milestones fixed for the whole work. If that is so the estimated contract value would come down to 43 crores. Instead of fixing the amount at 43 crores by applying normalization principle, the Tender Evaluation Committee fixed it at 53.75 crores. Again this was deliberately done only to eliminate petitioner. He would further submit that as per guidelines notified vide G.O.Ms.No.94 Irrigation and CAD (PW-COD) Department, dated 01.07.2003 the turn over required was only 43 crores, whereas, petitioner's turn over was more than 49 crores. He would therefore submit that tender conditions and assessment of petitioner's eligibility is not as per the standards and norms fixed by the State Government.

9.4. Revision of other criteria in the e-procurement tender notification compared to earlier tender notification is also illegal. This was deliberately done only to eliminate petitioner since his earlier offer was the lowest.

9.5. By extensively referring to various clauses of tender notification, G.O.Ms.No.94, dated 01.07.2003 and the notes of Tender Committee, learned senior counsel would submit that all this would show that deliberately petitioner was disqualified. He would further submit that fixing experience of executing work of similar nature only from Government/Public Sector Undertakings as eligibility criteria is again illegal. What is required to assess the competence of a person is execution of work of similar nature. Petitioner has executed prestigious projects and is the manufacturer of lamp posts and illumination equipment.

9.6. Learned Senior Counsel asserted that 3rd respondent is not qualified. It is a joint venture and does not measure upto the eligibility criteria. Going by documents uploaded by 3rd respondent figures do not match. It appears in collusion with him the tender Committee may have considered offline documents, contrary to tender conditions.

9.7. He would further submit that merely because petitioner participated in the tenders would not amount to waiver of his right to challenge the entire process. Further, there can be no waiver of constitutional rights.

9.8. He would submit that as held by Hon'ble Supreme Court, in Michigan Rubber (India) Limited Vs State of Karnataka and others 2012 (8) SCC 216 the process adopted is mala fide and entire exercise was to favour third respondent.

9.9. Learned senior counsel placed reliance on following decisions:

Reliance Energy Ltd Vs Maharashtra State Road Development Corporation

Limited and another (2007) 8 SCC 1 , Haffkine Bio-Pharmaceutical Corporation Limited Vs Nirlac Chemicals (2018) 12 SCC 790 , Balaji Transport, Tadepalligudem Vs State of Andhra Pradesh and others 2013 SCC Online AP 568 , Meerut Development Authority Vs Association of Management Studies and another (2009) 6 SCC 171 , Bharat Biotech International Limited, Hyderabad Vs A.P. Health and Medical Housing and Infrastructure Development Corporation, Hyderabad and others 2002 SCC Online AP 1070 .

W.P.No.34231 of 2018 :

10. Petitioner in W.P. No. 34231 of 2018 along with 4th respondent was declared as qualified in the initial evaluation of basic criteria and were subjected to MOCKUP test. In the MOCKUP test, both were declared qualified, financial bids were opened and holding that offer of 4th respondent is lowest, contract was awarded to him. In this writ petition, petitioner challenges the procedure adopted while evaluating the competence of petitioner and 4th respondent in MOCKUP test. Primarily, according to petitioner, 4th respondent was disqualified but by giving further opportunity, he was made to qualify.

11.1. According to learned Counsel Sri O.Manohar Reddy, MOCKUP test is an essential condition required to be cleared by the bidder and in the MOCK UP Test conducted on 24.07.2018, 4th respondent failed. Instead of disqualifying him, he was given further opportunity to subject himself to second test with modified specifications.

11.2. By referring to various clauses in the tender document, particularly clause 22.5, he would submit that subjecting 4th respondent to second MOCKUP test is wholly illegal. The tender Committee has no competence to permit second MOCKUP test.

According to tender conditions, wattage can be up to 190 Watts. Petitioner specified his wattage as 175 watts and 4th respondent opted to show his capacity as 180 watts. After his failure in first MOCKUP test he has submitted revised wattage as 190 watts and cleared the MOCKUP test. Lux level is an important component of illumination and is the primary requirement for a bidder to qualify. The 4th respondent failed in achieving Lux levels.

11.3. He would submit that though petitioner objected to conducting of second MOCKUP test to the 4th respondent, before conducting the test and after, but the same was not considered and no reply was given to petitioner.

11.4. By referring to deliberations and notes of the tender committee he would submit that the same would reflect that 4th respondent was disqualified. All this amounts to mala fide exercise of power to favour 4th respondent. It was a farcical exercise.

11.5. He would further submit that the Managing Director has no role in tender evaluation but he ordered for second MOCKUP test and the same is ex-facie illegal.

11.6. He would submit that LUX level is a mandatory requirement and cannot be relaxed. Once procedure is set in motion rules of the game can not be changed.

11.7. Learned counsel Sri O.Manohar Reddy placed reliance on Supreme Court decision in Central Coalfields Limited and another Vs SLL-SML (Joint Venture Consortium) and others (2016) 8 SCC 622 .

Submissions of learned Additional Advocate General W.P.No.35812 of 2018 :

12.1. He would submit that petitioner in W.P.No.35812 of 2018 did not protest against cancellation of earlier tender and notifying fresh tender with more stringent conditions. On 26.4.2018 he sought withdrawal of bank guarantee. With eyes wide open he participated in the second tender process. He did not raise objections to new conditions of eligibility.

12.2. Learned Additional Advocate General justified cancelling earlier tender and notifying fresh tender on e-procurement platform by relying on G.O.Ms.No.94 dated 01.07.2003, G.O.Ms.No.171 dated 01.05.2004, and G.O.Ms.No.819 dated 16.11.2007. According to learned Additional Advocate General whenever the value of contract exceeds 10 lakhs the tenders have to be notified on e-procurement platform. The conditions imposed in fresh tender notification are in accordance with G.O.Ms.No.94. The condition that bidder ought to have executed similar work of value of not less than 50% of the bid amount in any year in the last 10 years and minimum key quantities are as per G.O.Ms.No.94.

