



GAHC010183052020

Page No.# 1/43



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5518/2020

SMEC INTERNATIONAL PTY LTD AND ANR
FIRST FLOOR, NOVUS TOWER, WEST WING, PLOT NO. 18, SECTOR-18,
GURUGRAM- 122015 (HARYANA), REP. BY ITS AUTHORIZED SIGNATORY
MR GAURAV KUMAR SRIVASTAVA

2: SMEC INDIA PVT. LTD.
FIRST FLOOR
NOVUS TOWER
WEST WING
PLOT NO. 18
SECTOR-18
GURUGRAM- 122015 (HARYANA)
REP. BY ITS AUTHORIZED SIGNATORY MR GAURAV KUMAR SRIVASTAV

VERSUS

ASSAM ELECTRICITY GRID CORPORATION LTD AND 2 ORS
MANAGING DIRECTOR, 1ST FLOOR, BIJULEE BHAWAN, PALTAN BAZAR,
GHY-01, ASSAM

2: THE MANAGING DIRECTOR
ASSAM ELECTRICITY GRID CORPORATION LTD. (AEGCL)
1ST FLOOR
BIJULEE BHAWAN
PALTAN BAZAR
GHY-01
ASSAM

3: PT FEEDBACK INFRA LTD.
THROUGH ITS MANAGING DIRECTOR
10TH FLOOR
BUILDING 10C
CYBER CITY
DLF PHASE II



GURUGRAM 122002
HARYANA
INDIA

Advocate for the Petitioner : MR. P K MUNIR

Advocate for the Respondent : SC, AEGCL

BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

JUDGMENT AND ORDER

12-08-2022

Heard Mr. Kishore Kumar Sharma, learned Senior Counsel, assisted by Mr. Parvez Khizirul Munir learned counsel for the petitioners SMEC International Pty Limited, Australia in association with SMEC India Private Limited, India from Australia. Also heard Mr. Tanmay Jyoti Mahanta, learned Senior Counsel, assisted by Ms. Panchali Bhattacharya, learned counsel for the respondent Nos. 1 and 2 in the Assam Electricity Grid Corporation Limited and Mr. Yusuf Saleh Mannan and Mr. Rajesh Kumar Bhatra, learned counsels for the respondent No.3.

2) Petitioner No. 1 SMEC International Pty. Ltd. is a company incorporated under the laws of Australia and Petitioner No. 2 SMEC India Pvt. Ltd. is a company incorporated in India.

3) The respondent No. 1, the Assam Electricity Grid Corporation Limited (AEGCL, in short), is a State Public Sector Company registered under 'the Companies Act, 1956', an instrumentality of the State being amenable to Writ Jurisdiction and the respondent No. 2 is the Managing Director of the respondent No. 1.

4) For the purpose of 'Procurement of Consulting Services for Project Implementation and Management Support' (hereinafter referred to as the Consulting Services), in respect of its assignment 'Assam Intra State Transmission System Enhancement Project' (hereinafter referred to as the Project), the Client AEGCL vide RFP No.: AEGCL/MD/AIIB/PMC/2019/37 dated 07.03.2020 addressed the Request for Proposal (RFP, in short) to the petitioners as well

as the respondent No. 3 PT Feedback Infra Limited and five such others, in total seven shortlisted Consultants specifying that the Consultants must submit their (a) Technical Proposal (one original) and (b) Financial Proposal (one original) before the Project Director, Office of the Managing Director, AEGCL in it's given address by 14:00 Hours on 24.04.2020. Later, the respondent AEGCL extended the date of submission of such proposals by those shortlisted Consultants up to 16.06.2020.

5) All those seven shortlisted Consultants including the Petitioner Nos. 1 and 2 jointly and the respondent No. 3 submitted their respective proposals in respect of said RFP dated 07.03.2020 issued by the Client AEGCL.

6) On 13.10.2020 at 17:30 Hours IST (Indian Standard Time) by its e-mail, the concerned Client respondent AEGCL issued Notification of Intention to Award in respect of said RFP dated 07.03.2020 informing its decision to award the contract in favour of the respondent No.3, PT Feedback Infra Limited, Indonesia in association with Jade Consult Nepal and NIPSA, Spain, as the successful Consultant at its offered Financial Proposal exclusive of GST specifying that the Standstill Period shall last ten Business Days after the date of transmission of the said Notification of Intention to Award, which shall end at midnight on 27.10.2020 at 24:00 hours IST informing further that if there is any question with regard to the said Notification, not to hesitate to contact the concerned Project Director.

7) In pursuance of said Notification of Intention to Award dated 13.10.2020, noted above, a Draft Contract Agreement was signed between the respondent AEGCL and the respondent No. 3 on 01.11.2020 and the respondent AEGCL vide letter No. AEGCL/MD/PMC/CONTRACT/2020/03 dated 02.11.2020 issued Notification of Award of "Consultancy Services for Project Implementation and Management Support" for "the Assam Intra State Transmission System Enhancement Project" in favour of the respondent No.3, in terms of the RFP dated 07.03.2020 as well as the negotiations held between those respondents.

8) Disregarding their better claim and being aggrieved with the said Notification of Intention to Award dated 13.10.2020 issued by the respondent AEGCL selecting the respondent No.3 for the concerned project in respect of the RFP dated 07.03.2020, noted

above, the petitioner No.1 through its Indian counterpart, Petitioner No.2 filed this writ petition on 10.12.2020 praying amongst others to declare (i) the action of the respondents in the AEGCL in not evaluating the technical proposal of the petitioners as per Clause and that issuance of said Notification of Intention to Award dated 13.10.2020 as illegal, arbitrary, unconstitutional and in violation of principle of level playing field and equal opportunity, (ii) the Notice of Award dated 02.11.2020, awarding the work to the respondent No. 3 as illegal, arbitrary, unconstitutional and void, and to set aside the decision to award the said work to the respondent No.3 and (iii) to direct the respondent Nos. 1 and 2 to award the work in the tender/RFP dated 07.03.2020 to the petitioners.

