

(2021) 11 GAU CK 0019

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 684, 2959 Of 2021

Trans Virtual Pvt Ltd And Anr

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

Date of Decision : 01-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2021) 11 GAU CK 0019

Hon'ble Judges : Prasanta Kumar Deka, J

Bench : Single Bench

Advocate : K N Choudhury

Final Decision : Dismissed

Judgement

1. Heard Mr. KN Choudhury, learned Senior counsel assisted by Mr. TR Sarma, the learned counsel for the petitioners in both the writ petitions. Also heard Mr. D Saikia, the learned Advocate General, Assam assisted by Mr. S Bora, learned standing counsel for the Guwahati Municipal Corporation (GMC) and Guwahati Development Department (GDD).

WP(C) 684/2021

2. The petitioners filed WP(C) 684/2021 on the following facts and circumstances. The Guwahati Smart City Limited (GSCL), respondent No. 2 represented by its Managing Director, the respondent No. 3 floated a Request For Proposal (RFP) for the work "Selection of System Integrator for implementation of integrated command and control centre, ITMS and city surveillance system in Guwahati on Design, Supply, Implementation and O&M (5 years) basis" vide tender notice No. SPV/GSCL/DEV/55/2017/936 dated 12.06.2020. The writ petitioners formed a consortium with Broadcast Engineering Consultant India Limited (BECIL) and participated in the tender process. The technical evaluation of the bid was done by the technical evaluation committee constituted by the Guwahati Smart City Limited i.e. respondent No. 2 on 16.10.2020 and

17.10.2020 in presence of the representatives of all the participant bidders. In the technical bid M/s BECIL in consortium with the writ petitioners scored highest mark and declared "T1". In the said tender process M/s BECIL along with petitioners as the consortium, M/s Larsen & Toubro Limited Smart World (L&T) and M/s e-Centric Solutions Pvt. Ltd., in consortium and M/s Assam Electronics Development Corporation Limited (AMTRON) and Intec Infonet Pvt. Ltd. in consortium were the three parties who qualified in the technical bid. As hereinabove stated M/s BECIL in consortium with the writ petitioners scored highest mark in technical bid and declared "T1". The price bid was opened and the bid of M/s BECIL in consortium with the writ petitioners was found to be lowest and the comparative statement of scores (technical score+ financial score) was prepared on 29.10.2020 and M/s BECIL in consortium with the writ petitioners was declared to be the "H1" bidder. The petitioners came to know on 30.10.2020 and after the bid of M/S BECIL in consortium with the writ petitioners was declared to be the 'H1' bidder, the 'H3' bidder Larsen & Toubro Smart World (M/s L&T) lodged a complaint before the Chairman, GSCL relating to the methodology in the marking process adopted in the technical evaluation process. The copy of the complaint was sent to the Hon'ble Minister, Guwahati Development Department by M/S L & T. On receipt of the complaint, the Hon'ble Minister passed a direction on 31.10.2020 to keep the tender process in abeyance. Despite being declared as 'H1' bidder the Guwahati Smart City Limited, the respondent No. 2 did not issue the work order in favour of M/s BECIL in consortium with the writ petitioners.

3. The Guwahati Smart City Limited, the respondent No. 2 called for the RFP pursuant to the direction of this Hon'ble High Court passed in PIL No. 72/2016 as the Project sought to be executed is of utmost public importance. It was observed by the Hon'ble Division Bench of this court in the said PIL No. 72/2016 that if the Project is completed by the GSCL most of the issues relating to the traffic congestion and management would be resolved. Despite such observations made by the Hon'ble Division Bench of this court the respondent No. 3 acted maliciously in delaying the finalization of the tender process. Taking the plea of roving enquiries for extraneous consideration, the petitioners therefore preferred this writ petition seeking the relief for issuance of the work order to the petitioners to execute the Project for which the tender was called for by the respondent No. 2.

WP(C) 2959/2021

4. During the pendency of the aforesaid WP(C) 684/2021, the Managing Director, Guwahati Smart City Limited, the respondent No. 3 issued the notice dated 28.04.2021 whereby the tender notice dated 12.06.2020 was cancelled. Challenging the impugned action of the respondent authority in cancelling the tender dated 12.06.2020 as illegal, arbitrary and prejudicial to the interest of the writ petitioners they filed the subsequent writ petition WP(C) 2959/2021 for issuance of a writ of certiorari quashing the impugned notice No. SPV/GSCL/

DEV/55/2018/Pt-II/332 dated 28.04.2021 whereby the tender No. SPV/GSCL/DEV/55/2017/396 dated 12.06.2020 was cancelled and a writ in the nature of Mandamus directing the respondents to finalise the tender process against the tender notice dated 12.06.2020.