12.3. He would further submit that clause No.3 of bid notice dated 17.04.2018 deals with qualification data of the bidders. In this clause under note C (viii) it is clearly mentioned that the value of similar work is 53.78 Crores. Petitioner has not raised objection on this condition and as petitioner did not fulfill those parameters he was disqualified from participating in the tender process.

12.4. Having participated, he cannot turn around and challenge those conditions after he was disqualified. Petitioner can not approbate and reprobate. Moreover, petitioner allowed the rest of the tender process to be finalized and after 3rd respondent was identified as successful bidder, this writ petition was filed. He therefore, submitted that there are no bona fides in the claim of petitioner. He would therefore submit that, as petitioner did not meet the tender conditions his tender was declared as non-responsive.

W.P.No.34231 of 2018 :

13.1. Learned Additional Advocate General would submit that there was no illegality in assessing the suitability of two bidders and no undue favour was conferred on 4th respondent as sought to be alleged. By referring to clause 21.1 of the bid document, he would submit that this clause enables the tender committee to seek clarifications from bidders. Thus, clarifications were sought and in its discretion permitted 4th respondent to undergo second MOCKUP test. The discretion was validly exercised only to assess the suitability of two bidders.

13.2. He would further submit that in the evaluation of bids of petitioner and 4th respondent the tender committee noticed deficiencies and therefore subjected them for further evaluation and to rectify the mistakes. Having availed this opportunity petitioner cannot turn around only because he was not L1.

13.3. He would further submit that petitioner gave counter offer to allot the work to him and 4th respondent. As this offer was not accepted, he instituted this writ petition as a counter blast. He would submit that there are no bona fides in the claim of petitioner.

13.4. He would submit that there is no illegality and procedural irregularity in the entire exercise. The jurisdiction of writ court in tender matters is very limited and petitioners have not satisfied these parameters. The terms of tender are not amenable to judicial review.

13.5. Learned Additional Advocate General placed reliance on the following decisions :

Tata Cellular Vs Union of India (1994) 6 SCC 651 , Air India Ltd Vs Cochin International Airport Ltd and others (2000) 2 SCC 617, Raunaq International Ltd Vs I.V.R Construction Ltd and another (1999) 1 SCC 492 , JSW Infrastructure Limited and another Vs Kakinada Seaports Limited and another (2017) 4 SCC 170 , Jagdish Mandal Vs State of Orissa and others (2007) 14 SCC 517 , Bakshi Security and Personnel Services Private Limited Vs Devkishan Computed Private Limited (2016) 8 SCC 446 , Montecarlo Limited Vs National Thermal Power Corporation Limited (2016) 15 SCC 272 , Afcons Infrastructure Limited Vs Nagpur Metro Rail Corporation Limited and another (2016) 16 SCC 818 , M/s. S.S.C.JV Vs. Hyderabad Metropolitan Development Authority 2014 SCC Online Hyd 818 , Jal Mahal Resorts Private Ltd Vs K.P.Sharma and others (2014) 8 SCC 804 , Caretel Infotech Ltd., Vs Hindustan Petroleum Corporation Limited and others 2019 SCC Online SC 494 , Afcons Infrastructure Limited, Michigan Rubber (India) Limited (supra), Shimnit Utsch India Private Ltd and another Vs. West Bengal Transport Infrastructure Development Corporation Ltd and others (2010) 6 SCC 303, Association of Registration Plates Vs Union of India and others (2005) 1 SCC 679 and judgment of this Court in K.Venkata Raju Engineers & Contractors (P) Ltd., Vijayawada Vs. State of A.P. and others 2017 (4) ALD 133 .

Submissions of Sri D.Prakash Reddy, learned Senior Counsel for M/s.KMV Projects Ltd (3rd respondent in W.P.No.35812 of 2018 and 4th respondent in W.P.No.34231 of 2018).

14. According to learned Senior Counsel as petitioner in W.P.No.35812 of 2018 has not met the essential parameters to qualify, it is not open to him to challenge the assignment of contract to KMV Projects. He has no locus standi to challenge subsequent evaluation of tenders.

15.1. He would submit that clause No.22.5 of bid document has several parameters. This clause permits the tender committee to subject bidder to second MOCKUP test. Having noticed certain deficiencies in both bidders, further opportunity was afforded. According to learned Senior counsel, petitioner in W.P.No.34231 of 2018 also failed in automation parameter and battery backup.

Both are essential requirements. Having failed in the first attempt, it rectified deficiencies pointed out by the tender committee and participated in further evaluation of bids hence, it is not open to him to contend that second MOCKUP test could not have been conducted.

15.2. He would further submit that petitioner accepted the eligibility of 4th respondent and requested to split up the work in his letter dated 20.08.2018. Thus, it is no more open to him to challenge awarding of contract to 4th respondent, merely because his request to split the work was not accepted. This shows lack of bona fides in the petitioner's claim.

15.3. He would submit that no mala fides are alleged. No extra concession was extended to 4th respondent and no favourtism was conferred on him. The power of relaxation was validly exercised in the larger public interest as illumination of ORR is in public interest. He would submit that 4th respondent is the lowest bidder.

16. While petitioner in W.P.No.35812 of 2018 challenges the change in tender conditions and disqualifying him at the initial stage, petitioner in W.P.No.34231 of 2018 challenges awarding of contract to 4th respondent in the said writ petition.

17. Thus, two issues arise for consideration, firstly, whether changes effected to bid conditions in the e-procurement platform compared to earlier box tender is justified and secondly, whether essential tender conditions were relaxed and permission granted to 4th respondent in W.P.No.34231 of 2018 again to undergo MOCKUP tests with changed specifications is valid in law.

ISSUE No. I :

18. The decision to cancel earlier bid process is perplexing. It is seen from the minutes of Tender Committee dated 04.04.2018, going in for box tender system instead of e-procurement platform was a conscious decision, though as per policy of the Government wherever contract value exceeds 10 lakhs the tenders have to be called on e-procurement platform. The decision to go for box tender was primarily on the ground that most of the LED manufacturers have not registered on e-procurement platform. The HGCL has given wide publicity as a measure to ensure that all experienced contractors would participate in the bids. Thus, it was a conscious decision and enough safeguards were provided. The HGCL tried to hide under the garb of parameters fixed in G.O.Ms.No.94 to go in for e-procurement mode.