9) On 21.12.2020, while issuing notice to the respondents, the Court observed that the prayer for interim relief shall be considered on the next date.

10) On 08.02.2021, the Court after hearing the submissions of the learned counsels for the parties observed that in order to decide the dispute between the parties and in order to examine violations of some of the clauses of the RFP dated 07.03.2020 involved the case, records are required and accordingly, directed the respondent AEGCL to produce the relevant records.

11) Considering the facts that the private respondent No.3 had already executed the agreement and had taken up 7 (seven) numbers of sub-stations for initiating the process of system improvement, the Court by the said order dated 08.02.2021 observed that the respondent No.3 shall restrict its zone of work within those 7 sub-stations, both 220 KV and 132 KV that were already handed over to it by the respondent AEGCL. Said interim order dated 08.02.2021 is still in force.

12) Pursuant to the orders of the Court dated 08.02.2021 and 15.03.2021, the respondent AEGCL produced the relevant records in original before the Court and the petitioners through their counsels and representative examined the same in presence of the counsels of respondent AEGCL.

13) The petitioners contended that to provide advantage to the respondent No.3, the respondent AEGCL in violation of the mandatory terms and conditions of the Request for Proposal (RFP) dated 07.03.2020 acted illegally and thereby issued the impugned Notification

of Award dated 13.10.2020 in favour of said respondent No.3 awarding the contract with regard to the Project in terms of the RFP dated 07.03.2020.

14) Petitioners stated that as per the concerned RFP dated 07.03.2020, though it is required to make the necessary selection of the successful bidder on the basis of QCBS Method (Quality cum Cost Based Selection Method) where the weightage given to the Technical Proposal (T) is 80% and that of the Financial Proposal (P) is 20% respectively, together 100%; but violating the provisions of Clause 23 of said RFP dated 07.03.2020, the respondent AEGCL on 13.10.2020 issued the impugned Notification of Intention to Award for the relevant work selecting the respondent No. 3.

15) It is stated that as per Clause 21.1 of the RFP dated 07.03.2020 as provided in its ITC (Instruction to the Consultants), it is mandatory for the Client, i.e., respondent AEGCL, to evaluate each of the technical bids applying the evaluation criteria, sub-criteria and point system specified in the Data Sheet and further stated that in terms of said Clause it is also mandatory on the part of said Client, the respondent AEGCL to provide information relating to Consultant's overall technical score as well as scores obtained by it in each criteria and sub-criteria.

16) Petitioners stated that the respondent AEGCL without fixing the criteria and without constituting the committee opened the Technical bids of the participated seven short listed Consultants on 16.06.2020, whereas the criteria were fixed only on 27.08.2020 and thereby the Client, respondent AEGCL changed the rules of the game after opening the technical bids of those seven Consultants.

17) Petitioners contended that the respondent AEGCL through its letter dated 28.09.2020 informed all the seven bidders about the total Technical scores obtained by each of them, without providing the break-up of the points scored by them in their criteria and sub-criteria respectively, which is not in conformity with the conditions prescribed in the RFP dated 07.03.2020. It is stated that for that reason the petitioners on 06.10.2020 sent a representation to the respondent AEGCL highlighting the violation of the relevant provisions of the said RFP committed by it and stated that the respondent AEGCL did not answer to the same.

18) Petitioners stated that even at the time of opening of the Financial proposals of the bidders on 05.10.2020, the respondent AEGCL did not disclose the criteria and sub-criteria wise Technical scores of the seven bidding Consultants, violating the mandatory provisions of Clause 23.5 of the said RFP dated 07.03.2020.

19) It is stated that after issuance of its Intention to Award Contract to the respondent No. 3 on 13.10.2020, the petitioners on 15.10.2020, much within the time specified, wrote to the respondent AEGCL informing the violations committed by it and sought for debriefing as provided in Clause 33(1) of the RFP, but the respondent AEGCL did not respond to the same and thereby violated the mandatory provisions of the concerned RFP dated 07.03.2020.

20) Petitioners stated that on perusal of the records they found several discrepancies committed by the Client AEGCL during evaluation of the technical bids, in constitution of the technical evaluation committee, adoption of wrong process of scoring pattern by the committee, that there were no unanimous decision regarding scoring pattern amongst the members of committee, different suggestions and options were made by the members of the committee regarding scoring pattern of the technical scores and change of scoring pattern during the bidding process etc. Petitioners urged before the Court that the records reveal that the respondent No.3 had no experience of Team Leader as well as Sub Station expert and yet, the respondent AEGCL had given marks/scores to the respondent No.3.

21) Petitioners stated that from the records it can be seen that the respondent AEGCL awarded the points to the petitioners as well as the respondent No.3 under the heads criteria and sub-criteria "key experts" and on their comparison it shows that the evaluation committee constituted by the respondent AEGCL committed gross violation of the RFP dated 07.03.2020 and that the respondent No.3 in no way is qualified to get points/scores/marks under sub-criteria (ii) and (iv).

22) Mr. Sharma on behalf of the petitioners stated that the respondent AEGCL have violated the level playing field, changed the policy of selection criteria during the process of selection of the Consultancy Service and did not comply with the provisions of the RFP as prescribed. Mr. Sharma also submitted that the law is well settled that - where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that

manner or not at all, and all other modes of performance are necessarily forbidden.

23) Petitioners contended that since the entire bidding process that had been initiated by changing the scoring criteria by the respondent Client AEGCL as can be seen from the various minutes from the records and as the terms of the RFP dated 07.03.2020 were not followed by the respondent AEGCL, therefore the entire process of bidding being bad in law and vitiated, should be declared as illegal and should be cancelled.

24) Petitioners placed a written note consisting of Inspection Report of the relevant file, Evaluations made by the committee on 27.08.2020, 15.09.2020, 16.09.2020, 21.09.2020, Evaluation Summary dated 19.09.2020, Minutes of the Meeting dated 19.09.2020 and RFP Evaluation Report of Consultancy Services submitted by the Funding Agency AIIB with regard to the petitioner and the respondent No.3, stating that they had copied those from the records on being asked to verify by the Court.

