

ACME Tele Power Limited and Mr. Yogesh Sanklecha Vs Union of India (UOI), Ministry of Communications and Information Technology, Bharat Sanchar Nigam Limited, KEC International Limited and GTL Limited

Court: Bombay High Court

Date of Decision: Oct. 16, 2009

Acts Referred: Constitution of India, 1950 " Article 226

Hon'ble Judges: R.G. Ketkar, J; A.M. Khanwilkar, J

Bench: Division Bench

Advocate: Rohit Kapadia, Jimmy Pochkhanwala, Jayesh Desai, Sandeep Narain and Amrita Thakore, instructed by Singhi and Co, for the Appellant; V.D. Shukla and S.D. Shukla, instructed by Shukla and Associates for Respondent No. 2, V.R. Dhond and Ameya Gokhale, instructed by Khaitan and Co. for Respondent No. 3 and P.N. Mody and Najma Shaikh, instructed by Vigil Juris, for the Respondent

Judgement

R.G. Ketkar, J.

Heard the learned Counsel for the parties. Rule. Counsel for the Respondents waive service. By consent rule is made returnable forthwith and the matter is taken up for hearing and final disposal. By this petition under Article 226 of the Constitution of India, the

petitioners pray for issuance of the writ of mandamus directing the Respondent No. 1 (Union of India) and the Respondent No. 2-Bharat Sanchar

Nigam Limited (BSNL), to withdraw, recall and cancel the evaluation of the bids carried out by them and reevaluate the said bids strictly in

accordance with the terms of the tender dated May 1, 2008, issued by the BSNL; for issuance of a writ, order or direction prohibiting the BSNL

from taking any steps or awarding any contract to Respondent No. 3-KES International Limited and Respondent No. 4GTA Limited. The

controversy arises in the following circumstances.

2. On behalf of the BSNL sealed tenders were invited on two stage bidding system in four parts from the eligible bidders for planning, engineering,

supply, installation, testing and commissioning of GSM/UMTS based cellular mobile and supply, installation, testing and commissioning of

infrastructure for network of capacity of 25 million lines to be rolled out in three phases in the licensed service areas of the BSNL in West Zone

covering Maharashtra, Gujrat, Madhya Pradesh, Chatisgarh.

3. The tender is in four parts. Part-1 covers planning, engineering, supply, installation, testing and commissioning of GSM based cellular network

together with 3GPP R4 Core, IMS, IN and VAS. Part-2 covers planning, engineering of 3G network, VAS and MBMS. Part-3 covers supply,

installation, testing and commissioning of infrastructure and associated items for radio sites. Part-4 covers OSS/BSS. Eligible bidders can

participate in one or more of the parts independently, subject to the fulfillment of the specified eligibility criteria.

4. The tender is divided in XI Sections. Section-I is Notice Inviting Tender (NIT). Clauses 3 to 4.8 lay down the eligibility criteria as per Section-

I. Clause 3 thereof provides for eligibility criteria common for all parts. Clause 4.1 lays down eligibility criteria for part-1. Clause 4.2 lays down

eligibility criteria for part-2, Clause 4.7 lays down eligibility criteria for part-3 and finally Clause 4.8 lays down eligibility criteria for part-4.

5. The tender envisages planning, design, engineering, supply, installation, testing, commissioning and Annual Maintenance Contract (AMC) for 25

million lines of GSM/UMTS R6 equipment in four parts for BSNL Network, each part on turnkey basis in the service areas in which the BSNL

has been licensed to operate its mobile services in West Zone. The project is proposed to be executed in four parts, out of which parts I, II and III

will be executed in three phases whereas part IV will be executed in only two phases.

6. Clause 6 of Section-I (NIT) lays down that the bid security in the form of Bank Guarantee is Rs. 120 crores (Rupees One Hundred Twenty

Crores only) for part-1, Rs. 15 crores (Rupees Fifteen Crores only) for part-2, Rs. 30 crores (Rupees Thirty Crores only) for part-3 and Rs. 15

crores (Rupees Fifteen Crores only) for part-4.

7. Clause 4.2 of Section-II deals with Instructions to Bidders (ITB). Clause 4.2 provides that the bidder is expected to examine all instructions,

forms, terms and specifications in the tender document. Failure to furnish all information required as per the tender document or submission of the

bid not substantively responsive to the tender document in every respect will be at bidder's risk and may result in rejection of the bid. Clause 5.1

provides that a prospective bidder requiring any clarification of tender shall notify the purchaser (BSNL) of such queries in writing or by fax at the

BSNL's address indicated in the invitation of the bid, among other things. Clause 5.2 provides that any clarification issued by BSNL in response to

the query raised by prospective bidders shall form integral part of the tender document and would amount to amendment of relevant clauses of the

tender.

8. Clause 9.1 lays down that a bidder shall give total composite price inclusive of all levies and taxes viz. excise duty, customs duty, VAT, sales

tax, service tax, packing, forwarding, freight and insurance etc., but excluding octroi/entry tax which will be paid extra as per the actual, wherever

applicable as per the terms of payment specified in Section-IV. The basic unit price and all other components of the price need to be individually

indicated against the goods and services it proposes to supply under the contract as per the price schedule given in Section-VII. Clause 9.2 lays

down that the prices indicated in the price schedule shall be entered in a particular manner. Clause 9.5 which is mandatory term of the tender lays

down that the discount, if any, offered by the bidders shall not be considered unless specifically indicated in the price schedule among other things.

Clause 10 which is mandatory term of the tender provides for the documents establishing bidder's eligibility and qualification.

9. Clause 11.2 provides that the documentary evidences of the conformity of the goods and services to the tender may be, in the form of literature,

drawings, data etc., and the bidder shall furnish among other things the compliance of techno-commercial compliance of the tender terms,

conditions and technical specification as sought as per the procedure more particularly set out therein. Clause 11.2 (c) (i) to (vi) is mandatory term

of the tender setting out the procedure through which techno-commercial compliance of the tender term or condition and technical specification is

sought. Clause 12.1 provides for the amount and form of bid security, which is mandatory term of the tender. Clause 12.3 thereof provides that the

bid security shall be in the form of a bank guarantee issued by a scheduled bank in favour of the purchaser, valid for a period of 180 days from the

date of bid opening. The purchaser reserves the right to request the lowest bidder during the period of bid evaluation to extend the bid security for

a further period of 120 days and the bidder shall extend the same accordingly. Refusal to extend the bid security will result in forfeiture of the bid

security.

10. Clause 13.1 is a mandatory term of the tender and lays down that bids shall remain valid for 150 days from the date of opening prescribed by

the purchaser pursuant to Clause 19.1 and a bid valid for a shorter period shall be rejected by the purchaser as non responsive. Clause 15.1 is also

a mandatory term of the tender that provides for submission of bid in two covers. The first cover shall contain original and four copies of the bid

duly marked ""ORIGINAL"" and ""COPY"". The second cover shall contain documents establishing bidder's eligibility as per Clause 2 alongwith bid

security as per Clause 12. Both the covers should be sealed separately by the personal seal of the bidder. Clause 20 provides for clarification of

bids and lays down that to assist in the examination, evaluation and comparison of bids, the purchaser (BSNL) may, at its discretion ask the bidder

for the clarification of its bid. The request for the clarification and the response shall be in writing. However, no post bid clarification at the initiative

of the bidder shall be entertained.