19. However, matter does not rest here. After notification of tender on e-procurement platform, M/s. Bajaj Electricals Ltd., asked to refund bank guarantee submitted in earlier tender process and without protest participated in the bid process. Even after its technical bid was rejected for not fulfilling the

tender conditions, it kept quite and allowed undertaking of further process and awarding of contract to 3rd respondent in its writ petition. This writ petition is also filed after M/s. Sabhari filed W.P.No.34231 of 2018. Further, Bajaj Electricals Ltd., bid was rejected on three grounds. One of the conditions prescribed for eligibility was to execute work of similar nature with Government and Public Sector Undertakings. Even if contention of learned Senior Counsel that experience of executing similar work with other reputed Organizations could not have been ignored is held as valid, petitioner in W.P.No.35812 of 2018 did not satisfy the execution of contract value of similar work in a year. Clause 3(viii) of the bid document (extracted below) mentions the expected turn over in a year as 53.75 crores. This clause is not under challenge. Thus, though elaborate submissions are made on change in the tender conditions when notified on e-procurement platform, court is not expressing opinion on the same as those conditions were not challenged soon after bid was notified, allowed the entire bid process to be completed, and petitioner also failed on other parameters.

20. While formulating tender conditions, employer has wider latitude and scope of judicial review is minimal. Court cannot interject the tender process on the ground that some of the terms of invitation to tender are not palatable to a contractor.

20.1. In Life Insurance Corporation of India V Escorts Limited and Others AIR 1986, SC 1370 , Supreme Court delineated scope of judicial review in contract matters. Supreme Court held as under :

"101. It was, however, urged by the learned Counsel for the company that the Life Insurance Corporation was an instrumentality of the State and was, therefore, debarred by Article 14 from acting arbitrarily. It was, therefore, under an obligation to state to the Court its reasons for the resolution once a rule nisi was issued to it. If it failed to disclose its reasons to the Court, the Court would presume that it had no valid reasons to give and its action was, therefore, arbitrary ....."

"......While we do not for a moment doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, we do not construe Article 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions."

102. For example, if the action of the State is political or sovereign in character, the court will keep away from it. The court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of

State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder."

(emphasis supplied)

20.2. In Narmada Bachao Andolan V Union of India (2000) 10 SCC 664 , Supreme Court is pleased to hold :

"229. It is now well settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the Courts are ill-equipped to adjudicate on a policy decision so undertaken."

21. From the precedent decisions, few of them noted above, it is clear that principle of law is settled on competence of the employer to prescribe the conditions to execute a work and Courts cannot ask the employer to change the requirements or to prescribe/relax certain conditions Court deems as valid.

22. It is seen that petitioner in W.P.No.35812 of 2018 opposes prescribing certain tender conditions which he does not fulfill. It is the foremost contention of learned senior counsel that these conditions are tailor-made to suit other contractors and eliminate petitioner from competition. It is not explained how these conditions are not useful in ensuring higher quality illumination on the outer ring road. It cannot be said that prescription of higher eligibility criteria, experience, etc., are against public interest.

23. Illumination of Outer Ring Road/connecting roads/ interjections requires lot of technical inputs, analysis and assessment by experts in the concerned field. The State through its various Departments/instruments is best suited to evolve conditions to execute the work. The Court is not equipped to assess such requirements. It is not the job of judicial wing of the State to assess what components of a contract are required and what components are not required. It cannot be said that the revised terms are so unreasonable and arbitrary for this Court to interfere and ask the employer to redraw the tender conditions. It cannot be said that the justification assigned in the counter-affidavit to prescribe

such higher conditions of eligibility are not valid. Moreover, petitioner filed W.P.No.35812 of 2018 after entire process was completed.

ISSUE No. II :

24. The next question is whether essential conditions are relaxed and further opportunity afforded to M/s.KMV Projects Limited to undergo MOCKUP tests is in violation of tender conditions and is arbitrary. Further, even if a condition is essential, whether relaxation of said condition would prejudice one of the participants and also denied others from participating in the tenders ?

25. Before discussing on these aspects, a brief recapitulation of precedent decisions is necessary for better understanding of respective submissions.

26.1. In G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488 at page 501 (Relied upon by Kanhaiya Lal above), Supreme Court observed,

"15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Shri Vaidyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to court with any such grievance. The question, then, is whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana case [(1990) 2 SCC 486] will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis-a-vis MCC are, however, a matter for the KPC (counselled by the TCE) to decide and not for the courts. We were, therefore, rightly not called upon to go into this question."

(emphasis supplied)

26.2. In Poddar Steel Corp. v. Ganesh Engg Works (1991) 3 SCC 273, it was held,

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance with the condition in appropriate cases."

(emphasis supplied)

26.3. Similarly in Kanhaiya Lal Agrawal v. Union of India (2002) 6 SCC 315 , Supreme Court held,

"6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term...."

(emphasis supplied)

26.4. B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548 at page 571 (Discusses the G.J. Fernandez and Poddar Steel judgments as above, to conclude), Supreme Court held,

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

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

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint."

(emphasis supplied)

27.1. In Asia Foundation & Construction Ltd., v Trafalgar House Construction (I) Ltd., (1997) 1 SCC 738 while referring to guidelines laid down in Tata Cellular (supra), Supreme Court held as under :

"9....... The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the Court has not found any mala fides or favoritism in the grant of contract in favour of the appellant. IN Tata Cellular Vs Union of India (supra), this Court has held that :

"The duty of the Court is to confine itself to the question of legality. Its concern should be :

(1) Whether a decision-making authority exceeded its powers.

(2) Committed an error of law,

(3) Committed a breach of the rules of natural justice,

(4) Reached a decision which no reasonable Tribunal would have reached or,

(5) Abused its powers.