5. Mr. Choudhury, learned Senior counsel for the petitioners submits that M/s L&T in its complaint dated 30.10.2020 expressed its distress how they were awarded lower marks than BECIL in technical score by the technical evaluation committee. It was alleged that the entire technical bid of the H1 bidder i.e. the bid of BECIL in consortium with the writ petitioners was not uploaded in the tender portal. In fact GSCL issued addendum No. 17 dated 28.09.2020 allowing submission of hard copy of technical bid in case entire technical bid cannot be uploaded in the tender portal. The said addendum was issued by the GSCL in view of the pre bid queries raised by the intending bidders in finding difficulty to upload large size file of technical bid in the technical folder. The BECIL in consortium with the writ petitioners uploaded the pre qualification bid and price bid online and remaining technical documents were submitted in hard copy and soft copy as mandated by the RFP and the subsequent addendum thereto. M/S L&T was aware of its technical score before opening of the price bid but did not raise any objection. When BECIL was found to be the lowest, M/S L&T lodged the complaint alleging arbitrariness and malafide on the part of the technical evaluation committee with an intent to delay the entire tender process.

6. In the PIL No. 72/2016 the Hon'ble Division Bench of this court took note of the tender process initiated by the GSCL and vide order dated 24.09.2020 it was observed that in the light of urgent requirement of installing such equipment the respondents therein would take expeditious decision within the reasonable time of opening of the technical bid. Vide order dated 15.10.2020 in PIL No. 72/2016 this court expressed hope and trust that the tender process would be completed on or before 31.10.2020. It was brought to the notice of this court by the respondent No. 19 (GSCL) in the said PIL that due to the complaint lodged by M/s L&T as hereinabove stated and the subsequent direction of the Hon'ble Minister, GDD the tender process could not be finalized. Vide order dated 17.11.2020, this court directed that the respondent Nos.7 and 19 in the said PIL would complete the tender process so that smart city Project could be launched at the earliest. The present writ petitioner No. 1 was allowed to be impleaded as the respondent No. 23 in the PIL No. 72/2016. On 17.12.2020, the respondent GSCL submitted its third status report regarding the stage of finalization of the tender process in PIL No. 72/2016.

7. Mr. Choudhury submits that in the tender summary report uploaded in the portal of e-procurement system, Government of Assam, the reason for cancellation of the tender was shown as administrative one. The notice dated 28.04.2021 uploading cancellation of the tender process initiated under tender dated 12.06.2020 is cryptic and hence cannot withstand judicial scrutiny. The said cancellation notice ought not to have issued during the pendency of WP(C)

684/2021 and that amounts to interfering with the dispensation of justice by the court of law as held by this Hon'ble Court in Akaddas Ali Vs State of Assam reported in 2014 (4) GLT 55.

8. It is further submitted that the well settled proposition of administrative law that consideration which is relevant alone can form the basis for an action which has adverse civil consequences. It is submitted that as per the copies of the note sheet of MSI files of the GSCL obtained through an application made under the Right To Information Act, at page 61 thereof the Managing Director GSCL narrated the detailed proceeding for perusal of the Chairman, GSCL regarding the Master System Integrator (MSI) Project. From the said note sheet it is apparent that 3222 queries were received from 92 prospective bidders and the same were examined by Tata Consulting Engineers Limited, the Project Management Consultant (PMC) from 22.06.2020 and the pre bid responses were submitted on 06.07.2020. On receipt of the replies against the pre-bid queries from the PMC, the same were forwarded to National Informatics Centre (NIC) for further verification. Thereafter, NIC modified the responses by changing various clauses on 04.08.2020 of the RFP. Accordingly a review meeting was held wherein it was decided to upload the pre bid responses and corrigenda for changes in clauses of the RFP and subsequently addenda No. 4,5,6,7,8 and 9 received from NIC were uploaded. Similarly, there were various addenda which were considered by the Chairman, GSCL. The said development was informed to the Hon'ble Division Bench in the PIL No. 72/2016 in the form of third status report subsequent whereto the cancellation of the tender process started. The said changes which are internal matters of the GSCL cannot have any bearing on judging the credibility of the petitioners as joint venture bidder or in determining transparency in the decision making process. Accordingly, it is the submission of Mr. Choudhury that the impugned notice thereby cancelling the process initiated on RFP notice dated 12.06.2020 was without any objective materials rather based on subjective satisfaction of the GSCL authority and the same is arbitrary. Accordingly, it is a fit case for interference by this court.