11. Clause 21 provides for technical and commercial evaluation. Clause 21.2 thereof is one of the important clauses of the tender and provides

that the purchaser (BSNL) shall determine the substantive responsiveness of each of the technical and commercial bids to the requirements of the

tender document. A substantively responsive bid is one which conforms to all technical specifications and commercial terms and conditions of the

tender document without material deviation/exceptions. The BSNL's determination of bid's responsiveness shall be based on the contents of the

bid itself without recourse to extrinsic evidence. Clause 21.3 provides that during the evaluation, BSNL at its discretion may call upon the bidder to

give a techno-commercial presentation of its offer, to explain the products offered, its capability to undertake the project and to respond to any

question from BSNL. Clause 21.4 lays down that a bid, determined as substantively non-responsive will be rejected by the purchaser and shall not

subsequent to the bid opening be made responsive by the bidder by correction of the non-conformity. Clause 21.5 which is one of the important

clauses, provides that the BSNL may waive any minor infirmity or non-conformity or irregularity in a bid which does not constitute a material

deviation, provided such waiver does not prejudice the establishment of techno-commercial parity among the bids. Clause 21.6 is also important

term of the tender and lays down that the financial bids of only those technical and commercial bids that are determined as substantively responsive

shall be opened. The financial bids of those technical and commercial bids that are determined as substantively non-responsive shall be returned to

the respective bidders unopened.

12. Clause 22.1 is also important clause of the tender and provides that the BSNL shall evaluate and compare the financial bids in detail of those

technical and commercial bids previously determined to be substantively responsive pursuant to clause-21. Clause 22.2 (a) lays down that the

evaluation and comparison of responsive bids shall be done on the basis of net cost to BSNL on the prices of the goods offered inclusive of duties

and taxes (but excluding CENVAT-able duties & taxes), sales tax, packing, forwarding, freight and insurance charges etc., as indicated in col. 17

of the price schedule in the Section VII, Part-II of the tender document, and as stipulated in Clause 9.1 the octroi/entry taxes are not to be

included in the composite price and hence the same will not be considered for the purpose of evaluation and comparison of responsive bids.

13. Section IV lays down special conditions of contract. Clause 46 therein provides for Evaluation. Clauses 46.2(i) and 2(vii)(a) are quoted herein

below for ready reference;

46.2 ""Further, the tender shall be evaluated as a package quoted by the bidders for various equipments/materials/services as per the criterion given

below:

(i) The price of various components forming part of the package detailed in the SoR at Section-V shall be evaluated. It shall also include all those

items which respective bidders consider essential for commissioning purposes. The sanctity of the price of individual items shall be maintained by

the bidders within the package even though the evaluation is package based.

46.2(vii) : In order to establish techno-commercial parity among the bids, the financial bids shall be loaded as below:

(a) Cases in which bidder has not quoted the price of the item mentioned in the SoR of the tender document and has not given any

comments/justifications for not quoting the same, the price bid will be loaded with the maximum price quoted for that item by any other bidder for

the purpose of evaluation.

14. The tender seeks a comprehensive and complete requirement of infrastructure items for the successful installation and commissioning of the

IMPCS network. Clause 54 of the tender deals with Annual Maintenance Contract (AMC) and lays down that the bidder shall quote cost of

AMC for a period of seven years (AMC for 6th & 7th year is optional) from the date of completion of each of the three phases of the project and

on the expiry of warranty as mentioned in Clause 53. Annexure-II deals with AMC. Clause 2.4 thereof provides that the supplier shall submit list

of spares required alongwith the bid and cost of the same is to be quoted in price schedule. The price shall be same as that quoted in the bill of

material against the concerned item in the Schedule Of Requirement (SOR).

15. In the present case BSNL invited bids by a tender dated May 1, 2008. The technical & commercial bids were opened on September 10,

2008 and the following bidders had participated:

i. M/s. GTL Ltd. (Respondent No. 4)

ii. M/s. Spanco Pvt. Ltd.

iii. M/s. Aster Teleservices Pvt. Ltd.

iv. M/s. ACME Tele-Power Ltd. (Petitioner)

v. M/s. ICOMM Tele Ltd.

vi. M/s. Teracom Pvt. Ltd.,

vii. M/s. KEC International Ltd. (Respondent No. 3)

On the scrutiny of technical and commercial bids, the bids of following bidders were found to be eligible for opening of financial bids.

1. M/s. GTL (Respondent No. 4)

2. M/s. Spanco

3. M/s. KEC (Respondent No. 3)

4. M/s. ACME

5. M/s. ICOMM

16. By letter dated February 24, 2009 BSNL intimated the eligible bidders that the financial bids will be opened on February 28, 2009 so that the

bidders can depute their representatives to attend the same. In the first stage of evaluation of the bids, the Technical and Evaluation Committee

(TEC) was required to evaluate the technical and commercial bids in accordance with Clause 21 of Section -II. The financial bids of the bidders

whose technical and commercial bids were found by TEC to be substantively responsive were to be evaluated further in the second stage of

financial evaluation by the Financial Evaluation Committee as per Clause 22 of Section-II of the tender document. Upon evaluation of the financial

bids, the Financial Evaluation Committee would determine ranking of the bidder as lowest (L-1), second lowest (L-2), third lowest (L-3) and so

on. The tender stipulate that the lowest bidder would be awarded 50% of the contract in the inverse ratio of the bid amounts. The lowest bidder

could also be invited for further reduction in their prices by Price Negotiation Committee (PNC) and the second & third lowest bidders were also

obliged to execute the contract at such reduced prices of the lowest bidder. After completing this formalities, the purchase orders for the respective

quantities are to be placed on lowest, second lowest and third lowest bidders.

17. It is the case of the petitioners that the Financial Evaluation Committee carried out financial evaluation between March 1, 2009 and April 30,

2009 and submitted its final report before April 30, 2009. During this evaluation the ranking of the parties as SPANCO as lowest (L-1), GTL-4th

Respondent as second lowest (L-2), KEC-3rd Respondent as third lowest (L-3), and the petitioner as L-4. It is the further case of the petitioners

that the PNC invited lowest bidder SPANCO Limited for negotiation for further reduction in the price sometime in the first week of May, 2009.

The prices were lowered by SPANCO and even the PNC recommended issuance of purchase orders to L-1, L-2 & L-3 in July, 2009 in respect

of Western Zone on such reduced and negotiated prices.

18. The petitioners challenge the techno-commercial evaluation as well as financial evaluation in respect of the item spares which is the major line

item of supply as required by BSNL. The said item is at serial No. 19 of Section-V dealing with SOR (part III). It is the case of the petitioners that

the list of spares was mandatorily required to be furnished in the techno-commercial bid, as per Clause 11.2 of Section-II of the tender read with

Clause 9.1 of Section-III dealing with General (Commercial) Conditions of Contract. The third Respondent has also not quoted the price of such

spares in its financial bid. In so far as 4th Respondent is concerned, the grievance of the petitioner is that in col.5 & 6 of the financial bid, it was

necessary for the bidder to quote excise duty. Both the respondents viz. 3rd and 4th Respondent did not quote the amount of excise duty in col.5

& 6 in the financial bids. This being the mandatory term of the tender, the BSNL ought to have declared their bids as substantively non-responsive

bids. It is the submission of the petitioners that since the mandatory terms of the tender document were not fulfilled by Respondent Nos. 3 & 4, as

per the terms of tender, the BSNL ought to have declared the bids of Respondent Nos. 3 & 4 as substantively non-responsive bids and ought to

have rejected the same. If that was done by the BSNL, there was no question of opening the financial bids of Respondent Nos. 3 & 4, and should

have been returned to the respective bidders unopened in terms of Clause 21.6. In support of this submission, the petitioners rely upon?

(i) Clause 11.2 (b) of Section II

(ii) Clause 9 of Section III

(iii) Query No. 65 and Reply

(iv) Clause 54.4 of Section IV

(v) Clauses 2.4, 2.5 and 2.6 of Annexure II of Section IV.

19. In so far as excise duty is concerned, the excise duty leviable on all items of SOR was also mandatorily required to be filled in percentage as

well as in amount in the financial bids, which were to be filled in as per the price schedule as set out in Section VII of the tender. In support of this

submission, the petitioners rely upon -

(i) Clause 9.1 of Section II,

(ii) Clause 9.2 of Section II,

(iii) Query No. 458 and its Reply.