Therefore, it is for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(I) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(II) Irrationality, namely, Wednesbury unreasonableness.

(III) Procedural Impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

(Emphasis supplied)

27.2. In Raunaq International Limited (supra), Supreme Court dealt with the matter in some detail and held as under:

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services

as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest?

(1) Public money would be expended for the purposes of the contract;

(2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities.

(3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously.

(4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether

these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene."

(emphasis supplied)

27.3. In Reliance Airport Developers (P) Ltd., V.Airports Authority of India, (2006) 10 SCC 1 Supreme Court elaborated on these three parameters. Supreme Court observed :

"65. In other words, to characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

66. In essence, the test is to see whether there is any infirmity in the decision-making process and not in the decision itself. (See Indian Rly. Construction Co.Ltd. V Ajay Kumar (2003) 4 SCC 579 =2003 SCC (L&S) 528 ."

(emphasis supplied)

27.4. Court is conscious of limitations of judicial review. On the scope of judicial review of the decisions of executive, more particularly decision involving technical matters, in Union of India V J.O.Suryavamshi (2011) 13 SCC 167, Supreme Court cautioned the Courts to resist the temptation to usurp the power of executive. The wholesome rule with regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant facts, eschews from considering irrelevant facts and acts reasonably within the parameters of the law, Courts should keep off the same [Paragraph 18, Federation of Rly.Officers Assn. V Union of India (2003) 4 SCC 289]. Legality of policy and not the wisdom or soundness of the policy, is the subject of judicial review. [Paragraph 16, Directorate of Film Festivals Vs Gauraw Ashwin Jain (2007) 4 SCC 737 .]

27.5. In Municipal Corporation, Ujjain v. BVG India Limited, (2018) 5 SCC 462 several precedent decisions including the decisions cited at the bar were considered. Supreme Court held,

"7. the modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or a quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by mala fides. (See the judgment in the case of Master Merin Services (P) Ltd. v. Metcalfe & Hodgkinson (2005) 6 SCC 138.)

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision."

21. Thus, only when a decision making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decisions, power of judicial review can be exercised. However, if it is bona fide and in public interest, the Court will not interfere in the exercise of power of judicial review even if there is a procedural lacuna. The principles of equity and natural justice do not operate in the field of commercial transactions. Wherever a decision has been taken appropriately in public interest, the Court ordinarily should exercise judicial restraint. When a decision is taken by the concerned authority upon due consideration of the tender document submitted by all tenderers on their own merits and it is ultimately found that the successful bidder had in fact substantially complied with the purpose and object for which the essential conditions were laid down, the same may not ordinarily be interfered with.

(emphasis supplied)

27.6. In Caretel Infotech Ltd., (supra) the Supreme Court held,

"38. we consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and Public Sector Enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public

Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private Sector is competing often in the same field. Promptness and efficacy levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the Public Sector."

(emphasis supplied)

28. In the first set of decisions, Supreme Court dealt with issue on essential conditions and whether such conditions can be relaxed and in the second set of decisions the parameters of judicial review, in matters concerning processing of tenders and awarding of contracts is discussed. Supreme Court consistently held that essential conditions have to be strictly enforced. Court can undertake judicial review of an executive decision on grounds of 'illegality', 'irrationality' and 'procedural impropriety'. The Writ Court is required to consider whether the decision making process satisfies the test of reasonableness, fairness, non-arbitrariness, whether authority lacks competence, and the element of public interest.

29. In the light of law as propounded by Hon'ble Supreme Court, on various aspects of tender process, it is necessary to examine whether HGCL has deviated from the tender conditions, if so whether such conditions are essential and by granting additional opportunity to Respondent No.4 to rectify the mistakes without declaring bid document as non-responsive undue favour was conferred on Respondent No.4 and whether tender evaluation process is vitiated on principles evolved in the precedent decisions.

30. To appreciate these aspects, it is necessary to look into the relevant clauses of tender notification. The relevant clauses of tender notification which have a bearing on the issues in these cases read as under:

"2(b). The intending Bidders need to register on the electronic procurement market place of Government of Telangana that is, www.eprocurement.gov.in. On registration on the e-procurement market place they will be provided with a user ID and password using which they can submit their bids on line.

(d) While submitting the tender on the e-procurement market place, Bidders need to scan and upload all the required documents as per the tender requirements/conditions. However, the tenders of those bidders shall be acceptable who have paid the cost of tender document & bid processing fee of .25,000 (Rupees Twenty five thousand only) and also the required EMD as per tender conditions. The scanned copy as proof of payment shall be up loaded without which their bid shall not be considered.

(e) Such uploaded documents need to be attached to the tender while submitting the bids.

3(i) The Department shall carry out the technical bid evaluation solely based on the Uploaded certificates/documents, proof of payment of EMD & cost of Bid document etc., in the e-procurement System and physical submission of the all attested documents as uploaded and proof of original payments towards EMDs. etc.

6.(2) All Experience of Govt/Semi Govt/Govt. under takings with in India only will be considered on production of completion Certificate from the Engineer not below the rank of Executive Engineer. The completion certificate must clearly indicate (i) name of the work (ii) the date of commencement of work (iii) the date of completion of work (iv) Nature of work (v) that the work has been completed satisfactory (vi) contract value, billing amount (vii) Performance of the contractor.

6. (3) The Bidder should have satisfactorily executed the works as a prime Contractor/Authorized Sub Contractor.

6.3 (viii) Satisfactorily completed as a prime contractor similar works of value not less than .53.75 crores in any one year during the last 10 financial years i.e., from 2008-2009 to 2017-18 (updated to current price level at the rate of 10% per year). Similar nature of work means the agreement/work order should contain Supply, installation, testing & commissioning of external illumination like road lighting/street lighting/ Yard lighting/stadium lighting etc. For any project spreading over two or more financial years, the value of work will be considered on pro-rata basis.

6.3.(ix)Minimum key quantities :

The Minimum key quantities executed in any financial year during last ten (10) financial years i.e., 2008-09 to 2017-18 shall be as follows :

Sl.No.