25) In support of his argument Mr. Sharma placed the following judgments:

- i) Tata Cellular Vs. Union of India, reported in (1994) 6 SCC 651,
- ii) Jagdish Mandal Vs. State of Orissa, reported in (2007) 14 SCC 517,
- iii) Shobikaa Impex (P) Ltd. Vs. Central Medical Services Society, reported in (2016) 16 SCC 233,
- iv) Reliance Energy Ltd. Vs. Maharashtra State Road Development Corpn. Ltd., reported in (2007) 8 SCC 1.
- v) Central Coalfields Ltd. Vs. SLL-SML (Joint Venture Consortium), reported in (2016) 8 SCC 622,
- vi) Municipal Corporation, Ujjain Vs. BVG India Ltd., reported in (2018) 5 SCC 462,
- vii) Sethi Auto Service Station Vs. DDA, reported in (2009) 1 SCC 180,
- viii) Siemens Aktiengesellschaft & Siemens Limited Vs. DMRC Limited, reported in (2014) 11 SCC 288,
- ix) J.S. Yadav Vs. State of U.P., reported in (2011) 6 SCC 570,
- x) Poonam Vs. State of U.P., reported in (2016) 2 SCC 779,
- xi) Maharastra State Road Transport Vs. Rajendra Bhimrao Mandve, (2001) Appeal (Civil) 1942 of 2020,
- xii) Reliance Energy Limited and Another Vs. Maharashtra State Road, SC-Appeal (Civil) 3526 of 2007,
- xiii) Associates of Registration Plates Vs. Union of India and Others, 2005 (1) RAJ 95 (SC),
- xiv) Anupal Singh Vs. State of Uttar Pradesh, Civil Appeal No. 4815 of 2019.

26) Appearing on behalf of the AEGCL, respondent Nos. 1 and 2, Mr. T. J. Mahanta, learned Sr. Counsel after giving the details of the requirement of Project Management Consultancy as mandatory for the "Assam Intra State Transmission System Enhancement Project" being funded by external funding agency AIIB, it is placed that the AEGCL on 19.12.2019 floated an Expression of Interest (EOI) for Consulting Services for the aforesaid project where the last date of submission of tender was 05.02.2020. It is also stated that in pursuance of said EOI, twenty seven numbers of firms submitted their respective EOIs for the Consultancy Services for the said Project including the petitioners and the respondent No.3 and out of those, seven numbers of firms, including the petitioners and respondent No. 3 were shortlisted as they fulfilled the eligibility criteria.

27) It is stated that as per Clause 27.1 of Request for Proposal (RFP), the selection process was based on quality and cost based selection. With regard to those seven consultants on the basis of their detailed Combined Scores including Technical Score and Financial Score, assessed by the Bid Evaluation Committee, the respondent AEGCL on 02.11.2020 issued Notice of Award in favour of the respondent No.3 for Consultancy Service for the Project, since the respondent No.3 was found to have scored the highest combined scores and accordingly the contract was awarded to it.

28) It is also stated that after evaluation of the technical proposals, total marks scored by each of the seven consultants were notified on 28.09.2020 in the website of the AEGCL and was also informed individually to each of them in their respective e-mails as per Clause 23.2 of the RFP notifying that the financial proposals will be opened on 05.10.2020.

29) Respondent AEGCL contended that in spite of coming to know about its total Technical Scores and that of the other six consultants, including the respondent No. 3, on 28.09.2020 itself, the petitioners remained silent and even during the time of opening of the financial proposals of the seven short listed consultants on 05.10.2020, they did not ask for the detail Technical Scores, criteria and sub-criteria wise, although sufficient opportunities were given to all the seven consultants to raise their objections with regard to their Technical Scores, if any within seven days time from 28.09.2020, upto the date of opening of their financial proposals on 05.10.2020.

30) It is also stated that as per Clause 23.5 of the RFP at the time of opening of financial proposals all participants were present, names of the consultants and their respective overall technical scores including the breakup scores were read aloud before all the consultants, where the AEGCL authority requested all the participants to inform if they have any objection regarding technical evaluation.

31) Mr. Mahanta pointed out that the petitioner got the second highest Technical Scores at 82.43, whereas the respondent No.3 got the third highest Technical Scores at 82.18 during the technical evaluation made by the expert committee. On 05.10.2020 during the opening of the financial proposals of the seven shortlisted consultants, who obtained 70 and more scores in their technical proposals, regardless of granting opportunity, including the authorised representative of the petitioner present during the opening of their financial proposals did not object or raise any objection with regard to their technical scores. Since there was no objection from those seven consultants with regard to their technical scores, their respective financial proposals were opened by the Client AEGCL on 05.10.2020 itself in presence of those seven consultants.

32) It is also submitted on behalf of the respondent AEGCL that though the respective technical scores obtained by each of the seven shortlisted bidders/ consultancies were notified on 28.09.2020 itself intimating further that their financial bids shall be opened on 05.10.2020, giving them seven clear days time, but only after opening of the financial bid on 05.10.2020 the petitioners for the first time on 06.10.2020 raised its objection regarding the technical scores obtained by it through its e-mail.

33) It is stated that Clause 35.1 of the RFP provides for making a Procurement related complaint that are detailed in the Bank's Procurement Instructions for the recipients. Clause 5.2 of that policy deals with complaint received after the deadline for tender or proposal submission and before the Notification of Intention to Award. As per said clause, if the Recipients receive a complaint after the deadline of submission of the tender/proposal but before issuance of the Notification of Intention to Award, the Recipients are required to examine the complaints in consultation with the Bank, i.e., the funding agency concerned, where the Recipients only response to the substance of the complaint within three days after the commencement of the standstill period.