20. The petitioners rely upon the judgment of the Apex Court in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, .

21. The respondents have filed affidavits in opposition to the petition. On behalf of the BSNL, Devid S.A., working as AD (MM-I) has sworn

affidavit on August 20, 2009. It is contended that the evaluation process is still under process and no cause of action has arisen. It is contended

that the petition is pre-mature and same is based upon assumption/anticipation for the purpose of trying to delay the tender process. On behalf of

3rd Respondent, Surinder Bir has sworn affidavit on August 25, 2009 contending interalia that the petition is pre-mature. It is submitted that the

financial bids were opened on February 28, 2009 and the present petition is instituted on August 3, 2009 which suffers from delay and laches. It is

further submitted that the evaluation of bids is under process and the BSNL has not yet issued purchase orders. On merits, it is submitted that the

contentions raised by the petitioners that the 3rd Respondent has not complied with the mandatory terms of the tender and in that the technical bid

did not contain the list of spares, as also the financial bid was not in compliance with the terms and conditions of the tender and the bid is liable to

be rejected, are wholly misconceived. In substance, the argument of the 3rd Respondent is that these are not the mandatory terms of the tender.

As far as excise duty is concerned, under the provisions of the Central Excise Act and Rules, every person who produces or manufactures any

excisable goods has to pay duty leviable on such goods. The 3rd Respondent is neither the producer nor the manufacturer of any of the goods.

Reliance is placed upon Clause 22.2 of Section-II read with Section-VII, Part-2 dealing with the Price Schedule for indigenous equipments

(including partly imported) and service costs and price schedule for imported equipments.

22. On behalf of 4th Respondent, Arunkumar Sinha, the constituted attorney has sworn affidavit on August 18, 2009. It is submitted that the

petitioners are not entitled to any relief"s as the petition is barred by gross and unexplained delay and laches. The petitioners acquired knowledge

on February 28, 2009 when the financial bids were opened and the petition is instituted on August 3, 2009. At any rate, technocommercial bids

were opened as far back as on September 10, 2008 and if the petitioners contention is valid, the BSNL ought to have declared the bids of 3rd

and 4th Respondents as substantively nonresponsive and consequently there was no question of BSNL opening their financial bids. Since the

BSNL did not declare the bids of 3rd and 4th Respondents as substantively non-responsive bids after opening of these bids on September 10,

2008 and proceeded further for evaluating the financial bids, the cause of action accrued to the petitioners then and there itself. The petitioners

allowed the BSNL to open financial bids of 3rd & 4th Respondents on February 28, 2009. In view of this, the petitioners are precluded from

challenging the techno commercial evaluation of the 3rd & 4th Respondents. In so far as financial evaluation is concerned, it is submitted that the

financial bids were opened on February 28, 2009 and the present petition is instituted on August 3, 2009. The petition therefore suffers from gross

delay and laches.

23. Mr. Rohit Kapadia, learned senior counsel for the petitioners submitted that the spares are important component of the goods that are required

to be supplied under the tender as they would be required for replacement, upkeep and maintenance and regular functioning of mobile telephone

services by BSNL immediately upon expiry of one year warranty period after commissioning of the infrastructure for such mobile telephones. The

spares are required to be supplied under the tender itself and are to be kept in adequate quantities at all sites so that they can be immediately

replaced as and when required.

24. In the instant case, the 3rd Respondent did not furnish list of spares and also has not quoted price of such spares in its financial bids. If at all the

detailed list of spares was not provided for any reason, a deviation/exception statement justifying for not providing such list was required to be

furnished as per Clause 11.2 (b) (ii) of Section II of the tender. As per Clause 31 (iv) of Section II of the tender if the compliance,

deviation/exception statement as prescribed are not given, a bid is to be rejected at the stage of techno-commercial evaluation. The 3rd

Respondent has also not furnished any deviation/exception statement. In view of this, the BSNL ought to have rejected the bid of the 3rd

Respondent at the stage of technocommercial evaluation. The fact that the 3rd Respondent did not furnish list of spares is established from the

Evaluation Chart (pre- clarification) annexed by BSNL to its affidavit. In view of this, it is submitted that the techno-commercial bid of the 3rd

Respondent was liable for outright rejection under Clause 31 (iv) of Section II. In this connection, it is further submitted that under Clause 9.2 (ii)

of Section II, the bidders were to quote as per the price schedule given in Section VII of the tender for ""all"" the items given in the SOR. The bidder

was to quote the price of such spares in its financial bid. If the prices were not filled in as required in the price schedule, the financial bid was liable

for outright rejection in terms of Clause 31 (v) of Section-II. Admittedly, the 3rd Respondent has not filled-in the price schedule for all the items of

SOR and has left the entire row of prices of spares in their financial bids as blank. In view of this the financial bid of the 3rd Respondent was liable

for outright rejection under Clause 31(v) of Section II, ITB.

25. It is further contended that the 4th Respondent has not filled-in the price schedule for all the items of SOR and has left col.5 & 6 of their

financial bid as blank for all the items and thus their financial bid is liable for outright rejection under Clause 3 1(v) of Section II, ITB. A reliance is

placed upon the judgment of the Apex Court in the case of W.B. State Electricity Board (supra) and in particular paragraph No. 24 to contend

that in a big and high value tender, the degree of care required is greater than in local bids for small works. The Apex Court has held that it is

essential to maintain the sanctity and integrity of the process of tender/bid which should be filled in and the terms complied with scrupulously, and

that adherence to instructions under ITB (Section II in the instant case), cannot be given a go-bye by branding it as a pedantic approach, otherwise

it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to rule of law and constitutional

values. It has been further held therein that relaxation of such rules in favour of one or the other bidder would impair the rule of transparency and

fairness and provide a room for manipulation in picking and choosing a bidder which is not permissible in law for State Authorities.

26. Dealing with the contentions raised by BSNL in its affidavit to the effect that in the given case taking into consideration the quantum, nature,

costs, technicalities involved, if the special conditions of the contract were strictly implied all the bids of the eligible bidders would have been bound

to be rejected and the entire bid process would have had to be renegotiated, which would have been time consuming at the cost of substantial

public money and delay in process of implementation of tender work, and to overcome that the remedy of obtaining unconditional undertaking was

obtained from all the eligible bidders to comply with the tender conditions, it is submitted that the entire approach of the BSNL was unsustainable.

In the first place, the BSNL has failed to point out any fatal deficiency in the bids of either the petitioners or the other bidders excepting the

Respondent Nos. 3 & 4. Secondly, such undertakings could not have been obtained after opening of the bids in terms of Clause 21.4 of Section II

of the tender. Such undertakings would also disturb technocommercial parity interse the bidders, they could not have been called for by the BSNL

in view of Clause 21.5 of Section-II of the tender.

27. Mr. Dhond, learned Counsel on behalf of 3rd Respondent submitted that the contentions of the petitioners that failure to provide a list of

spares and or excise duty on all items in the SOR should result in rejection of the bids, is wholly misconceived and contrary to plain terms of the

tender. Under the tender, bidders were required to furnish their bids in accordance with SOR (Part-III) which is set out in Section V of the tender.

Perusal of Section V indicates that as many as 173 items are set out therein. One of the items is entitled ""spares"". The spares form a very small part

or component of the SOR which is required to be submitted in response to the tender. The spares are relevant only in the context of upkeep and

maintenance of the equipment which is supplied by the respective bidders. The spares are needed when an individual component either breaks

down or is consumed or requires replacement. As per the tender, the bidders have to quote costs of AMC for a period of seven years (AMC for

6th & 7th year is optional), from the date of completion of each of three phases of the project and on expiry of warranty as mentioned in Clause

53. It is common ground between the parties that the warranty period was one year from the date of commissioning of the equipment.

Consequently, for a period of 8 (7+1) years from the date of commissioning, bidder would be responsible for ensuring that the equipment was

kept fully operational and/or functional, and it would be his responsibility to keep the equipment operational, and the BSNL would not be required

to bear any expenditure towards the spares.