Item

Qty

1

Supply installation testing & Commissioning of (SITC) Electrical street light Poles (above 7.5 Mts height poles)

3500 Nos.

2

SITC Road Street lighting with LED/Conventional luminaries.

7000 Nos.

3

SITC High Masts (20 Mts and above)

9 Nos.

4

SITC PVC insulated, PVC Sheathing/XLPE

Underground cable above 16 Sqmm cable.

175 km

5

Supply and erection feeder pillars control and automation system.

with

street

light

50 Nos.

Sl.No.

Item

Qty

1

Supply installation testing & Commissioning of (SITC) Electrical Octagonal Poles (above 7.5 Mts height poles)

1000 Nos.

2

SITC Road Street lighting with LED/Conventional luminaries (above 120 Watts).

1500 Nos.

3

SITC High Masts (20 Mts and above)

8 Nos.

4

SITC PVC insulated, PVC Sheathing/XLPE Underground cable above 16 Sqmm cable.

30 km

5

Supply and erection feeder pillars with street light control and automation system.

20 Nos.

(xv) Lighting design calculations shall be submitted for each typical road configuration for all the proposed luminaries using Dialux.(as per ANNEXURE-11). Soft copy of photometry files to be submitted along with design calculation reports. Lux levels has to be submitted in grid distribution area (for each design luminary make, wattage, lumen output, Color temperature and other luminaire parameter has to be submitted as per ANNEXURE-11).

INSTRUCTIONS TO TENDERERS : A-General :

1.0 (B). The Works under this Contract shall be carried out in accordance with the bidding documents constituting the Contract and shall consist of :

a) On Main Carriageway :

(i) 12 m height Octagonal Pole with double armed bracket with 2 Nos. of 190 W LED with 25.00 m spacing for 8-Lane Carriage way with paved shoulders from Kokapet to Shamshabad (0.00 km to 136 km) for road width 18.2 Mtrs.

(ii) 12 m height Octagonal Pole with doubt armed bracket with 2 Nos. of 240 W LED fitting with 25.00 m spacing for 8-Lane Carriageway with paved shoulders from Kokapet to Shamshabad (0.00 Km to 136 km) for road width 20 Mtrs.

(b)(i) On Service Roads: 7.5 Mts height Octagonal pole with single armed bracket with 1 No 105 W LED fitting for road width 9 mts.

(ii) Up & Down ramps : 7.5 Mts. Height Octagonal pole with single armed bracket with 1 No 120 W LED fitting for road width 9 mts.

(iii) Road between junctions : 9.0 Mts height octagonal pole with double armed bracket with 1 No 140 W LED fitting for road width 10.5 Mtrs.

(x) Bid Capacity :

13.2. During the above mentioned period no plea by the Tenderer for any sort of modification of the tender based upon or arising out of any alleged misunderstanding of misconception or mistake or for any reason will be entertained.

19. Modification to the Tender :

19.1. No Tender shall be modified after the last date/time of submission of Tenders.

E) TENDER OPENING AND EVALUATION

20. Tender opening

20.1 The Technical bids will be opened online by the Chief General Manager, HGCL at the time and date as specified in the tender documents. All the Statements, documents, certificates, Demand Draft / Bank Guarantee etc., uploaded by the Tenderers will be verified and downloaded, for technical evaluation. The clarifications, particulars, if any, required from the bidders, will be obtained either online or in the conventional method by addressing the bidders. The technical bids will be evaluated against the specified parameters / criteria same as in the case of conventional tenders and the technically qualified bidders will be identified. The result of Technical bids evaluation will be displayed on the e?market place, which can be seen by all the Tenderers who participated in the Tenders.

The department shall carry out the technical bid evaluation solely based on the uploaded certificates/documents, DD/BG towards EMD in the e-procurement system and documents submitted physically. Those who qualify in technical will be allowed for mockup test and open the price bids of the responsive bidders those who pass the mockup test only .

21. Clarification on the Technical Bid :

21.1. The tender opening authority may call upon any Tenderer for clarification on the statements, documentary proof relating to the technical bid. The request for clarification and response thereto shall be in writing and it shall be only on the qualification information furnished by the Tenderer. The clarification called for from the Tenderers shall be furnished within the stipulated time, which shall not be more than a week.

22. Examination of technical Bids and Determination of Responsiveness :

22.1. The Chief General Manager will evaluate whether each Tenderer is satisfying the eligibility criteria prescribed in the tender document and declares them as a qualified Tenderer.

22.3. If any alteration is made by the Tenderer in the tender documents, the conditions of the contract, the drawings, specifications or statements/formats or quantities the tender will be rejected.

22.5. Mockup Test :

The Bidder is required to supply 10 Nos. light fixtures as per proposed design along with the other accessories of light fixtures/luminaries of specified types as per submitted design and specifications mentioned in the submitted tender documents (by the Bidder) for mock-up. Out of which 2 nos. randomly selected for testing at NABL lab, these two luminars will not be returned. Supply & fixing of poles and light fixtures etc., for the mockup shall be done with 4 nos poles and 8 Nos. light fixtures on the existing 8 lane ORR main carriageway of width 18.20 mts location shown by the HGCL. The mock up shall meet the requirements of average 30 Lux (with MF 0.85) on 8 lane main carriage way for road width of 18.2 Mtrs. The bidder is required to show automation and dimming technology with GSM/GPRs, panel in the mockup and control the above luminaries and required functionalities has to shown to the committee. The Bidder shall depute representative having complete knowledge to explain their product in detail. Bidder shall organize & bear all cost of providing samples material, illumination arrangement power generator, transport, loading, unloading security etc., for the mockup. Mockup will be evaluated by a committee, nominated by HGCL. If required modifications will be suggested and an undertaking to agree to the modifications without any financial implications will be taken from the Bidder. However, in case of major changes, if any in the work or if HGCL feels that some modifications need to be done to create a level playing field, a revision if the price bid could be allowed only at the discretion of HGCL. Those who qualify in the mockup as above shall be invited for the opening of financial bid. The cost of mockup shall be borne by the bidder. To avoid delay the bidder should get ready with all arrangements to carryout MOCKUP test at any time with in 4 days from the date of intimation letter.