9. Mr. Saikia, learned Advocate General, Assam relied the averments made in the affidavit-in-opposition of the respondent Nos. 2 and 3. It is submitted that the petitioner being the H1 bidder cannot claim as a matter of right nor seek for any direction from this court to issue the letter of intent (LOI) to the answering respondents inasmuch as there are inherent flaws in the original RFP and the subsequent addenda issued in respect of the RFP. The Chairman, GSCL with a note dated 07.12.2020 forwarded the matter for consideration by the Finance Committee on the Guwahati Smart City constituted as per the direction of this Hon'ble Court by order dated 12.06.2020 in PIL No. 72/2016. The Finance Committee on thread bare discussion of the progress of the Project and considering the view expressed by the Chief Secretary, Assam cum Chairman, Guwahati Smart City Limited (GSCL) unanimously opined that if the tender process/ RFP suffers from deficiency as noted by the Chief Secretary, Assam Cum Chairman, GSCL in following the principles of transparency, competitiveness and

accountability the tender may be cancelled and a de-novo RFP may be initiated by the respondent No. 2, Guwahati Smart City Limited.

10. Pursuant to the minutes of the meeting of the Finance Committee dated 18.02.2021, the Chief Secretary, Assam cum Chairman, GSCL on 24.04.2021 upon consideration of the entire matter in totality and on application of mind came to the conclusion that the touchstone of an impartial tender process is that it should not only be fair, transparent and objective it should also appear to be so. The original parameters of the RFP had undergone major changes which is indicative of poorly drafted original RFP thereby diluting the original RFP where changes were made in many parameters without justification clearly vitiating the whole process warranting a fresh tender and a de-novo exercise was required to be undertaken by cancelling the e-RFP dated 12.06.2020. In view of the said findings and observations of the Chief Secretary, Assam cum Chairman, GSCL order dated 28.04.2021 was issued by the respondent No. 2 cancelling the e-RFP No. SPV/GSCL/DEV/55/2017/396 dated 12.06.2020. In support of the said contention, Mr. Saikia produced the entire original records before this court.

11. Mr. Saikia further submitted that prior to coming to the final decision by the Chief Secretary, Assam cum Chairman, GSCL he considered the technical opinion from technical persons and on the basis of the said opinion it was decided for cancellation of the e-RFP dated 12.06.2020. There was no hidden agenda in order to deprive the petitioner in taking such steps for cancellation of the e-RFP rather the same was done as there were technical shortfalls, poor drafting of the RFP, repeated changes in the RFP, participation of AMTRON in the tender as bidder though it was involved in vetting of the RFP which vitiated the tender process initiated on the basis of the RFP. Deficiency in transparency of the tender process required to take such a step for cancellation of the e-RFP dated 12.06.2020. Referring to the submission of Mr. Choudhury, Mr. Saikia submitted that admittedly there were 3222 queries from 92 prospective bidders in respect of the original RFP. The said queries were examined by Tata Consulting Engineers Limited, the Project Management Consultant and replied as pre-bid responses.

12. It was further submitted that the pre-bid queries with responses of PMC were forwarded to National Informatics Centre (NIC) for further verification. NIC modified the responses of Tata Consulting Engineers Limited thereby changing various clauses on 04.08.2020 of the original RFP. The said changes though internal matter of GSCL but the same had bearing on the transparency of the tender process inasmuch as if the report which forms part of the record on the basis of which the Chief Secretary, Assam cum Chairman, GSCL had cancelled the e-RFP is considered same goes to show how the original e-RFP was changed. Under such circumstances the action of such cancellation was carried out and it was uploaded thereby informing the public that the said e-RFP dated 12.06.2020 was cancelled for administrative reason. It is further submitted by Mr. Saikia that though it is required to give specific reasons in any order passed by the Government but it is not mandatory to give reasons in each and every orders of

the Government.

13. Mr. Saikia relied *Silppi Constructions Contractors vs. Union of India and Another* reported in (2020) 16 SCC 489 and submitted that the scope of judicial review and interference therewith under Article 226 is very limited. Court must give 'fair play in the joints' to the Government and the public sector undertaking in a matter of contract. Court must also not interfere where such interference would cause unnecessary loss to the public exchequer. The court does not sit like a court of appeal over the tender authority and for that purpose the court must realize that the authority floating the tender is the best judge of its requirement and therefore the court's interference should be minimum. It was contended by Mr. Saikia that substantial amount was incurred in preparing the original e-RFP by Tata Consulting Engineers Limited, the Project Management Consultant. Subsequently on the basis of the pre-bid queries and the replies by NIC it came to the notice of the respondent No. 2 that the original e-RFP had totally changed and in order to check loss to the public exchequer the decision was taken for cancellation. In view of the subsequent technical opinion, it was decided to disintegrate the original Master System Integrator (MSI) Project consisting three projects and the GSCL had decided to go for independent Projects for the betterment of the Guwahati city. Mr. Saikia further submitted that the submission of the learned counsel for the petitioner cannot be considered vis-à-vis the technical opinion obtained by the Chief Secretary, Assam cum Chairman, GSCL which forms the basis of cancellation of the tender process initiated under the e-RFP dated 12.06.2020.