34) Mr. Mahanta stated that in the case in hand after receipt of the letter dated 06.10.2020 of the petitioners by e-mail on 09.10.2020, the respondent AEGCL informed the former that as per Procurement Instruction of the Funding Agency AIIB and relevant clause of RFP, the AEGCL shall be able to provide response only after the issuance of Notification of Intention of Award to the successful consultant. It is also stated by Mr. Mahanta that on the basis of detailed combined scores of Technical and Financial as assessed by the bid evaluation committee, the authorities in the AEGCL on 13.10.2020 issued the Notification of Intention to Award to the respondent No.3 being the successful consultant in the procurement process.

35) Mr. Mahanta clarified that after completion of technical and financial evaluation, the AEGCL submitted the complete evaluation before the funding agency AIIB and after its due diligent examination of the report, the AIIB on 07.10.2020 accorded its approval of said evaluation report. It also stated that the AEGCL authority assessed the evaluation criteria of the tenderers on the basis of the declaration and documents furnished by each of the seven consultants and that there is no scope for self assessment as made by the petitioners. Though AEGCL brought the letter of the petitioners dated 15.10.2020 to the notice of the funding agency AIIB, but by its e-mail dated 17.10.2020, the said funding agency informed the AEGCL authority to dismiss the complaint of the petitioners being baseless, which was communicated to the petitioners on 20.10.2020.

36) Respondent AEGCL categorically stated that as per format annexed with the RFP for Notification of intention of Awards there is no requirement to provide reason of unsuccessfulness of the proposal if the combined score already reveals the reason of such unsuccessfulness, where the AEGCL had already informed the petitioners about the same on 20.10.2020.

37) It is also stated that in consultation with the AIIB, the AEGCL on 27.10.2020 sent a reply to the petitioners' letter dated 26.10.2020 stating that as the AEGCL had already responded by e-mail dated 22.10.2020, there was nothing further to be added, therefore, the matter was treated as closed.

38) It is submitted by Mr. Mahanta that the entire tender process was evaluated by the AEGCL in a transparent and fair manner strictly complying with the RFP as well as the

guidelines provided by the AIIB, following the criteria mentioned in Clause 21.2 of Section 2 of the RFP and Section 7 of the Terms of Reference by the expert committee in two layers and that the expert committee while evaluating the tenders never deviated from the criteria mentioned in the RFP, even while evaluating the Technical Proposal of the petitioners.

39) It is stated that as per Clause 21.2 of Section 2 of the RFP and Clause 4.2 of Section 7 of the Terms of Reference, the respondent authority on 12.06.2020 set the evaluation criteria, and the Technical Expert Committee consisting of technical experts in the relevant field, in two layers, i.e., Layer 1 and Layer 2, assessed the Technical Score of all the seven shortlisted bidders/consultants including the petitioners and respondent No.3, strictly in compliance with the evaluation criteria in conformity with the relevant Clauses of the RFP, scrutinising and analysing various technical aspect that are relevant for the project. The respondent AEGCL also stated that its expert committees on completion of the evaluation, as set on 12.06.2020 as per the criteria, forwarded the Report to the funding agency AIIB. Accordingly, after considering the matter, the said funding agency AIIB on 07.10.2020 accorded its approval of said evaluation report.

40) Mr. Mahanta stated that on the basis of the combined Technical and Financial Score of the bidders/shortlisted consultants, the respondent AEGCL issued the Notification of Intention to Award dated 13.10.2020 as well as the Award dated 02.11.2020 in favour of the respondent No.3 since out of the seven shortlisted consultants, it is the respondent No. 3 who got the highest combined Scores (Technical + Financial) after due evaluation made by the expert committee of AEGCL consisting of technical and financial experts, strictly following the RFP and the guidelines provided by the AIIB in that regard in a transparent manner.

41) It is stated that as per Clause 27.1 of the RFP the selection process has to be based upon quality and cost-based selection. As the respondent No.3 qualified as successful bidder obtaining highest combined score, the award was issued in its favour, after the approval of the funding agency AIIB. Mr. Mahanta stated that while granting the award to the respondent No.3 the respondent AEGCL did not act arbitrarily or in bias or in discrepancy or in mala fide and rather the entire act was done as per the Clauses of the RFP, where there was an unanimous decision of all the members of the two Layer Technical Committees and the decision of awarding the contract to the respondent No.3 was taken by the Layer-2

Committee, which is a high-level and final decision-making committee.

42) Although as per its self assessment, the petitioners claimed that its Technical Score should have been 58.76 instead of 49.83 as awarded by the expert committee of the respondent AEGCL, Mr. Mahanta submitted that such self assessment made by the bidder itself is not permissible and/or acceptable being not based on the criterion of the RFP. Mr. Mahanta also stated that such self assessment of Technical Score and claim of such higher Technical Score by the petitioner was of 06.10.2020, that too after the opening of the Financial Bids on 05.10.2020, which was received by the AEGCL through e-mail only on 09.10.2020.

43) With regard to 'Debriefing', Mr. Mahanta, learned Sr. counsel for the AEGCL placed the provisions of Section 9 of the Notification of Intention to Award Form Serial No.3, which provides that – "*Reason/s why your proposal was unsuccessful [Delete if the combined score already reveals the reason]*" and also srl. No. 4 of said Section 9, which stipulates that – "*How to request a debriefing [This applies only if your proposal was unsuccessful as stated under point (3) above]*", and submitted that from those provisions of Section 9 of the Notification of Intention to Award as well as the provisions specified in Clause 33 and 35 of the RFP, it is clear that 'debriefing' is to be done only when a bidder is technically not qualified during the selection process. Mr. Mahanta stated that with regard to the case in hand, 'debriefing' is not applicable to the petitioners, as it is a technically qualified/successful bidder secured the score of 82.430, much more than the required cut-off score of 70 to be a successful bidder in technical evaluation as per Clause 21.1 of the RFP.