23. PRICE BID OPENING:

23.1. At the specified date and time, the price bids of all the technically qualified bidders who pass the mockup test will be opened online by the Chief General Manager and the result will be displayed on the 'e' market place which can be seen by all the bidders who participated in the Tenders.

23.2 Only the price bids of qualified Tenderers whose technical bids are found satisfying the eligibility criteria and who passed the mockup test shall be opened on the date and time fixed.

23.4 Tenders shall be scrutinized in accordance with the conditions stipulated in the Tender document. In case of any discrepancy of non-adherence conditions the Tender accepting authority shall communicate the same which will be the binding both on the tender opening authority and the Tenderer. In case of any ambiguity, the decision taken by the Tender Accepting Authority on tenders shall be final.

27. Award Criteria

27.1 The Chief General Manager will award or recommend to the competent tender accepting authority for award of the contract to the Tenderer who is found technically qualified as per the Tender conditions and whose price bid is lowest.

27.2 The tender accepting authority reserves the right to accept or reject any Tender or all tenders and to cancel the Tendering process, at any time prior to the award of Contract, without thereby incurring any liability to the affected Tenderer or Tenderers or any obligation to inform the affected Tenderer or Tenderers of the reasons for such action."

31. Three bids were submitted by persons who are parties to these writ petitions. As per bid document, after the last date for submission of bids was over, the Bids would be subjected to technical evaluation (clause 20.1). At this stage, it is permissible for Chief General Manager to seek clarifications from tenderers on any aspect mentioned in their bids (clauses 20.1 and 21.1). On assessing eligibility criteria, after considering clarifications if any sought and furnished, whether bidders are technically qualified would be notified (clauses 21.1, 22.1 and 22.3). In the cases on hand no clarifications were sought. Based on the bids

submitted by three tenderers, M/s.Bajaj Electricals Ltd., was declared as non-responsive. The other two bidders' bids were found to be responsive. Therefore, the tender committee proceeded to the next stage.

32. As evident from the scheme of bid evaluation, no alteration in tender document, the drawing, specification and statements are permissible and if any such corrections/changes are made bid would be rejected on this ground (Clauses 20.1 and 22.3). It is thus apparent that once bid document was uploaded it is not permissible to change specifications. Clause 22.3 comes into play after the clause 22.1 stage is over.

33. The bidders who cleared technical evaluation, on qualification and suitability would be subjected to MOCKUP test. MOCKUP test is the most important eligibility criteria. Only if bidder meets the parameters in MOCKUP test his financial bid would be opened. Clause 22.5 of bid document deals with MOCKUP test.

34. MOCKUP test has two components. First component is field assessment of parameters and second component is testing in laboratory. Bidder has to supply 10 Nos. of light fixtures as per proposed design along with other accessories of fixtures/ luminaries of specified types as per submitted design and specifications mentioned in the tender document. Out of this, two would be sent to the Laboratory. In the field assessment, the bidder has to satisfy on three aspects. Firstly, he should meet average 30 LUX levels on 8 lane carriage way of 18.2 Mts., road width; secondly, automation/dimming technology with GSM/GPRS panel; and thirdly 'limiting specified driver output'. The MOCKUP test results would be evaluated by the Committee. Clause 22.5 enables the Committee to suggest required modifications. At this stage, it is apt to note that no such modifications were suggested to two bidders. Therefore, scope of said clause is not looked into.

35. In the MOCKUP test conducted on 24.07.2018 M/s.KMV Projects Limited failed. The firm applied for second MOCKUP test. The same was agreed and second (MOCKUP) field assessment test was conducted. In addition, further lab tests were ordered. Conducting of second MOCKUP test was opposed by M/s.Sabhari Electricals. HGCL holds that it has power to permit the second MOCKUP test also.

36. The result of first MOCKUP (field assessment) test conducted on 24.07.2018 and second opportunity sought by KMV Projects are tabulated and discussed by Chief General Manager (Technical) in the note submitted to tender committee. It reads as under :

"As per recorded results the lux level measurement results as follows :

Sl.No

Parameter

As per tender specification

Achievement By M/s.Sabhari Electricals

Result

Achievement By M/s.KMV projects

Result

1

Average Lux

Levels with 80.85

Maintenance

factor

30

34.03

OK

29.0

Failed

2

Average Lux Levels without Maintenance factor

35.3

40.03

OK

34.1

Failed

3

Uniformity Min/Max ratio

>0.33

0.48

OK

0.32

Failed

4

Uniformity Min/average ratio

>0.40

0.57

OK

0.48

OK

5

Uniformity longitudinal UL=Min/Max ratio

>0.70

0.92

OK

0.90

OK

6

Dimming Technology

Shown by the bidder

OK

Shown by the bidder

OK

From the above results the bidder M/s.Sabhari Electricals, Chennai achieved the lux levels & uniformity, the bidder M/s.KMV Projects, Hyderabad not achieved the lux levels & uniformity.

M/s.KMV Projects has represented to Chief General Manager (T), HGCL vide Letter No.KMVPL/HGCL/03/2018-19 dt.25.07.2018 that they exhibited mockup test on 24.07.2018 at Keesara junction with 180 watts fixture instead of 190 watts as per design standards for better efficiency and power saving. Before mockup test they measured the lux levels with their lux meter found satisfied with the results, but at the time of mockup test measured the lux levels with standard meter and not achieved the lux levels.

M/s.KMV Projects is requested to give chance to show lux level demonstration with 190 watts (as per tender specification) with their cost to show all the parameters required as per the tender document.

As per the note approval of MD, HGCL the 2nd mockup test has been conducted on 02.08.2018 with 190 watts luminaries supplied by the bidder M/s.KMV Projects, Hyderabad and the test results are shown in annexure-III."