14. Mr. Choudhury on the other hand countered the submission of Mr. Saikia that the action initiated by the respondent in cancelling the e-RFP and that too during the pendency of the earlier WP(C) 684/2021 without the leave of the court is itself a ground for setting aside and quashing of the order of cancellation of the e-RFP. Moreover, the Chief Secretary, Assam is not a technical expert to come to a conclusion that there was poor drafting of the original e-RFP. The cancellation of the tender process itself had civil consequences and as such a duty was cast on the respondents at least to notify the participant bidders in the said tender process before taking the final decision in respect of cancellation of the tender process and the e-RFP dated 12.06.2020. Admitting that all administrative action does not require reasonings however, in the present case in hand there being civil consequences attached to the decision a duty was cast on the respondents to notify to the participants in the tender process before taking the decision of cancellation of the e-RFP. Accordingly, challenging the said decision primarily the Chief Secretary, Assam being not a technical person in order to arrive and pass such decision thereby cancelling the e-RFP, it is submitted by Mr. Choudhury that impugned order is liable to be set aside thereby reviving the tender process under e-RFP dated 12.06.2020 and a specific direction required to be passed to the respondents to bring the tender process to its logical conclusion.

15. I have given due consideration to the submissions made by the learned

Senior Counsel. Initially the writ petitioners filed WP(C) 684/2021 thereby seeking for a direction to respondent No. 2 for issuance of the work order to the petitioner to execute the project for which the tender was called for by the respondent No. 2. During the pendency of the said writ petition the respondent No. 3 vide the notice dated 28.04.2021 cancelled the tender No. SPV/GSCL/DEV/55/2017/396 dated 12.06.2020 stating that the same was carried out due to administrative reason. Mr. Choudhury though urged various illegalities in the impugned action of the respondents, however a specific submission was made that whether the person concerned being not a technical expert was able to give the conclusion that there was poor drafting of the original e-RFP and other technical issues following which the impugned cancellation notice dated 28.04.2021 was issued.

16. I have perused the records. The RFP for Master System Integrator (MSI) was floated on 12.06.2020 by the respondent No. 2 which was uploaded in the Assam E-Procurement Portal. The scope of the work are as follows:

- (a) City Surveillance-the CCTV (DOME, fixed, FPZ)
- (b) Integrated traffic management system (ITMS-ANAR,RLVD, SVD camera, E-challan system etc.).
- (c) Network connectivity.
- (d) Data Centre
- (e) Integrated command and control centre (ICCC)

17. The estimated tender amount as per the RFP was Rs. 215,95,72,000/-only. Period of implementation was 365 days. Operation and maintenance period was 5 years after successful commissioning of all works and issuance of commissioning certificate from the clients. There was no provision for pre-bid meeting and as such last date and time for pre-bid queries was fixed till 22.06.2020 up to 18.00 hours. Bidders were requested to submit all queries properly described with required references to GSCL which would be replied appropriately on the e-procurement portal. The last date and time for online submission of bid was initially fixed on 13.07.2020 up to 15.00 hours and the last date of physical submission of bid in hard copy on 15.07.2020 up to 11.00 hours. It would not be out of place to mention herein that finally as per addendum No. 18 dated 03.10.2020 the last date for submission of online bid was fixed on 09.10.2020 and last date for submission of hard copy on 12.10.2020.

18. The Government of Assam in the Information Technology Department prior to publication of the RFP vide office order dated 02.06.2020 constituted a Technical Committee to-

- (i) Examine and evaluate the functional architecture, technical specification and model implementation of proposed network of Guwahati Smart City.

- (ii) Evaluate server and storage specification,
- (iii) Prepare a report on the scope of the Data Centre, Space. Allocation for smart city server storage and network devices inside State data centre,
- (iv) Prepare a report on the basis of the observation.

19. The said Committee vide its report dated 05.06.2020 opined that as GSCL planned to ride on the State owned Assam State Wide Area Network (ASWAN) to implement ITMS, ICCC etc. as per the RFP for which it was suggested that the ASWAN infrastructure required to be augmented to meet the demand of the GSCL. Accordingly, it was recommended that the Assam Electronics Development Corporation Limited (AMTRON) to work jointly with BSNL to augment ASWAN capacity for meeting the demand of GSCL. Though there were other recommendations however the relevant one is taken note of.

20. There were in total 3222 pre-bid queries received from the prospective bidders in the official e-mail of GSCL which were forwarded to Tata Consulting Engineers Limited, PMC of GSCL. Response against the pre-bid queries were prepared by the PMC and submitted corrigenda to GSCL on 06.07.2020. As per the instruction of the then Chairman, GSCL the said responses by the PMC were sent to State Informatics Officer (SIO) of NIC for verification.