44) Mr. Mahanta placed Clause 35.1 of the RFP that deals with Procurement related Complaints, which reads as – "*The procedure for making a Procurement-related complaint are detailed in the Blank's Procurement Instructions for Recipients (Annexure-IV). If a Consultant wishes to make a Procurement-related Complaint following these procedures, in writing (by the quickest means available, such as by e-mail or fax).*"

45) Mr. Mahanta also placed the Clause 4.8 of the Procurement Instruction of the recipient of AIIB that deals with Debriefing Unsuccessful Tenderers/Consultants by the Bank, which reads as – "*If after notification of contract award, a tenderer or consultant has not*

received satisfactory explanation from the Recipient, including through a debriefing with the Recipient, as to why its tender or proposal was not successful, the tenderer or consultant may seek a meeting with the Bank. The purpose of such meeting is limited to discussing the tenderer's or consultant's tender or proposal, and not to reversing the Bank's decision conveyed to the Recipient or to discuss the tender or proposal of other tenderers or consultants."

46) Placing the relevant records in original before the Court Mr. Mahanta submitted that the written note consisting of Inspection Report of the relevant file, Evaluations, Evaluation Summary, Minutes of the Meeting and RFP Evaluation Report of Consultancy Services etc. submitted by the petitioners with regard to it and the respondent No.3, are incomplete and does not tally with the records of AEGCL.

47) Placing all the above Mr. Mahanta stated that the petitioner never approached the Bank for discussion as per said Clause 4.8 at any point of time, whereas the respondent AEGCL has followed all the procedures of Bank's Procurement Instruction for Recipients as per Clause 35.1 of the RFP.

48) Mr. Mahanta submitted that the Assam Intra State Transmission System Enhancement Project is a time bound project and the time limit for completion of the whole project is only sixty months and that the project involves larger public interest.

49) Mr. Mahanta therefore, submitted that for the reasons above this writ petition should be dismissed.

50) In support of his argument Mr. Mahanta relied upon the following judgments:

- i) (2007) 14 SCC 517 - Jagdish Mandal Vs. State of Orissa.
- ii) (2020) 16 SCC 759 - Bharat Coking Coal Limited Vs. AMR Dev Prabha.
- iii) (2016) 8 SCC 622 - Central Coalfields Ltd. Vs. SLL-SML (Joint Venture Consortium).
- iv) (2018) 5 SCC 462 - Municipal Corporation, Ujjain Vs. BVG India Limited.
- v) 2020 SCC OnLine SC-1035 - Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Vs. New J. K. Roadways, Fleet Owners and Transport Contractors.
- vi) (2009) 1 SCC 180 - Sethi Auto Service Station Vs. Delhi Development Authority and Others.

vii) (2022) 6 SCC 127 - N.G. Projects Ltd. Vs. Vinod Kumar Jain and Others.

51) Mr. Mannan, learned counsel appearing for the respondent No. 3, stated that the entire evaluation process in selecting the bidder for the project involved with the case was duly monitored by the concerned funding agency AIIB. In spite of having full knowledge about it and being fully aware about the same since the petitioners have not made the AIIB, the concerned funding agency as a party respondent in the present proceeding which is a necessary party for proper adjudication of the case in hand, Mr. Mannan, learned counsel for the respondent No. 3 submitted that for that reason alone this writ petition should be dismissed for non-joinder of necessary party.

52) To that extent Mr. Mannan, learned counsel placed all the annexures annexed by the petitioners in the writ petition to show that whether it is the Project Director of respondent AEGCL or the concerned Team of respondent AEGCL, all were only performing on behalf of the concerned funding agency AIIB and that the petitioners have communicated to the concerned Project Director of AEGCL, who acted for and on behalf of said AIIB.

53) Mr. Mannan stated that the claim of the petitioners that in not providing them their sub-criteria wise technical scores during opening of the technical bids being in violation of the provisions of the RFP and in selecting the respondent No. 3 for the project involved in the case vitiates the entire selection process in selecting the bidder, is not tenable in the eye of law, since the petitioners failed to make the concerned funding agency AIIB as a party respondent in the present writ petition, being a necessary party of the case as it looked after the entire evaluation process in selecting the bidder. Therefore, on behalf of the respondent No.3, it is submitted that this writ petition is liable to be dismissed for non-joinder of necessary party.

54) It is stated that that after opening the financial proposals of the seven technically successful consultants, including the petitioners and the respondent No. 3 on 05.10.2020 by following the provisions of the RFP, the respondent AEGCL found the respondent No.3 to be the successful L-1 Bidder in the QCBS process of evaluation and the same was approved by the concerned funding Bank AIIB. Accordingly, the respondent AEGCL on 13.10.2020 issued the Notification of Intention to Award in favour of the respondent No.3 and further, on 02.11.2020 awarded the contract of Consultancy Service for the Project Implementation and

Management Support to it. Mr. Mannan, learned counsel thus placed before the Court that after more than two months of issuance of said Notification of Intention to Award dated 13.10.2020 to the respondent No. 3, the petitioners on 21.12.2020 have preferred the present writ petition challenging the impugned award in favour of the said respondent that too, without any justifiable ground of delay.

55) Mr. Mannan, submitted that non-providing of sub-criteria wise technical scores is of no consequences as none of the seven shortlisted technically responsive consultants/bidders, including the petitioners, were provided with such sub-criteria wise technical scores, except the total technical scores obtained by each of those seven shortlisted technically responsive bidders out of total score of hundred, wherein petitioners obtained 82.43 being the second highest scores above the respondent No. 3.

56) Mr. Mannan contended that the expert committee has given higher marks to the petitioners in technical scores than the respondent No. 3, but in the combined scores under QCBS process, i.e., technical + financial, the respondent No. 3 came out as the successful consultant/bidder amongst the seven shortlisted technically responsive consultants/bidders, where the financial bid of the respondent No. 3 is about four crores less than the petitioners.

57) Mr. Mannan stated that it is not the case of the petitioners that only they were not provided with the sub-criteria wise technical scores and therefore, the question of malafide or discrimination against the petitioners by the respondent AEGCL does not arise.