28. It is further submitted that Clause 31 of Section II of the ITB particularises those conditions which are essential and mandatory and whose

non-compliance would result in outright rejection of the bid. In so far as grievance of the petitioners about non-compliance of Clause 31 (v) of

Section-II is concerned, the grievance is wholly misconceived, inasmuch as Clause 31(v) of Section-II lays down rejection of the bid on account of

prices not filled-in as prescribed in the price schedule. It is submitted that Clause 31(v) of Section II has no application whatsoever to the present

case as the bid of the 3rd Respondent has been filled in the manner prescribed in the price schedule in Section VII. Under Clause 31 (iv) of

Section-II of the tender, non-compliance of Clause 11.2.(c) of Section-II being mandatory is fatal. Clause 11.2 (b) of Section-II deals with the list

giving full particulars including available sources and current prices of all spare parts, tools etc. necessary for proper and continuous functioning of

the goods for a period of eight years following commencement of use of the goods by the BSNL, which is required to be furnished by the bidder.

However, Clause 11.2 (b) that deals with furnishing list of all spare parts as detailed therein is not included in Clause 31 of Section II. In view of

this, it is submitted that the grievances of the petitioners on the ground of spares is wholly unsustainable.

29. At any rate it is submitted, that Clause 46.2 (vii) (a) of Section IV lays down that in order to establish techno commercial parity among the

bids, the financial bids shall be loaded as under:-

Cases in which bidder has not quoted the price of the item mentioned in SOR of the tender document and has not given any

comments/justifications for not quoting the same, the price bid will be loaded with the maximum price quoted for that item by any other bidder for

the purpose of evaluation.

In view of this it is submitted that where price of the item has not been mentioned, the BSNL is not remediless and can invoke Clause 46.2 (vii)

(a) of Section IV of the tender.

30. Mr. Modi, learned Counsel for the 4th Respondent submitted that the 4th Respondent does not manufacture any of the items listed in the

tender. If the tender is awarded to the 4th Respondent it will be merely purchasing the said items from other manufacturers/suppliers. Under the

provisions of Central Excise Act and Rules, it is the respective producer or manufacturer who has to pay the excise duty to the Excise Authorities

and not the 4th Respondent. There is therefore no question of 4th Respondent failing or neglecting to fill in col.5 & 6 of Section VII (Part-II)

dealing with the price schedule for indigenous equipment (including partly imported) and service costs and the price schedule for imported

equipments. It is explained in the affidavit made on behalf of the 4th Respondent that ex-factory price (basic unit price exclusive of all levies and

charges) in col.4, and the excise duty in col.5 & 6 of the prescribed format would have to be detailed up alongwith other costs to arrive at the unit

price in col.12, which in turn would get directly reflected in col. 17 and the format as the total discounted price excluding cenvatable duties and

taxes. Cenvatable duties & tax amounts were shown in col.13 of the said format wherever available. It is also submitted that as per Clause 22.2 of

Section-II of the tender (ITB), the evaluation and comparison of the bids is to be made on the basis of net costs to BSNL of the goods offered

inclusive of duties and taxes but excluding cenvatable duties and taxes as indicated in col.17. Col.17 of the said format would be effective net costs

to the BSNL after getting credit/benefit for the said cenvatable duties and taxes. In view of this, it was denied that the bid of the 4th Respondent

was misleading or manipulating as falsely alleged. It was also submitted that the tenders are yet to be evaluated and in fact as per Clause 21.3 of

Section II of the tender (ITB), it is provided that while evaluating the said bid the BSNL would be entitled to call upon to furnish clarifications. On

these among other grounds, the 4th Respondent has prayed for dismissal of the petition.

31. On behalf of the BSNL Mr. Shukla, learned Counsel reiterated that the evaluation process is still under process and no cause of action has

arisen. Having regard to the magnitude and scope of the work, it must have freedom of contract, in other words, fairplay in the joints is necessary

concomitant for administrative body functioning in an administrative sphere or quasi administrative sphere. He submitted that though at pre-

clarification stage the 3rd and 4th Respondents did not submit spares list, at the stage of post-clarification stage the 3rd and 4th Respondents did

supply spares list. At any rate, both at pre- clarification and post-clarification stages, the 3rd and 4th Respondents had given NIL deviation

statement. He also contended that the petition is prematured as the purchase orders are not issued as the evaluation process is still under process.

32. On behalf of the petitioners Chamber Summons No. 296 of 2009 was taken out seeking a permission to amend the writ petition as per the

schedule annexed thereto. With the consent of the parties, we proceeded to hear the main petition alongwith the chamber summons finally at the

stage of admission itself. The chamber summons is taken out mainly to counter the submissions made by the Respondents that the petition is

premature. On the basis of annexures to the chamber summons it is submitted that the financial evaluation is over and in fact the PNC has

negotiated with the lowest bidder M/s. Spanco. It therefore cannot be said that the petition is premature. If the petitioners were to institute the

petition after issue of purchase orders in favour of successful bidders, either it would have been met with fate accompli or it would have been

contended on behalf of the successful bidders that now the rights have been created in their favour and in that case, the petitioners would be left

with no effective remedy.

33. While explaining the procurement of report of the Committee for Evaluation of Tender in respect of financial bid and the copy of the report of

the Price Negotiation Committee, it is asserted that the matter was heard on Friday-September 5, 2009 and was stood over to Monday-

September 7, 2009. To the surprise of the petitioners on Monday-September 7, 2009 a packet was left at the petitioners office addressed to the

Petitioner No. 1. On opening of the same, the petitioners were surprised to see the contents thereof which were the copy of the report of the

Committee for Evaluation of Tender in respect of the financial bids and the copy of the report of the Price Negotiation Committee. Under the

circumstances, the petitioners are not aware of the identity of the person who left the packet at the office of the Petitioner No. 1. These assertions

were strongly refuted by the Respondents by filing affidavits in opposition.

34. Mr. Kapadia relied upon the following judgments:

(i) Magraj Patodia Vs. R.K. Birla and Others, , and in particular paragraph No. 20 thereof. The relevant portion thereof reads as under:

The fact that a document was procured by improper or even illegal means, will not be a bar to its admissibility if it is relevant and its genuineness is

proved.

(ii) Bombay Chemical Limited v. Union of India 2007 (8) S.T.R. 417 (Bom) and in particular Paragraph No.7 thereof. In paragraph No.7 the

Court observed that as the authenticity of xerox copy of the order dated March 22, 1995 passed by the then Assistant Collector produced by the

petitioner was challenged by the Respondent, the Court directed the department to produce the original record. After careful perusal of the record,

the court found that the copy produced before the court was in fact true xerox copy of the original order which was in the office record. In that

context, the Division Bench observed as under:?

Hence, the source from which the petitioners got the copy, is immaterial.

35. Mr. Kapadia invited our attention to the affidavit made on behalf of BSNL in opposition to the chamber summons wherein the BSNL did not

deny existence of the documents, but mere authenticity of the documents referred by the petitioners. He therefore submitted that the court should

call upon the BSNL to produce the original file containing the copy of the report of the Committee for Evaluation of the Tender in respect of the

financial bids and the copy of the report of the Price Negotiation Committee (PNC).

36. Mr. Kapadia further submitted that the BSNL has determined the ranking of the bids as lowest (L-1), second lowest (L-2) and third lowest

(L-3). He invited our attention to the affidavit made on behalf of the BSNL by David S.A., working as A.D.(MM-I). In paragraph No. 9 of the

said affidavit it is set out that the tender process is divided into following parts:

(i) preparation of bid

(ii) invitation and opening of bid\

(iii) Pre-clarification techno-commercial evaluation

(iv) evaluation of financial bid

(v) awarding of tender.

37. It has been thereafter set out that on the basis of financial bid submitted, L-1, L-2 and L-3 have been determined. In Paragraph No. 13 of the

said affidavit, it has been set out that the CET has submitted its recommendations and L-1, L-2 and L-3 have only been determined, but further

process is still pending as still the price negotiations with L-1 are yet to take place. On the basis of assertions made in the affidavit of the BSNL,

Mr. Kapadia submitted that the financial evaluation is over and in fact BSNL has determined the ranking of the bids as L-1, L-2 and L-3. He

therefore submitted that the contentions raised by the respondents that the petition is pre-mature is contrary to the record and factually incorrect.