21. The Deputy Director General and State Informatics Officer (SIO) vide his letter dated 04.08.2020 addressed to the then Chief Secretary, Government of Assam submitted the modified corrigenda as against the responses of the pre-bid queries by the Tata Consulting Engineers Limited along with fresh replies to the queries by the bidders. It was observed in the said letter dated 04.08.2020 that the PMC made contradictory replies and accordingly necessary modification on those points were suggested as to avoid confusion amongst the bidders and OEMS etc. Eligibility and evaluation (QCBS) criteria were modified to ensure larger participation of bidders in terms of the queries raised by the various prospective bidders. As per the general observation of the NIC on the existing RFP it was commented that the city backbone deployed as a smart city deployment in various parts of the country are mostly IP/MPLS based network which can provide a very sustainable and easy to deploy architecture. Accordingly, it was recommended to use IP/MPLS based ring network across the city to aggregate the field network traffic and transmit the same to DC/ICCC. DWDM equipments are superfluous in such an architecture. I would like to point out that the said opinion of NIC goes against the opinion of the technical committee dated 05.06.2020.

22. A review meeting was held presided by the then Chairman, GSCL on 11.08.2020 and it was decided to upload the pre-bid responses and corrigenda for changes in clauses submitted by NIC vide addenda Nos.4,5,6,7,8 and 9 which consisted of pre-bid responses, changes in clauses of RFP, EMD, BOQ. From the records, it is found that after the said addenda were published GSCL received numerous e-mails with grievances from the prospective bidders. The then

Chairman, GSCL decided to hold a webinar with prospective bidders for interaction which was held on 22.08.2020. The SIO, NIC after the said webinar issued further addenda Nos. 12 and 13 covering the changes in RFP and response of pre-bid queries. After the said two addenda were submitted on 09.12.2020 a copy of RFP and already uploaded addenda were shared with Sri Gautam Baruah, Director, IIT Guwahati. He submitted his observation whereafter the SIO, NIC submitted addendum No. 14 bringing further changes in clause 3.6.1 of the RFP. The said addenda Nos. 12,13 and 14 were uploaded on 11.09.2020 and as hereinabove stated finally vide addendum No. 18 dated 03.10.2020 the last date of submission of online bid was fixed on 09.10.2020 and the last date for submission of hard copy was fixed on 12.10.2020.

23. A separate technical committee for opening and evaluation of the bid was constituted on 09.10.020. On 12.10.2020 after assessment of pre-qualification criteria three bidders qualified for technical evaluation which was carried out by the said technical evaluation committee on 16th and 17th October, 2020. POC/ presentation was held on 27th and 28th October, 2020 on virtual mode. The financial bids of the three technically qualified bidders were also opened and the petitioner was the H1 bidder. On 30.10.2020 the file was placed before the then Chief Secretary cum Chairman, GSCL for approval to issue letter of intent to the H1 bidder. But no such decision was taken as the then Chairman was to demit his office on 31.10.2020. M/s L&T Smart World, the unsuccessful H3 bidder addressed a letter to the Chairman, GSCL who raised objection against marks awarded to it in the process of technical evaluation. The then, Minister, GDD vide his office Memo No. M/GDD/L&J/COOP/24/2020/68 dated 31.10.2020 directed the Managing Director, GSCL to keep in abeyance the finalization of the tender till the completion of enquiry to be ordered purportedly on 31.10.2020.

24. The Hon'ble Division Bench of this court on the other hand in its order dated 12.06.2020 in PIL No. 72/2016 in the matter of Smart City procurement, directed the Principal Secretary, Finance to constitute a committee of Senior officers and experts including from the police and finance department for monitoring the utilization of the money. The said committee was directed to be constituted by the Chief Secretary, Assam and Chairman, GSCL who took the new assignment after demitting of the office by the earlier Chief Secretary, Assam in his office note dated 07.12.2020. On the other hand, the Hon'ble Division Bench of this court fixed the PIL 72/2016 on 17.12.2020 thereby directing the respondents to inform the "present status" in the matter of the tender with further direction to complete the tender process expeditiously and submission of status to the court on 17.12.2020. The Chief Secretary cum Chairman who took charge of the new assignment expressed dissatisfaction in respect of constitution of the bid evaluation committee inasmuch as after two changes were made, the third committee was formed omitting the experts from the IIT, Guwahati. Further, in respect of Request for Proposal it was observed that the pre-bid queries were received by the due cut off date of 22.06.2020 and the engaged certified PMC prepared the addenda and the reply to the queries on