58) It is also submitted on behalf of the respondent No. 3 that the respondent authorities in the AEGCL vide Notice No. AEGCL/MD/AIIB/PMC/Part-I/ Extn_Evl/08 dated 28.09.2020 informed all the seven "Technically responsive Consultants/Bidders" about their overall Technical Scores out of 100 (hundred) obtained by each of them, including the petitioners as well as the respondent No.3. It is stated that in the said Notice dated 28.09.2020, the respondent AEGCL also notified all the seven technically responsive consultants including the petitioners and the respondent No.3 that their financial proposals will be opened on 05.10.2020 at 12:00 Hrs in the conference room of the Managing Director of AEGCL in the 1st Floor of Bijulee Bhawan at Paltan Bazar, Guwahati-781001. These are being matter of records and that overall technical scores were being accepted by all the seven technically responsive

consultants, not raising any objections with regard to it, including the petitioners; Mr. Mannan, learned counsel for the respondent No. 3 submitted that only after opening of the financial proposals of those seven consultants on 05.10.2020, when it was found that as per QCBS evaluation process after combined Scores of technical and financial scores, the respondent No.3 stood at rank No.1, the petitioners, for the first time, in its e-mail dated 06.10.2020 raised the objection in not providing sub-criteria wise technical score to them, requesting the respondent AEGCL to provide them with the sub-criteria wise/break-up of their technical scores.

59) The respondent No. 3 stated that all along, since 28.09.2020, i.e., the date when the respondent AEGCL informed the technically responsive seven consultants with their respective total technical scores out of 100, the petitioners remained silent in respect of sub-criteria wise/break-up of their technical scores up to 05.10.2020, i.e., the date of opening of the financial proposals of the technically responsive consultants. Mr. Mannan, learned counsel for the respondent No.3 therefore stated that such act of the petitioners clearly demonstrate that they along with all other consultants have accepted the technical and financial scores as declared by the respondent AEGCL and that the petitioners raised such objection for the first time only after opening of the financial bids as it did not come out as the winning bidder/consultant.

60) Mr. Mannan stated that the RFP concerned does not provide for self evaluation of technical and/or financial scores and such self-evaluation of technical scores made by the petitioners themselves cannot be a basis to raise the issue of unfair practice against the respondent AEGCL.

61) Mr. Mannan placed before the Court that besides Clause 21.1 of the ITC to the RFP, the evaluation is also guided by various factors mentioned in the Forms TECH-2 to TECH-6 of the Technical Proposal-Standard Form, Section-7 Terms of Reference, Minutes of Meeting of pre-bid clarification etc.

62) Mr. Mannan also stated that Clause 21.1 of the Data Sheet defines 'Criteria and weightage', that provides the guidelines on Sub-Criteria, but it does not prescribe for any weightage and rather specifies that evaluation and corresponding weightage are to be

finalized by the evaluation committee in accordance with the sub-criterias' as provided in the RFP.

63) Mr. Mannan on behalf of respondent No. 3 stated that from the RFP itself it can be seen that the debriefing is done when the consultant is technically not qualified in the selection process. It is stated that if the petitioners were not satisfied with their technical scores, it was their duty to raise the issue when the respondent AEGCL gave opportunities to all the seven consultants, including the petitioners, after declaring the overall technical scores out of 100 on 28.09.2020, where they had time up to 05.10.2020 till the opening of their financial proposals.

64) Mr. Mannan stated that had the petitioners were aggrieved being concerned with their technical scores out of hundred, they should have raised the issue at that stage, before opening of the financial proposals of those seven technically responsive consultants, including petitioners' financial proposal and therefore, the issue of the sub-criteria wise score in their technical proposal, after opening of the financial proposals of the seven technically responsive consultants raised by the petitioners clearly reflects that the same is an afterthought.

65) Placing the complaint of the petitioners dated 27.10.2020, Mr. Mannan, learned counsel submitted that the petitioners have failed to establish any such serious illegalities committed by the respondent ACEGCL in awarding scores, except raising the issue of not mentioning the scores criteria and sub-criteria wise with regard to their technical proposal, which the petitioners themselves have failed to raise and act in due and relevant period, i.e., by raising the issues prior to the opening of the financial proposals on the notified date on 05.10.2020.

66) Mr. Mannan, learned counsel pointed out that even if the break up score of criteria and sub-criteria wise would have been provided, then also the total technical scores would have remained the same and that would not have altered the outcome of the technical evaluation made by the evaluation committee of the respondent AEGCL. It is stated that the petitioners have filed the complaint only to harass the respondent No.3 and to stall the project of public importance and to disrupt the process of award of contract awarded by the respondent AEGCL in favour of the respondent No. 3 in a fair and transparent manner.

67) Mr. Mannan, stated that from the procurement related complaint and debriefing, their timing etc. made by the petitioners it can be seen that they are not concerned with the financial evaluation but with the technical evaluation that too on the basis of their self assessment and therefore, question of considerations of such complaint or debriefing made by the petitioners on their self assessment cannot arise.

68) Placing all the materials Mr. Mannan, learned counsel for the respondent No. 3 stated that the respondent AEGCL acted in accordance with the provisions of the RFP in a fair and transparent manner and issued the Notice of Award to the respondent No. 3, who is the successful bidder in the QCBS process and that there was no unfairness in the process.

69) It is also submitted by Mr. Mannan that this writ petition has been filed by the petitioner with delay and without making the concerned funding agency AIIB as party respondent. Mr. Mannan placed that there is no iota of public interest in the writ petition and involves only private interest. He further stated that the petitioners failed to place as to how the minor deviation, as claimed by it, caused favouritism, malafide or discrepancies in favour of the respondent No. 3.

70) Mr. Mannan stated that as the respondent AEGCL had issued the Award of Contract to the respondent No.3 on 17.11.2020 and thereafter, the said respondent had entered into a binding contract agreement with the respondent AEGCL on 02.12.2020 and the said Consultant, i.e., respondent No. 3 had already commenced mobilization on 15.12.2020 itself; therefore, this writ petition preferred by the petitioners should be dismissed.