38. Opposing the Chamber summons BSNL has made affidavit of David S.A. He has submitted that though the BSNL has determined the ranking

of bids as L-1, L-2 and L3, nonetheless there is substantial process left before finally evaluating L-1, L-2 and L-3 as successful bidders. Though

the PNC has negotiated with L-1, the recommendations of the PNC are yet to be approved by the tendering authority. If the tendering authority

approves the recommendations of the Committee as regards L-1, as also rates, the tender work would be allotted to L-1, which would be final

subject to L-1 furnishing unconditional acceptance and performance security in conformity with Section IX of the tender. If L-1 fails to comply

with the requisite conditions, the entire bid would be terminated and recalled.

39. On behalf of Respondent No. 4, Mr. Arun Kumar Sinha, constituted attorney has made an affidavit opposing the Chamber Summons. It is

submitted that it is patently absurd and dishonest attempt on the part of the petitioner to explain away as to how they obtained copies of the

confidential documents. When the court directed the petitioners to disclose the source thereof, they came out with an explanation that the copies of

the said documents were left in a packet at the petitioner's office addressed on September 7, 2009 by some unknown person. The said story is

ex-facie false and perjurious and impossible to accept. The said attempt is intended only to obfuscate and cover up the mischief and corrupt

practices of the petitioners. It is contended that the petitioners have not come to this Court with clean hands. It is reiterated that the contentions

raised earlier by 4th Respondent about the petition being pre-mature is based on the fact that no contract or purchase order or LOI was issued by

the BSNL and that the tender evaluation process is incomplete.

40. On behalf of 3rd Respondent, Mr. Surinder Bir has made an affidavit opposing the chamber summons. It is submitted that the explanation

given by the petitioners as to how they got hold of the documents is totally unsatisfactory and insufficient. At the highest the said documents would

be relevant for considering whether the petition is pre-mature or otherwise.

41. After hearing the learned Counsel appearing for the parties and also considering the material on record, it is abundantly clear that the BSNL

has completed the financial evaluation and determined the ranking of the bids as lowest (L-1), second lowest (L-2) and third lowest (L-3). It is

only after completion of the financial evaluation the ranking of the bids could be determined. From perusal of the affidavit made in opposition on

behalf of the BSNL to the chamber summons, it is abundantly clear that after evaluating the financial bids, the BSNL has determined the ranking of

the bids. It may be the recommendations of the PNC as regard its negotiations with L-1 are yet to be approved by the tendering authority. But

nonetheless the negotiations could be carried out by PNC only after evaluation of the financial bids. In our considered opinion, therefore, the

petition cannot be said to be pre-mature. Undoubtedly the petitioners have not explained as to how they got hold of these documents. For, the

explanation offered by the petitioners in paragraph 21 C of the affidavit in support of the Chamber Summons is unacceptable. BSNL, however,

admits existence of these documents and denies mere authenticity thereof. The best course for the BSNL, being a public body, was to produce the

original record for perusal of this Court. At any rate, the least that was expected from the BSNL was to produce the authentic copy of the

document alongwith the affidavit in opposition to the Chamber Summons. To observe sobriety we leave the matter at that.

42. Be that as it may, now turning to the merits of the case, the petitioners main grievance is two fold against the Respondents. Firstly, not

furnishing the list of spares by Respondent Nos. 3 & 4, and secondly, not filling in the amount of excise duty in col.5 & 6 in the financial bids by

Respondent Nos. 3 & 4. Before proceeding to ascertain answers to the above questions it will be useful to bear in mind the principles governing

the exercise of power of judicial review by this Court. After exhaustive consideration of long line of authorities, the Apex Court in the case of Tata

Cellular Vs. Union of India, , succinctly summarised the position and laid down the following principles:

(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.

In the light of these principles we shall determine the questions raised in the present petition.

43. In so far as not furnishing of list of spares, giving full particulars including available source and current prices of all spare parts, specially tools

etc. (clause 11.2(b)), the petitioners contend that as per Clause 31 of Section II, non-furnishing of such list alongwith the techno commercial bid is

fatal. The BSNL ought to have declared bids of the 3rd and 4th Respondents as substantively non-responsive bids and returned the financial bids

unopened to the 3rd & 4th Respondents.

44. With regard to issue of spares the petitioners rely upon following clauses in the tender: -

Clause 11.2(b) of Section-II,

Clause 9 of Section-III,

Clause 54.4 of Section-IV,

Clauses 2.4, 2.5 and 2.6 of Annexure II of Section-IV.

Aforesaid clauses read as under:-

Clause 11.2(b) of Section-II: A list, giving full particulars including available sources and current prices of all spares parts, special tools, etc.,

necessary for the proper and continuous functioning of the goods for a period of eight years following commencement of use of the goods by the

purchaser.

Clause 9 of Section-III - Spares.

Clause 54.4 of Section-IV - The bidder shall, at the time of submitting the bid submit the proposal specifying the fault control center locations

together with the resources to be deployed including the number of personnel and how the bidder proposes to carry out repair under AMC. He

shall also indicate the list of spares together with the quantity that will be kept in different locations. The infrastructure planned to be created by the

bidder to fulfil his obligations under AMC and his action plan to deal with the various situations arising out of hardware and software faults shall be

clearly indicated.

Clauses 2.4, 2.5 and 2.6 of Annexure II of Section-IV:

2.4 - The supplier shall submit a list of spares required alongwith the bid and cost of the same is to be quoted in the price schedule. The price shall

be same as that quoted in the bill of material against the concerned item in the SOR. The spares are to be kept at each core network elements

locations and at each BSC/RNC locations in the custody of BSNL. BSNL shall arrange space for the same. The minimum number of the spares to

be supplied are as per the chart.

2.5 - BSNL staff will replace the faulty units from the stock available wherever possible and attend to the fault. However, should there be a

problem vendor shall arrange telephonic support in diagnostic of the fault and also in replacing the card. In any case such fault could not be

attended to, the support team of the vendor shall be responsible to arrange rectification of the fault at site within stipulated time frame.

2.6 - The spares thus ordered are to be supplied within 6 months of placing the purchase orders. The date of expiry of warranty shall be extended

by the No. of days there is delay in supplying of such spares at all these sites.

45. The petitioners have also relied upon Query No. 65 and the reply given to the same, which read as under:-

Query 65 - List of following material and notification pertaining to spare parts not provided. Please provide the same. Since the spares will be

covered under warranty as well as AMC what is the purpose of providing spare parts under pricing. Since this clause demand the quantities also

whether the price of the spares will become part of the evaluation.

Reply - Please refer to sub clause of this clause. Further prices are being asked so that BSNL can decide to procure spare parts after AMC

period. Prices are also required for evaluation.

46. On the other hand the Respondents 3 and 4 submit that Clause 31 of Section II lays down the mandatory clauses of the tender, failure whereof

would result in outright rejection of the bid. The said Clause 31 reads as under:-

While all the conditions specified in the tender document are critical and are to be complied, special attention of bidder is invited to the following

clauses of the bid documents, non-compliance of any one of which shall result in out right rejection of the bid:

(i) Clause 15.1 of Section-II: The bids will be recorded/returned unopened if covers are not properly sealed with "PERSONAL SEAL" of the

bidder.

(ii) Clauses 12.1, 12.3 and 13.1 of Section-II: The bids will be rejected at opening stage if Bid security is not submitted as per Clauses 12.1 &

12.3 and bid validity is less than the period prescribed in Clause 13.1 mentioned above.

(iii) Clause 2 and 10 of Section-II: If the eligibility condition as per clause-2 of Section -II is not met and documents prescribed to establish the

eligibility as per Clause-10 of Section-II are not enclosed, the bids will be rejected without further evaluation. be rejected at the stage of techno-

commercial evaluation. In case of no deviations, a statement to that effect must be given.