the subject work. The said addenda were finally revised by the NIC and final addenda were issued by NIC. It was observed that once an independent agency like TCEL was hired as PMC then it was not understood why NIC was engaged. The inclusion of NIC in the middle of the tender process appeared to be without any justification. It was observed that the NIC diluted the stringent conditions of the original RFP like requirement of financial statements and in its place submission of CA certification was allowed which led to grievances by those adversely affected prospective bidders. The addenda Nos. 4 to 9 by the NIC invited many grievances from the prospective bidders requiring the then Chief Secretary to call for a webinar to resolve their grievances on 22.08.2020. These grievances appeared to have remained un-resolved. Accordingly, prima-facie observation was made by the Chief Secretary, Assam and Chairman, GSCL in respect of deficiency in following the principle of transparency, competitiveness etc. In the meantime, the Finance Committee as directed vide note dated 07.12.2020 of the Chief Secretary cum Chairman, GSCL was formed and as per the minutes of the meeting held on 18.02.2021 following decisions were arrived:

"Mr. Baruah apprised the Committee that bidding was floated inviting RFP for the Master System Integration.

Accordingly three bidders participated the bidding.

1. BPCL
2. L&T
3. AMTRON

BPCL emerged as L1 bidder.

When the matter was put up for favour of approval of the L1 bidder to the Chairman, Board of Directors of Guwahati Smart City Limited cum Chief Secretary, Assam, he took strong exception on the proposal and recorded a note of strong reservation on the process of bidding of the Master System Integration.

Managing Director, Guwahati Smart City Ltd. apprised the Finance Committee that Chief Secretary has noted that prima-facie, the tender process is seen deficient in following the principles of transparency, competitiveness and accountability in government procurement which must not only be fair and also seem to be fair.

The Committee noted that the view expressed by the Chief Secretary, Assam cum Chairman, Board of Directors of Guwahati Smart City Limited, Finance Committee unanimously opines that if the tender process suffers from the deficiency as noted by the Chief Secretary, Assam Chairman, Board of Directors of Guwahati Smart City Limited in following the principles of transparency, competitiveness and accountability, the tender may be cancelled and a 'de novo' bid may be invited by the authority of Guwahati Smart City Limited.

The meeting ended with a vote of thanks from the Chairman. "

25. WP(C) 684/2021 filed by the petitioners was listed on 07.04.2021 wherein the learned counsel appearing on behalf of the GDD produced the minutes of meeting dated 18.02.2021 of the Finance Committee referred above. Accordingly on the submission made by the learned counsel two weeks time was granted in order to submit clear stand of the respondent GSCL before the court thereby fixing the said writ petition on 26.04.2021. In terms of the said direction, the Chief Secretary, Assam cum Chairman, GSCL expressed his views as follows:

"After perusal of the material on record and the observations of the Finance Committee, which has unanimously opined that if the tender process suffers from deficiencies, then the process should be cancelled and a fresh de novo bid be initiated. The observation of the undersigned are as follows:

1. There was no pre-bid meeting due to uncertain conditions and restrictions prevailing due to COVID-19, there was no provision of pre-bid meeting kept in the RFP which was floated on 12.06.2020. However, provision was kept in that RFP to receive pre-bid queries by email and their responses to be uploaded in the e-procurement portal. The last date of receipt of pre-bid queries by email as per the RFP was fixed as 22.06.2020 up to 6.00 pm. A total 3222 nos. of queries were received from over 90 prospective bidders which comprised of System Integrators (Sis), Original Equipment Manufacturer (OEMs), Service Providers (SPs) etc. Many of the pre-bid queries received from the bidders were repetitive in nature.

2. It is seen, from perusal of the Report of the Technical Committee constituted under IT Department, the AMTRON was closely involved in the process of vetting of the RFP and, therefore, it was inappropriate for AMTRON to bid.

3. The Technical Committee had also expressed strong reservations regarding the capacity constraints of the SWAN (maintained by AMTRON) infrastructure on which MSI was to piggyback to support a highly complex project like MSI. The same does not appear to have been addressed appropriately before going in for the MSI Project by GSCL.

4. It is also seen that at a very belated stage, the whole Network Solution was changed from DWDM to MSPL on the recommendation of NIC which was not mandated to evaluate the proposal. In case there was doubts regarding the Technical Suitability of the MSI RFP, it should have been cleared before floating of RFP, and not sent hither and thither later, casting doubt on the integrity of the whole process, if not upon the intention of the officers, but the minds of the prospective bidders especially when something as basic as the Network Solution parameter was changed.

5. It is also noted that the changes were made in the pre-qualification criteria, where the stringency of the earlier clauses has also been considerably diluted e.g. reduction in the Annual Turnover, removal of turnover criteria in the consortium, reduction in shelf life guarantees etc.

6. It is also noticed that opinions were sought from IT experts at a very belated stage, whereas it should have been sought before uploading if there were doubts with regard to the quality of the RFP, which had been seen by a Technical Committee duly constituted. Accordingly, the need for referring the matter to NIC and not to them has also not been duly recorded.