(emphasis supplied)

37. It is also seen from this note that M/s.Sabhari Electricals battery back up was only 10 minutes as against required six hours.

38. Note also contains test results of CPRI, Bangalore. In the tests conducted on 13.07.2018 M/s.Sabhari Electricals met all the parameters whereas KMV Projects 'failed in limiting the specified driver output'. Another laboratory test was conducted on KMV Projects on 01.08.2018.

39. The relevant portion of note reads as, "but as per CPRI test repots, test results of luminaries supplied by KMV Projects failed in limiting the specified driver output current limit of

750 MA (3.16 Amps as per test reports) even though they given 2nd mockup chance. So the driver current exceeded by 421% over the specified limit. Due to this the LEDs can become brighter to achieve the lux levels, but the increased heat can degrade the light output at a faster rate and shorten useful life of the luminair". Thus, it is apparent that even in second laboratory test M/s.KMV Projects failed.

40. The assessment of laboratory test with reference to M/s.Sabhari on 'total current harmonic distortion' would show that it was qualified. The report noted as under :

Sl.No.

Criteria

Specification for LED street light fitting

M/s.Sabhari Electrical (CPRI test conducted on

13.07.2018)

5

Total Current Harmonic distortion

Total Current Harmonic Distortion should be lesser thatn 15%

16.90% the current harmonic distortion exceed the specified limit by 2% only. If it exceeds more than 20% it will have detrimental effect on electrical equipment. Hence, the fixtures

complied the requirements.

41. For the reasons best known the Tender Committee in its meeting held on 20.08.2018 noted that there are minor deficiencies by both bidders and advised them to under go sample test again. The relevant note containing table and

paragraphs above and below the table read as under:

" As per the mock up test and CPRI test results the following minor deficiencies were noticed and the clarifications furnished there on by the bidders/authorized representatives during the meeting are noted. The details are as under :

Sl.No.

Name of the Bidder

Deficiencies Noted

Clarification

furnished

1

M/s.KMV Projects/ rep., M/s. Lighting Technology (Luminaries manufacturer)

The luminary Output driver current is 3160mA against specified value of 750mA

They explained that they

arranged LEDs in 5 parallel circuits on PCB. Hence, the LED driving current

is only 640mA.

2

M/s.Sabhari Electricals. Rep: M/s.Philips Lighting India Ltd., (Luminaries manufacturer)

Luminaries supplied having

total current harmonic distortion of 16.90% as

against the specified value of 15%

They explained that, they will modify the driver circuit and will show the total current harmonic

distortion less than 15%.

After detailed examination of the evaluation reports, the tender committee asked both the bidders to undergo sample test once again for confirmation of above parameters at CPRI, Bangalore or any Govt. NABL approved Lab and get the certification before 24.08.2018 and place before the tender Committee for further evaluation."

42. Two aspects to be noted at this stage. In the assessment of CPRI as per test conducted on 13.07.2018 on M/s.Sabhari on 'total current harmonic distortion' it is within the parameters and declared that fixtures complied the requirements. Strangely, the very same aspect is seen as deficiency by HGCL. Further, as per CPRI report what is pointed out against M/s.KMV Projects is a serious deficiency

affecting the illumination. But, HGCL treated the same as minor deficiency. In the further test report of CPRI, dated 24.08.2018, based on fresh set of equipment, M/s.KMV Projects has satisfied the luminary output. With all this exercise KMV Projects was declared as qualified and on opening price bids, it was declared as L1.

43. It was vehemently contended by learned Additional Advocate General that clause 21.1 of bid document vests power in the tender opening authority to call for any clarification and in exercise of this power M/s.KMV Projects was permitted to undergo MOCKUP tests again.

44. The said contention is stated to be rejected for two reasons. Firstly, this clause enables tender committee to seek clarification before examining the technical bids and determination of responsiveness but not after MOCKUP test. Secondly, no such clarification was sought by tender committee. M/s. KMV Projects represented to permit it to replace equipment and subject it to field assessment and laboratory tests under MOCKUP test again.

Clause 21.1 does not enable such request and consideration thereof.

45. It was further contended by learned Additional Advocate General and learned Senior counsel Sri D.Prakash Reddy that clause 22.5 is very wide and under this clause it is permissible to subject a tenderer for second MOCKUP test.

46. This contention is stated to be rejected again for two reasons. Firstly, the clause does not envisage relaxation of conditions and conducting MOCKUP test second time. It does not vest any discretion in the CGM, Tender Committee and Managing Director. Discretion ends at the stage of clause 21.1. Secondly, clause 22.5 has to be read together with other tender conditions. Thus, MOCKUP test has to be as per the specifications mentioned in the bid document and specifications cannot be altered/ substituted/revised. In the cases on hand M/s.KMV Projects Limited was allowed to change specification (contrary to clauses 20.1 and 22.3), that too after MOCKUP test was conducted and permitted to undergo second field assessment and two more laboratory tests. Further, author of the tender conditions cannot breach its own conditions and reach out to a bidder.

47. It was sought to be contended that even M/s.Sabhari was not qualified. The issue whether M/s. Sabhari was qualified or not has no relevance but the core issue is how repeated opportunities were afforded to M/s.KMV Projects to make it eligible in technical parameters.

48. Important component of illumination of ORR is to have proper LUX levels and specified driver output current limit. Unless a prospective bidder meets these parameters he is not qualified. The tender conditions are carefully drafted taking due note of these requirements. Clause 3(xv) makes it explicit that bidder has to submit lighting design calculations for each typical road configuration for all the proposed luminaries. Further, LUX levels have to be submitted in grid distribution

area, luminary make, wattage, lumen output, colour temperature and other luminary parameters. All this has to be part of bid document [clause 2 (d)]. According to clause 3 (i) technical bid evaluation would be carried out solely based on uploaded certificates/ documents. According to clause 13.2 no plea by the tenderer for any sort of modification of the bid document based upon or arising out of any alleged misunderstanding or misconception or mistake or for any reason would be entertained. According to clause 19.1 tender should not be modified after the last date/time of submission of tenders. According to clause 22.3 if any alteration is made in drawings/specifications/quotations tender would be rejected. It is thus clear as crystal that bidder has to assess his capability vis-à-vis the specifications mentioned in the bid document, and shall state same in the bid document. The primary eligibility criteria and technical competence (MOCKUP test) has to be based on the disclosers made in the bid document and instruments supplied.