71) Mr. Mannan in support of his arguments placed the following judgments:

- i) (2009) 1 SCC 768 - Tridip Kumar Dingal Vs. State of West Bengal.
- ii) (1984) 4 SCC 251 - Prabodh Verma Vs. State of U.P.
- iii) (2011) 6 SCC 570 - J.S. Yadav Vs. State of U.P.
- iv) (2016) 2 SCC 779 - Poonam Vs. State of U.P.
- v) (2007) 14 SCC 517 - Jagdish Mandal Vs. State of Orissa.
- vi) (2014) 11 SCC 288 - Siemens Aktiengesellschaft & Siemens Limited Vs. DMRC Limited.
- vii) (2016) 8 SCC 622 - Central Coalfields Ltd. Vs. SLL-SML (Joint Venture Consortium).
- viii) (2016) 16 SCC 233 - Shobikaa Impex (P) Limited Vs. Central Medical Services

Society.

- ix) (2020) 16 SCC 489 - Silppi Constructions Contractors Vs. Union of India.
- x) (2020) 16 SCC 759 - Bharat Coking Coal Limited Vs. AMR Dev Prabha.
- xi) 2020 SCC OnLine SC-1035 - Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Vs. New J. K. Roadways, Fleet Owners and Transport Contractors.
- xii) 2020 SCC OnLine SC-301 - Utkal Suppliers Vs. Maa Kanak Durga Enterprises.
- xiii) (2022) 6 SCC 127 - N.G. Projects Ltd. Vs. Vinod Kumar Jain and Others.

72) Placing the judgments of the Hon'ble Apex Court in the cases of (i) *Prabodh Verma Vs. State of U.P. (1984) 4 SCC 251*, (iii) *J.S. Yadav Vs. State of U.P. (2011) 6 SCC 570* and (iii) *Poonam Vs. State of U.P. (2016) 2 SCC 779*, Mr. Mannan, learned counsel for the respondent No. 3 stated that as the petitioners did not make the AIIB, concerned funding agency, as party respondent in the present proceeding, a necessary party for proper adjudication of the case, therefore this writ petition should be dismissed for non-joinder of necessary party.

73) On the other hand, relying on the judgments of the Hon'ble Supreme Court in the cases of (i) *J.S. Yadav Vs. State of U.P., (2011) 6 SCC 570*, and (ii) *(2016) 2 SCC 779 - Poonam Vs. State of U.P.*, cited by the respondent No.3, Mr. Sharma learned counsel for the petitioners stated that the concerned funding agency/Bank, AIIB is not a necessary party in the case in hand as there is no cause of action with the said Bank and accordingly submitted that the present writ petition is not liable to be dismissed for non-joinder or mis-joinder of AIIB as party respondent.

74) Since the issue of maintainability of this writ petition for non-joinder of AIIB as necessary party has been raised by the respondent No. 3, let us examine the said issue first. We have also considered the judgments cited by both the parties, i.e., the petitioners as well as the respondent No. 3.

75) Mr. Mahanta learned senior counsel appearing for the respondent Nos. 1 and 2, AEGCL placed all the relevant records relating to the Assam Intra-State Transmission System Enhancement Project (hereinafter referred to as the Project) and selection of the Consultancy services for Project Implementation and Management Support pertaining to the said Project involved in the case.

76) From those records relating to the said Project it is seen that the Government of India

applied for financial assistance from the Asian Infrastructure Investment Bank (the AIIB or the Bank in short) in the form of a loan towards the cost of implementation of the said Project, where the Investment Program is to (i) strengthen power transmission capacity to deliver reliable and affordable electricity, (ii) improve access to electricity through grid electricity, (iii) enhance efficiency and quality of power supply and (iv) ensure financial health of the power sector through continued power sector reform.

77) The plan of the Project is to promote a sustainable state electricity sector with increased transmission capacity to support inclusive and low carbon economic growth and to enhance the quality and expanded service delivery of clean electricity in Assam through improved technical, commercial and financial performance and compatibility of the Assam Electricity Grid Corporation Limited (AEGCL), where the AEGCL have the overall responsibility for execution on the Investment Program and the sub-projects of the Project, like execution of the Investment Program and the AEGCL shall also function as the Implementing Agency (IA, in short) for the day-to-day project implementation of the sub-projects for which a full time Project Director have been established with responsibility for the day-to-day coordination and administration of the sub-projects.

78) The objectives of the assignment are that the Project under the facility includes (i) Construction of Transmission Line of Voltage 400kV, 220kV and 132 kV in total 1113 CkM (Circuit Kilo Meter); (ii) Construction of Sub-Station of Voltage Level 400/220kV, 220/132/33kV, 220/132 kV, 132/33kV and 132/11kV – {Capacity Addition of 5606 MVA (Megavolt Ampere)}; (iii) Transformer Capacity Augmentation – (Transformer capacity addition 828 MVA); (iv) Conversion of Air Insulated Substation (AIS) to Gas Insulated Substation (GIS) of one number; (v) Installation of Optical Ground Wire (OPGW) of 615 KM; (vi) Augmentation of Transmission Lines (Re-conductoring by HTLS) (High Temperature Low Sag Conductors) of 186 CkM; (vii) Bay Extension of 29 numbers; (viii) Institutional capacity building measures in AEGCL etc.

79) The Project has been divided into two phases. In the first phase AEGCL is required to execute construction of ten numbers of Sub-stations along with its associated transmission lines and bay extension, Augmentation of transformation capacity, Conversion of Air Insulated Sub-station (AIS) to Gas Insulated Substation (GIS), Installation of Optical Ground Wire

(OPGW), Augmentation of Transmission Lines (Re-conductoring by HTLS) and Institutional capacity building measures in AEGCL and the balance work i.e., Construction of fourteen numbers of Sub-stations along with transmission lines and associated bays are to be done in the second phase that is expected to commence within one year from the commencement of the first phase.