7. It is also noted that considerable changes have been made in the weightage accorded to the evaluation criteria, which led to allegation and counter later by bidders.

8. The bidding by AMTRON, which was so closely associated in the vetting of the MSI RFP, if not anything else, has decidedly vitiated the tender process as AMTRON were in knowledge of the parameters. Had they not participated in the tender, the tender may have been proposed for cancellation, in view of insufficiency of bidders. Even if they are placed at No. 3 in the outcome, their participation has itself clearly vitiated the integrity of the process of the tender.

In view of the aforesaid, it is reiterated that the touchstone of an impartial tender process is that it should not only be fair, transparent and objective but that it should also appear to be so. With the original parameters of the RFP undergoing a major change, is indicative of either a poorly drafted ORIGINAL RFP (which had purportedly gone through a process of scrutiny by the PMC and Technical Committee under IT Department), or dilution of the REVISED RFP, where changes appear to have been made in many parameters without adequate justification even in non-technical parameters thereby, clearly vitiating the whole process. Indeed it would have been better if a fresh tender was floated with new parameters.

It is also observed that IT had initially expressed reservation with regard to the capacity constraint of SWAN to provide infrastructure support to a technologically complex project like the MSI. There is nothing on file to justify that these concerns were adequately addressed before floating the RFP. In my opinion, the whole Project should have been more carefully thought through before embarking on it through wider stakeholder consultation. The company should have also weigh the pros and cons vis a vis financing projects providing basic amenities like Water and Sanitation as Guwahati till date lacks a proper Solid Waste and Sewerage Network.

Based on the aforesaid observations, it is proposed that the MD GSCL consider cancellation of the whole Bid process and instead issue a de novo bid. Moreover it would be appropriate to first ascertain the technical suitability of funding such Projects vis-à-vis the funding of Projects addressing the immediate concerns of the citizens like proper water and sanitation of the city of Guwahati.

MD GSCL, as competent authority, may take appropriate decision and convey to the Hon'ble Court, well before the next date accordingly"

26. On the basis of the said views expressed by the Chief Secretary cum

Chairman, GSCL the impugned letter bearing No. SPV/GSCL/DEV/55/2018/V-II/332 dated 28.04.2021 was issued by the respondent No. 3 thereby cancelling the tender SPV/GSCL/DEV/55/2017/396 due to administrative reasons. The said e-RFP cancellation notice dated 28.04.2021 is put under challenge on the grounds as hereinabove stated by the learned Senior counsel for the petitioner. Whether the impugned action and the decision taken by the administrative authority is proper that is to be looked into by this court by exercising the scope of judicial review under Article 226 of the Constitution of India.

27. In this regard the Hon'ble Apex Court has time and again urged that while exercising the scope of judicial review under Article 226 of the Constitution of India, the High Court must exercise restraint and caution and need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities. In this regard it would be proper to take note of the principle laid down in *Tata Cellular Vs. Union of India* reported in (1994) 6 SCC 651 wherein the Apex Court laid down the principle required to be adhered to while exercising the scope of judicial review as extracted below.

"94. The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

28. In *Jagdish Mandal Vs. State of Orissa* reported in (2007)14 SCC 517, the Apex Court held as follows:

"22. Judicial review of administrative action is intended to prevent arbitrariness,

irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out."

29. In *Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corpn. Ltd.* reported in (2016) 16 SCC 818, the Hon'ble Apex Court held as follows:

"12. In *Dwarkadas Marfatia and Sons v. Port of Bombay* it was held that the constitutional Courts are concerned with the decision making process. *Tata Cellular v. Union of India* went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal v. State of Orissa* as mentioned in *Central Coalfields*.

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision."

30. The Hon'ble Apex Court in *Silppi Constructions Contractors (Supra)* after considering the aforesaid decisions rendered by the Apex Court held as follows:

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

31. If the aforesaid decisions of the Hon'ble Supreme Court noted hereinabove

are taken into consideration, it is to be looked into whether the administrative action initiated by the respondents was in the true sense intended to prevent arbitrariness, irrationalities, un-reasonableness. If the decision is bona-fide and is in public interest, this court cannot exercise its power even if an error in assessment or prejudicial to a tenderer is made out.

Mere disagreement with the decision making process or the decision of the administrative authority cannot form the basis for this court to interfere until the action is initiated with malafide in order to favour someone and there exists perversity in the decision making process or the decision. It is also to be taken note that the authority which floated the contract or tender and authored the tender documents is the best judge as to how the documents and/ or terms stipulated in the tender document required to be interpreted. For the said reasons it was held in *Silppi Constructions Contractors (Supra)* that if two interpretations are possible then the interpretations of the author must be accepted. It is also important to note that for an administrative body functioning in an administrative sphere it is required to be given fair play in the joints.