49. Contrary to these clauses, after the MOCKUP test was conducted on 24.07.2018, M/s. KMV Project Limited, represented to CGM that as they furnished 180 Watt fixtures instead of 190 watts, to achieve required LUX levels, they be permitted to submit fresh set of 190 watt fixtures. It appears they went before Managing Director and as per orders of Managing Director, second MOCKUP test with modified fixtures was allowed to M/s. KMV Projects. In spite of conducting laboratory tests on two occasions M/s. KMV Projects failed in 'specified driver output current limit'. But its explanation was accepted, it was permitted to supply new set of instruments and then subjected to another laboratory test where it has cleared this specification also. Though bid document does not envisage repeated opportunities to show eligibility and no provision is made to relax the essential conditions, HGCL stretched its hands too far to make M/s.KMV Projects eligible and decided to award contract. It is thus apparent that by extending long arm M/s. KMV Projects was made to qualify in MOCKUP test. In the process objections raised by M/s. Sabhari were ignored.

50. Essential conditions cannot be relaxed. Such action smacks of arbitrary exercise of power and authority. Apparently, entire exercise was intended to favour a tenderer who failed in technical evaluation (MOCKUP test) and therefore is illegal. It is thus apparent that Managing Director and Tender Committee abused their powers (Asia Foundation and Construction Ltd); there is clear infirmity in decision making process and the decision is arbitrary, amounts to bias and malice in law (Municipal Corporation, Ujjain). It is so outrageous as to be in total defiance of logic or moral standards (Reliance Airport Developers (P) Ltd.) Permitting M/s. KMV Projects for second MOCKUP test on field and two additional laboratory tests cannot be said as for bona fide reasons. Thus, entire exercise is vitiated on parameters of 'illegality, 'irrationality' and 'procedural impropriety' (Tata Cellular).

51. There is also public law element and public interest involved in this case. The Outer Ring Road is the road that is formed as a ring around Hyderabad city and

is main connecting road. It has wide carriage way. However, there have been fatal accidents caused for various reasons. More particularly in the night. One of the reasons attributed to such accidents is poor visibility in the night. On conducting detailed assessment, the HGCL, who manage the ORR, decided to illuminate the entire stretch, connecting roads and drive ways. HGCL is a special purpose vehicle established by the State to improve infrastructure facilities in and around Hyderabad to boost-up economic activity and to attract investments. Main objective to establish lighting on ORR is to ensure visual sensation for safety, illuminated environment for quick movement of the vehicles and clear view of objects for comfortable movement of the road users.

52. To achieve these objectives, proper LUX level is the core aspect. Further, expert's report disclose that luminaries must maintain 'specified driver output current limit'. If the driver current exceeds the specified limit LEDs can become brighter which would increase heat which in tern would degrade light output at a faster rate reducing the life of luminair. It would add up to maintenance costs. From this statement of expert, it is apparent that specified driver output current limit is also a core aspect and both are primary requirements and are crucial to effective functioning of illumination of ORR. Thus, whoever takes up the job must be technically competent and have prior experience. The assessment of technical competence is through MOCKUP tests, on field and in the laboratory. Improper execution of such project may result in more serious consequences and may also impose higher financial burden on HGCL. Thus, MOCKUP test plays crucial role. A bidder who failed to clear MOCKUP test on field and twice in laboratory tests cannot be said to be technically qualified and competent to execute the contract. It appears from the representations stated to have been made by M/s. KMV Projects, it believes in 'trial and error' principle. If trial and error is permissible, probably many others would have participated with initial proposals with specifications which they would believe would allow required LUX levels and on failure to achieve LUX levels to submit fresh specifications and so on. A readying of bid conditions, it is clear that is not the intendment of the author. No such experimentation be allowed on busy ORR. Thus, it is not in public interest to compromise on essential parameters of illumination and jeopardize the very object of illumination. It is not permissible to prescribe rigid conditions in the bid document, which are essential and relax them to individual tenderer after the closure of bid submission period. If stand of HGCL that it can relax even essential conditions as valid, there is no justification to declare the bid of M/s. Bajaj Electronics as non-responsive, when in the earlier round, it was declared as successful bidder and it is declared as non-responsive in the second tender only because parameters of eligibility were revised upwards. On the ground that illumination has to be taken up on high priority, HGCL cannot compromise on essential requirements. In fact the delay in finalizing the tenders and awarding of contract is attributable to illegal procedure adopted by HGCL leading to avoidable litigation and delay for this long. Post facto, to cover up its mistakes, it is taking shelter under a proposal made by M/s. Sabhari to split the work, which is again

not permissible. Further, merely because a bidder proposes for awarding the contract to two participants by splitting the work, when both bidders have not satisfied the parameters set out in the bid document and such splitting is not prescribed in the bid document cannot validate illegal procedure followed by HGCL. Thus, awarding of contract to M/s. KMV Projects is not valid on several parameters noted above.

53. In the overall assessment, it is seen that M/s. KMV Projects failed on two important parameters. M/s. Sabhari also failed on power backup parameter and its price bid was far higher compared to M/s. KMV Projects. The Bajaj Electricals Limited failed at the initial stage. Thus, all three bidders are not qualified. Further, technology is changing rapidly. There may be better lighting systems now as compared to April, 2018, at a cheaper price and may be more competition. HGCL would benefit if they go for fresh bids.

54. W.P.No.34231 of 2018 is allowed to the extent of prayer against qualifying the bid of M/s. KMV Projects Limited and declaring it as L1. In view thereof, W.P.No.35812 of 2018 is disposed of. It is open to HGCL to take further steps. Pending miscellaneous petitions if any shall stand closed.