(v) Section-VII Price Schedule: Prices are not filled in as prescribed in price schedule.

(vi) Section-II Clause 9.5 on discount which is reproduced below:

Discount, if any, offered by the bidder shall not be considered unless specifically indicated in the price schedule.

Bidders desiring to offer discount

shall therefore modify their offer suitably while quoting and shall quote clearly net price taking all such factors like Discount, free supply etc. into

account.

(vii) Section-Unpriced detailed bill of material with card level details in the techno-commercial bid and the exactly same bill of materials with card

level prices in the financial bid.

47. The Respondents 3 & 4 contend they have not committed breach of any of the requirements laid down in Clause 31 of Section-II. In so far as

alleged non-compliance of Clause 31(v) of Section-II is concerned, the Respondents have filled in bid in the manner prescribed in the price

schedule in Section VII. Under Clause 31 (iv) of Section-II of the tender Clause 11.2(b) of Section-II is not included and noncompliance of

Clause 11.2(c) of Section-II is fatal as it is mandatory. Under Clause 31 (iv) non-compliance of Clause 11.2(c) of Section II would result in

outright rejection of the bid. In view of this it is strenuously submitted that in so far as the first grievance of the petitioners as regards the spares is

concerned, the same is wholly unsustainable.

48. We find considerable merit in the submissions advanced on behalf of the 3rd and 4th Respondents. Perusal of Clause 31 of Section-II lays

down the mandatory clauses of the tender and failure to comply these clauses would result in outright rejection of the bid. There is no breach of

Clause 31 (iv) & (v) of Section-II committed by the 3rd & 4th Respondents. As observed earlier Clause 31 (iv) of Section II provides that non-

compliance of Clause 11.2(c) would result in outright rejection of the bid. If the compliance of deviation/exception statement as prescribed are not

given, the bid will be rejected at the stage of techno-commercial evaluation. In case of no deviation, the statement to that effect has to be given.

From the affidavit of BSNL dated August 20, 2009 it is clear that the Respondent Nos. 3 & 4 submitted spares list at the stage of post-

clarification stage. Both at pre-clarification and post-clarification stages, the Respondent Nos. 3 & 4 had given NIL deviation statement. As far as

Clause 11.2(c) is concerned, it lays down the procedure by which the compliance of techno-commercial compliance of the tender terms,

conditions and technical specifications is to be submitted. The Respondent Nos. 3 & 4 have not committed breach of Clause 11.2(c) (i) to (vi) of

Section II of the tender. The petitioners are complaining about the non-compliance of Clause 11.2(b) of Section II of the tender. We are therefore

of the opinion that there is no substance in the submission advanced on behalf of the petitioners that there is breach of Clause 31 (iv) of Section II.

In so far as non-compliance of Clause 31 (v) of Section II is concerned, it lays down the manner in which the prices are to be filled -in in the price

schedule in Section-VII. We are of the opinion that the Respondent Nos. 3 & 4 have filled in the prices in price schedule as prescribed and there

is no breach committed by them.

49. Apart from merit, it is further submitted by the Respondents that the techno-commercial bid was opened by the BSNL on September 10,

2008 and the bids of 3rd & 4th Respondents were declared to be substantively responsive bids. The cause of action accrued to the petitioners

after September 10, 2008 as the BSNL thereafter proceeded further with the process of evaluation of bids of the 3rd and 4th Respondents. The

petitioners allowed the tender process to proceed further and instituted the present petition as late as on August 3, 2009. It is therefore submitted

that in the first place, the petition suffers from gross delay and laches. Secondly, the petitioners are precluded from challenging the techno-

commercial evaluation of the 3rd and 4th Respondents.

50. In this behalf, Clause 21 of Section II of tender dealing with techno commercial evaluation is material and the same reads as under:-

Technical and Commercial Evaluation:

21.1 In the first stage of evaluation, the purchaser shall evaluate the bids to determine whether they are complete, whether required bid security has

been furnished, whether the documents have been properly signed and whether the bids are generally in order.

21.2 Purchaser shall determine the substantive responsiveness of each of the technical and commercial bids to the requirements of the tender

document. A substantively responsive bid is one which conforms to all technical specifications and commercial terms and conditions of the tender

document without material deviation/exceptions. The purchaser's determination of bid's responsiveness shall be based on the contents of the bid

itself without recourse to extrinsic evidence.

21.3 During the evaluation, BSNL at its discretion may call upon the bidder to give a techno-commercial presentation of its offer, to explain the

products offered, its capability to undertake the project and to respond to any question from BSNL.

21.4 A bid determined as substantively non-responsive will be rejected by the purchaser and shall not subsequent to the bid opening be made

responsive by the bidder by correction of the non-conformity.

21.5 The purchaser may waive any minor infirmity or non-conformity or irregularity in a bid which doesn't constitute a material deviation, provided

such waiver doesn't prejudice the establishment of technocommercial parity among the bids.

21.6 The financial bids of only those technical and commercial bids that are determined as substantively responsive shall be opened. The financial

bids of those technical and commercial bids that are determined as substantively non-responsive shall be returned to the respective bidders

unopened.

51. In view of the above clause the challenge to the technocommercial evaluation bid of the 3rd & 4th Respondents suffers from gross delay and

latches. The petitioners allowed the tender process to progress further and even the financial evaluation was made by the BSNL and the BSNL

determined the ranking of the bidders. In view of this position, the petitioners cannot be allowed to challenge technocommercial evaluation of the

3rd & 4th Respondents. If we permit the challenges to be raised belatedly it would amount to petitioners taking chance in the matter and permitting

to grow grass under their feet and thereafter turn around and challenge the same. We decline to exercise our extra-ordinary jurisdiction in favour of

the petitioners.

52. This takes us to the second ground of attack viz. failure to quote the amount of excise duty in col.5 & 6 of Section-VII of the financial bid. So

far as this aspect is concerned, the petitioners rely upon clauses 9.1 and 9.2 of Section-II and Query No. 458 and the reply given by the BSNL.

Clauses 9.1 & 9.2 of Section-II read as under:-

9.1. The bidder shall give the total composite price inclusive of all levies and taxes viz. excise duties, custom duty, VAT, sales tax, service tax,

packing, forwarding, freight and insurance etc., but excluding octroi/entry tax which will be paid extra as per actual, wherever applicable as per the

terms of payment specified in Section-IV. The basic unit price and all other components of the price need to be individually indicated against the

goods and services it proposes to supply under the contract as per the price schedule given in Section- VII. Prices of incidental services should

also be quoted. The offer shall be firm in Indian Rupees. No foreign exchange will be made available by the purchaser.

9.2 Prices indicated in the Price Schedule shall be entered in the following manner:

(i) The basic unit price (ex-factory price) of the goods, excise duty/custom duty, VAT , sales tax, service tax, freight, forwarding, packing,

insurance and any other levies/charges already paid or payable by the supplier shall be quoted separately item wise.

(ii) The supplier shall quote as per price schedule given in section-VII for all the items given in the schedule of requirement. In case of imported

items, a new column (4C) indicating the assessable value for calculation of customs duty may be inserted and the value entered in that column shall

be used for calculation of customs duty only.

Query No. 458 and the Reply thereto reads as under:-

Query No. 458: As stated in price schedule ex-factory price is unit price excluding levies and charges. Will the ex-factory price include sales tax

paid, other costs, margins of supplier. Else where should such components of cost and the margin be shown.

Reply: Basic unit price is exclusive of all levies and charges. Columns have been provided for excise duty, sales tax and other levies and charges.

53. On behalf of the Respondents it is submitted that the 3rd & 4th Respondents do not manufacture any of the items listed in the tender. They are

also not producers of these items. As per Clause 22.2 of Section-II of the tender (ITB), the evaluation and the comparison of the bids is to be

made on the basis of net costs to the BSNL of the goods offered inclusive of duties and taxes, but cenvatable duties and taxes as indicated in col.

17. Column 17 of the said format would be effective net costs to the BSNL, after getting credit/benefit for the said cenvatable duties and taxes.