32. An affidavit sworn by one Sri Prasant Dhanda, the Managing Director of the respondent No. 2 GSCL was taken note and in the order dated 12.06.2020 passed in PIL 72/2016 by the Hon'ble Division Bench of this court it observed that grants for making Guwahati a smart city amounting Rs. 391.80 crores was received during the financial year 2016-17 and as on date of swearing the affidavit i.e. on 04.06.2020 the amount available with the GSCL was Rs. 417.89 crores alongwith interest. Out of the said amount a sum of Rs. 41.36 crores was spent for completion and ongoing project and for payment to the PMC. Out of the said total amount as hereinabove stated the tender for the MSI project was valued at Rs. 215,95,72,000/- only. The tender value itself indicates that the project is of high value which requires to be completed through expert in the fields. Keeping that view the PMC was engaged and with the advice of the technical committee formed by the IT department the RFP dated 12.06.2020 was uploaded giving the scope to the prospective participants to raise pre-bid queries.

33. The queries were accordingly considered and thereafter the addenda were submitted by the PMC for uploading the same. In the mid way it was decided to take the assistance of NIC. From the records it is observed that the pre-bid replies by the certified PMC were further changed as per the suggestion of NIC after which grievances in large numbers were raised by the prospective bidders, OEMs etc. which was duly noticed by the Chief Secretary cum Chairman in his note dated 07.12.2020 as referred hereinabove. In the said note itself the intent of GSCL in finalising the tender condition being the author, could be gathered, which were with a view that the evaluation criteria should be objective, tangible and supported by documentary evidence. The subsequent addenda purportedly at the initiative of NIC, as observed in the said note dated 07.12.2020 had diluted the stringency in not only the required specifications but also in the marking criteria which relied on subjectivity and loose interpretation. The

marking and evaluation criteria was also observed to be seriously deficient in many aspects. From the letter dated 04.08.2020 issued by the SIO NIC clearly shows that the modifications suggested by the NIC was totally on the basis of the perception which is contradictory to the report of the technical committee dated 05.06.2020 suggesting usage of ASWAN by the respondents GSCL. In the process Tata Consulting Engineers Limited, the PMC engaged by GSCL was sidetracked from the project covering the RFP uploaded on 12.06.2020. If that be so the amount paid to the PMC which forms a substantial amount as per the affidavit referred hereinabove by Sri Prasant Dhanda dated 04.06.2020 was an unproductive expenditure from the public exchequer which this court cannot blink its eyes from considering it. Even a layman can say that the technicality involved in any project must be settled in its detailed project report (DPR) and thereafter on the basis of the DPR the specifications required for various gadgets forming the infrastructure on the basis of the design are required to be published forming the basis of notice inviting bid or request for proposal. In the present case in hand as observed by the Chief Secretary cum Chairman, GSCL while taking the decision for cancellation of the tender process the deficiencies are clearly marked. In order to notice such variation in the conditions of RFP, qualifying criteria etc the person concerned need not required to be a technical one. Suffice it to hold from the point of view of this court, that if the administrative authority observed that the tender process adopted lacked transparency and deficient in the basic requirements this court cannot impose any decision of its own.

34. It is also on record that once the addenda suggested by NIC were uploaded there were grievances raised by the various prospective bidders which itself indicates that most of the prospective bidders were not satisfied with the changes brought into the RFP through said addenda. No doubt it can be argued that instead of cancelling the tender process it ought to have been allowed to go ahead with the tender process but the same cannot be considered inasmuch as it is the respondent GSCL who on its own concluded that touchstone of an impartial tender process would be missing if the same is allowed to be carried out on the basis of such redrafted RFP. Under said circumstances this court exercising its scope under judicial review cannot interfere with the decision taken inasmuch as there are no perversity crept into in the said decision making process as verified from the records by this court nor it can be held that the said cancellation was purely with an intent on the part of the administrative authority to do favour to any of the parties in the bidding process. Accordingly, I do not find any merit in these writ petitions, which accordingly stand dismissed. Interim order if any, stands vacated. No costs.

35. Before parting, painfully it is observed that the State Government is not at all aware of the fact that the fund made available in the year 2016 to the GSCL for utilization of the same for benefit of the public still remains unutilized. This amounts to deprivation of the fundamental rights of the citizens as they are deprived of the civic amenities. On the other hand as hereinabove observed that

after spending a substantial amount with Tata Consulting Engineers Ltd. as the PMC in the project under the RFP, technical assistance was sought from NIC throwing out Tata Consulting Engineers Ltd. This is an example of wastage of public fund by the Government from the public exchequer. Accordingly, in order to maintain good governance, the State must look into it on priority basis and if necessary enquiry may be conducted for knowing the cause behind such action of the officials roping in NIC at the cost of loss to the public exchequer.