Clauses 22.2(a) of Section-II reads as under:-

The evaluation and comparison of responsive bids shall be done on the basis of net cost to BSNL on the prices of the goods offered inclusive of

duties and taxes (but excluding CENVAT-able duties and taxes), sales tax, packing, forwarding, freight and insurance charges etc., as indicated in

Col.17 of the price schedule in the Section-VII, Part-II of the tender document. As stipulated in clause-9.1, octroi/entry taxes are not to be

included in the composite price and hence the same will not be considered for the purpose of evaluation and comparison of responsive bids.

However, octroi/entry taxes will be paid extra as per actual, wherever applicable, on production of proof of payment/relevant invoices/documents.

54. It is further submitted that under the provisions of the Central Excise Act and Rules, it is the respective producer or the manufacturer who has

to pay excise duty to the excise authorities. There is therefore no question of the Respondent Nos. 3 & 4 failing or neglecting to fill in col.5 & 6 of

Section-VII (Part-II) dealing with the price schedule for indigenous equipments (including partly imported) and service costs and the price

schedule for the imported equipments.

55. Having considered the rival submissions we are of the opinion that there is no substance in the challenge put forth on behalf of the petitioners

that the bid of the 3rd & 4th Respondents are liable to be rejected on account of failure to quote the amount of excise duty. Having regard to

Clause 22.2(a) of Section-II extracted hereinabove, the evaluation and comparison of responsive bids is to be done on the basis of net costs to

BSNL on the prices of goods offered inclusive of duties and taxes (but excluding leviable duties and taxes), sales tax, packing, forwarding,

freight and insurance charges etc., as indicated in col.17 of the said format. We therefore reject the submission made by the petitioners that the bid

of the 3rd & 4th Respondents was misleading or manipulative on this count.

56. The petitioners relied upon the judgment of the learned Single Judge of Calcutta High Court in Writ Petition No. 9770 (W) of 2009 in the case

of KEC International Limited and Anr. v. Union of India and Ors., dated July 8, 2009. In that case the petitioners assailed the evaluation of two of

the bids received by the BSNL in respect of the works viz. Planning, engineering, supply, installation, testing and commissioning of infrastructure

for 18 million lines of cellular mobile expansion project phase-VI in East Zone. In that case Clause 4.7.2 provided that the Engine Alternator

supplied should be of ready to use type (RTU), the BHP of engine may be suitably enhanced as per site conditions in order to deliver the minimum

required KVA at site. The Engine Alternators shall be of air cooled type. By Addendum No. 4 dated September 5, 2008 the tender dated May 1,

2008 and Clause 4.7.2 of the DTR of the Part-II was modified. It provided that the water cooled Engine Alternators can also be supplied

alongwith Air cooled Engine Alternators in the ratio 30:70 respectively. Similar functionalities as asked for Air Cooled Engine Alternators apply for

the water cooled Engine Alternators as well. By Addendum 4.2 dated September 6, 2008 the revised consolidated SOR for Par-3 was given. The

petitioners therein contended that the Addendum dated September 6, 2008 altogether altered the SOR and provided that the equipment and

quantities indicated in such revised SOR would be what the bidders had to quote for. On the other hand the BSNL and the contesting

Respondents contended that nothing in the Addendum dated September 6, 2008 detracted from the option given to the bidders by the Addendum

published on September 5, 2008. They submitted that it was open to the bidders to either quote for the entire complement of engine alternators as

the air-cooled type or quote air-cooled and water-cooled engine alternators in the ratio 70:30 as indicated by Addendum of September 5, 2008.

After exhaustively considering several judgments of the Apex Court, the learned Single Judge observed as under:-

Clause 4.7.2 of the detailed technical requirement specified that engine alternators ""shall be of air cooled type"". The moment addendum 4 was

published, the ""shall be"" in the second sentence of Clause 4.7.2 had per force to be read as ""may be"". The argument of the fourth respondent that

Clause 4.7.2 was not subservient to addendum 4.2 cannot be accepted since its mandate stood already diluted by addendum 4 issued on the

previous day. There is an element of vagueness about addendum 4. There is no doubt that it gave a choice to bidders to offer to supply water-

cooled alternators alongwith air-cooled ones. Did it then require bidders to offer to supply the full compliment in air-cooled alternators or a

combination of exactly 70:30 of air-cooled and water-cooled alternators or any combination of the two as long as air-cooled alternators did not

fall below 70 percent and water-cooled alternators did not exceed 30 percent? If the air-cooled alternators are the more preferred, as both BSNL

and the fourth respondent suggest, it would irrational that a bidder with an 80:20 mix of air-cooled alternators and water-cooled alternators would

stand disqualified though it would appear to be a better offer than a 70:30 mix of air-cooled and water-cooled alternators. But is unnecessary to

get into such issue save to appreciate the nature of the queries that may have been raised following the obvious option given by Addendum 4. The

last sentence above the table in addendum 4 referred to modifications in the SOR and the SOR being revised ""in relation to Engine Alternators"".

As a stand-alone sentence it would imply that the SOR in respect of engine alternators stood modified to the extent indicated in the table. But since

such sentence followed the option offered earlier in the addendum for water-cooled alternators to also be supplied alongwith air-cooled

alternators, it is reasonable to read the modified SOR relating to engine alternators in addendum 4 to permit bidders to offer to supply only air-

cooled alternators as per the original SOR or a mix of air-cooled and water-cooled alternators in accordance with the modification provided in

such addendum.

The learned Single Judge also considered Clause 31 (v) of ITB and observed thus:-

Clause 31(v) of the instructions to bidders in the tender papers provided that the failure of a bidder to fill in the prices as prescribed in the price

schedule would result in the rejection of the bid. Clause 46, 2 (vii) of the special conditions of contract stipulated that in case a bidder had not

quoted the price of any item mentioned in the SOR and had not justified for not quoting the same, the price bid was to be loaded with the

maximum price quoted for that item by any other bidder for the purpose of evaluation. It is true that the tender documents gave BSNL some elbow

room to exercise discretion to not reject a bid on a technical transgression. But as much as BSNL's reasonable stand in not rejecting the petitioner

company's bid for it not quoting for spares in its annual maintenance contract has to be applauded, its interpretation of addendum 4.2 cannot be

appreciated. It is possible that BSNL understood addendum 4.2 to be as it suggest, but that is of no importance. What is of consequence is as to

how a reasonable bidder would understand addendum 4.2 to imply. For, the document was intended for bidders and its interpretation lies in what

it conveyed rather than what it intended to convey. The expression ""to clear it all"" and the firm finality in the publication of ""the revised consolidated

SOR"" would admit of no other construction but that it was such modified SOR that bidders had to adhere to.

57. The learned Single Judge came to the conclusion that the process of evaluation was found to be faulty as the reasonable bidder would have

understood the table appended to addendum 4.2 to be the final, and inviolable schedule of requirements. The learned Single Judge eventually

issued writ of mandamus cancelling the evaluation of bids conducted by the BSNL with a direction to reassess the bids by treating SOR published

under addendum 4.2 as the applicable list of materials and quantities thereof.

58. We however find that the said judgment in fact supports the contentions raised by the 3rd and 4th Respondents as regards the issue of spares.

The learned Single Judge appreciated the BSNL's reasonable stand in not rejecting the petitioner Company's bid therein for not quoting for spares

in its AMC. The BSNL's said stand was in fact applauded although the learned Single Judge did not appreciate interpretation of addendum 4.2.

59. The petitioners also strenuously relied upon the judgment of the Apex Court in the case of West Bengal Electricity Board (supra) and in

particular paragraph No. 24 thereof, for the purpose of contending that in a bid and the high value tender as the present one, the degree of care

required is greater than in local bids for small works. The Apex Court held that it is essential to maintain the sanctity and integrity of the process of

tender/bid which should be filled in and the terms complied with scrupulously, and that adherence to instructions under ITB cannot be given a go-

bye by branding it as a pedantic approach, otherwise it would encourage and provide the scope for discrimination, arbitrariness and favouritism

which are totally opposed to the rule of law and constitutional values. It has been further held therein that relaxation of such rules in favour of one

or the other bidder would impair the rule of transparency and fairness and provide a room for manipulation in picking and choosing a bidder, which

is not permissible in law for state authorities. In that case the Apex Court considered the clauses of the tender and in particular clauses 14, 27 and

29 of the ITB as also the correspondence exchanged between the parties. Clause 24.3 of the ITB lays down that no bid shall be modified by the

bidder after the deadline for submission of bids. Clause 27 of the ITB dealt with the clarification of the bids. It provided that the request for

clarification and the response shall be in writing or by cable, but no change in the price or substance of the bid after opening the price bid shall be

sought, offered or permitted except as required to confirm the correction of arithmetical errors discovered by the employer's authorised

representative in the evaluation of the bids in accordance with Clause 29 of the ITB. Clause 29 of the ITB provided the procedure for correction

of errors.

The Court thereafter considered the nature of errors, corrections made by the appellant and the relief sought by the Respondents 1 to 4 in respect

of 37 items in the bid documents and observed thus in paragraph Nos. 16 and 17:

16. A perusal of the price bid statement "A" shows that the unit price filled in by the bidder in the first line against Item 02 - work item - ""Rock

Excavation"" is repeated in two lines - in the second line of the same item and in the first line of Item 03 - work item --""Impervious Core

Embankment"". In the quantity column, "1000" is noted by the appellant. The unit rate for rock excavation is given by Respondents 1 to 4 in the

first line in Indian Rupee as Rs. 148.08 both in figures as well as in words. In the amount column Rs. 148,077.97 is entered which is arrived at by

multiplying quantity, 1000, by unit rate, Rs. 148.08. It contains an arithmetical error; instead of Rs. 1,48,080.00, it is noted as Rs. 1,48,077.97. It

has been noticed above that under Clause 29.1(b) of the ITB, such an error in the line total in the amount column is amenable for correction and

not the unit rate noted by the bidder in the figure column. In the second line, the same entry is repeated though that line should contain unit rate in

US Dollar which is rupee equivalent of the unit rate mentioned in the first line. Respondents 1 to 4 seek correction of "148.08" in the second line as

"3.38" in the figure column and also in words to conform to 3384.64 which is noted in the amount column to wit as US Dollar equivalent of

1,48,077.97 Indian Rupee in the first line. This appears to be the import of their letter of 17.12.1999.

17. Respondents 1 to 4 seek correction of the entries in the third line also which is the first line against work item ""Impervious Core Embankment"".

It is plain that against this work item the entries in the first line are quite different. The quantity column is blank, though "3900" should have been

noted therein. In that line also the entries in the first line are repeated. There the correction sought is that the figure column should read as 84.21

both in figure and words. It is stated that in the second line the unit rate 1.92 both in figures and words, represents US Dollar equivalent of 84.21

Indian Rupee which is now sought to be inserted. The errors in the other 36 items are said to be similar. Had the errors been confined to these

aspects, it would not have resulted in material change in the unit rate because the unit rate in one of the permissible currencies is correctly given and

there will be no discrepancy as envisaged in sub-clause (b) of Clause 29.1. It would not really be a case of incorporating a new unit rate but a case

of either recording US Dollar equivalent of the unit rate already noted in Indian Rupee or vice versa as given in statement "B" above. In such a

case, perhaps, they would have been entitled to equitable relief of rectification of mistake. But here, as would be shown presently, the position is

different.

After considering the correspondence exchanged between the parties, the Court observed that the corrections in the bid documents of Respondent

Nos. 1 to 4 carried out by the appellant, evaluation of bid under Clause 29.2 and the impugned communication of the appellant dated December

18, 1999 were unsustainable and of no consequence by observing in paragraph Nos. 21 and 22 as under:-

21. The appellant could not have ignored these letters. Had the appellant taken note of these letters and the mistakes occurring due to repetition of

entries in 37 items in the bid documents, it would not have proceeded with correction of such mistakes and evaluation of their bid without first

seeking clarification from Respondents 1 to 4 under Clause 27.1. We have already referred to the gist of that clause. The only prohibition

contained therein is that no change in the price or substance of the bid after its openings can be sought, offered or permitted. In that regard they

had made their position clear. The prohibition is, therefore, not attracted. In these circumstances any reasonable person in the position of the

appellant would have sought clarification from Respondents 1 to 4 under Clause 27.1. Even assuming that after the letter of 17.12.1999, no further

clarification was required to be sought by the appellant, we cannot but hold that correction of the errors taking note of the unit rates which are

mere repetition of the unit rates quoted for a different work item, is mechanical and without application of mind by the appellant. In our view such a

correction is far beyond the scope of Clause 29. From the description of the mistakes, noted above, and the correction and evaluation made by

the appellant, it is evident that except the error in the first line against the work item ""Rock excavation"" and Schedule "N" day work, all other

mistakes/errors are beyond the scope of Clause 29.1, so clause 29.2 will not be attracted. It follows that the corrections in the bid documents of

Respondents 1 to 4 carried out by the appellant, evaluation of bid under Clause 29.2 and the impugned communication of the appellant dated

18.12.1999 are unsustainable and of no consequence.

22. Now, reverting to the relief of correction of errors, Mr. Chidambaram has argued that in the two lines against each of the work items, the first

line denotes 50 percent of the quoted unit rate in Indian Rupees and the second line represents the other 50 percent of the unit rate in US Dollars.

According to him the actual rate quoted for quantity 1000 is the sum total of the two lines i.e. 148.08 in Indian Rupees plus 3.38 in US Dollars.

This is not noted either in Statement "A" or in Statement "B". Be that as it may, quoting the unit rate 50 percent in Indian Rupees and 50 percent in

US Dollars is not provided for in the ITB. Nothing is brought to our notice to justify splitting of unit rate in that ratio. There is no indication of this

fact in the price bid documents submitted by the said respondents to explain that the unit rate has been so quoted. This is also not in conformity

with Clause 15 of the ITB which, as noted above, requires a bidder to quote unit rates and prices in Indian Rupees and either in US Dollars or

Japanese Yen. The learned Additional Solicitor General, in our view, is right in his submission that till the representation was made by the said

respondents on 23.12.1999, after the interim direction of the High Court, the appellant was unaware of the quoted unit rate being in such

proportion. A combined reading of the ITB and the annexure, extracted above, makes it clear that the second line against each work item is meant

for writing US Dollar or Japanese Yen equivalent of the "unit rate and line total in the amount column" entered in the first line and not for writing

bifurcated unit price in different currencies in the ratio of 50:50. On these facts, the errors cannot be termed as mere clerical or mechanical.

Permitting correction of such errors, if they can be so called, would result in not only rewriting unit rates in 37 entries in which such errors are said

to have been committed but also appending an explanation thereto regarding splitting of unit rates in terms of representation dated 23.12.1999 of

Respondents 1 to 4. Neither Clause 27 and 29 nor any other clause in ITB permits such corrections.

On facts the Apex Court considered that the errors committed by the Respondent Nos. 1 to 4 cannot be termed as mere clerical or mechanical.

Permitting correction of such errors would result in not only rewriting unit rates in 37 entries in which such errors are said to have been committed,

but also appending an explanation thereto regarding splitting of unit rates in terms of representation dated December 23, 1999 of Respondent Nos.

1 to 4. Neither clauses 27 and 29 nor any other clause in ITB permitted such corrections.

60. In so far as the controversy in the present case is concerned, we have already held that the Respondent Nos. 3 & 4 have not committed

breach of any of the clauses stipulated in Clause 31 of the tender. The judgment of the Apex Court in the case of West Bengal Electricity Board

(supra) is not applicable to the controversy raised in the present case.

61. In the result the petition fails. Rule is discharged with no order as to costs. Since we have proceeded to hear the Chamber Summons alongwith

the main petition, no separate orders are necessary in the Chamber Summons and the same stands disposed off.