80) To provide consulting services for project management, supervision and implementation of the said project, the AEGCL intended to recruit a consultancy firm (Project Management Consultancy or PMC or Consultant) where the Consultant will be responsible for review existing designs, support the AEGCL in procurement of turnkey contractors, supervise the works of the suppliers and contractors and ensure successful commissioning of the Project.

81) The AEGCL intended to apply a portion of the proceeds of the said loan to eligible payments under the contract to such Consultant and for that the AEGCL on 19.12.2019 issued Request for Expression of Interest (REOI) for the Consultancy services for Project Implementation and Management Support for the said Project funded by the AIIB where the closing date was extended up to 05.02.2020, with concurrence of the said Bank.

82) The eligibility of such Consultant is that it must have capability in electrical, civil design and construction supervision and they shall implement a comprehensive project management plan to ensure the most efficient, timely and economical implementation of the Project. The Project Management Consultancy or PMC or Consultant is also required to coordinate and supervise construction works during the construction period and assist the Implementing Agency, i.e. the AEGCL to operate the plan in the most efficient way and thereby in particular, the PMC will be responsible for supporting the Implementing Agency (IA) in project supervision, implementation of Environmental and Social Management Planning Framework (ESMPF), design and engineering services, conducting review meetings, coordination of contractor(s), other government agencies, assist in procurement and control of schedule and quality, advise in financial matters. Since the component of the project is scattered in various districts of Assam, the Consultant shall have to demonstrate in their proposal, the methodology of mobilisation of their team in order to execution of the project phase-wise as noted above.

83) The primary responsibilities of the Project Management Consultants (PMC) is to advise and assist the Implementing Agency (IAs) i.e., the AEGCL in management and sub-projects, providing technical support, administration and implementation of the Loans for AIIB financing in respect of (i) Project Preparation; (ii) Preparation of sub-projects; (iii) Interface with Environmental and Social (E&S) Consultant; (iv) Procurement; (v) Contract management; (vi) Design Review; (vii) Project Scheduling and Monitoring; (viii) Supervision of Project Implementation; (ix) Prepare E&S documents and Monitor E&S Aspects of the Project; (x) Project Progress Meetings; (xi) Reporting Support; (xii) Monitoring Project Disbursement; (xiii) Capacity Building Measures; (xiv) Management Information System (MIS) etc.

84) The Standard Request for Proposals (SRFP) for Consulting Services has been prepared by the AIIB/the Bank for the selection of consultants to provide consulting services in compliance with the Bank's Procurement Instruction for Recipients (PIR), for projects that are financed in whole or in part by the Bank.

85) The SRFP contains three Parts, which are as follows:

Part-I – Selection Procedure and Requirements.

Section-1: Request for Proposals (RFP) Letter, Section-2: Instructions to Consultants and Data Sheet, Section-3: Technical Proposal-Standard Forms, Section-4: Financial Proposal-Standard Forms, Section-5: Eligible Countries, Section-6: Prohibited Practices and Section-7: Terms of Reference (TORs).

Part-II – Conditions of Contract and Contract Forms.

Section-8: Standard Forms of Contract.

Part-III – Notification of Intention to Award and Beneficial Ownership Disclosure.

Section-9: Notification of Intention to Award Form and Beneficial Ownership Disclosure Form.

86) As per the definitions provided in the Request for Proposals Consulting Service issued by the Client AEGCL, involved in the case, "Bank" means the Asian Infrastructure Bank (AIIB) and "Recipient" means the Government, Government agency or other entity that signs the financing agreement with the Bank, i.e., AIIB.

87) The definition of "Client" as stipulated in sub-Section 1(e) of Part I, Section-2 i.e., 'Instructions to Consultants and Data Sheet' as well as sub-Section 1(d) of Part II, Section-8

i.e., 'Conditions of Contract and Contract Forms (II General Conditions of Contract)' of the Request for Proposals (RFP) means - *the implementing agency that signs the Contract for the Services with the selected Consultant.*

88) The definition of "Proposal" stipulated in sub-Section 1(q) of Part I of Section-2 of the RFP, i.e., 'Instructions to Consultants and Data Sheet', means - *the Technical Proposal and the Financial Proposal of the Consultant.* Sub-Section 1(r) of Part I of said Section-2 defines "RFP" which means - *the Request for Proposals to be prepared by the Client for the selection of Consultants, based on SRFP.*

89) The definition of "SRFP" stipulated in sub-Section 1(s) of Part I of Section-2 of the SRFP, i.e., 'Instructions to Consultants and Data Sheet', it means - *the Standard Request for Proposals, which must be used by the Client as the basis for preparation of the RFP.*

90) As per sub-Section 1(e) of Part II, Section-8 i.e., 'Conditions of Contract and Contract Forms (II. General Conditions of Contract)' of the RFP the "Consultant" means – *a legally-established professional consulting firm or entity selected by the Client to provide the Services under the signed Contract.*

91) Sub-Section 2.1 of Section 2 (Introduction) of Part I, Section-2 'Instructions to Consultants and Data Sheet' of the RFP provides that - *the Client named in the Data Sheet intends to select a Consultant from those listed in the Request for Proposal (RFP), in accordance with method of selection specified in the Data Sheet.*

92) The RFP relating to the Project Management Consultancy, involved in the case, specifies that the Client's evaluation committee shall evaluate the Technical Proposals on the basis of their responsiveness to the Terms of Reference (TOR) and the Request for Proposals (RFP) applying the evaluation criteria, sub-criteria, and point system specified in the Data Sheet.

93) The said RFP also provides that Financial Proposals shall be opened publicly by the Client's evaluation committee in the presence of the representatives of the Consultants whose Technical Proposals have been found to be responsive and anyone else who chooses to attend.

94) The Data Sheet of the RFP and Instructions to Consultant clearly provides that for the Assam Intra-State Transmission System Enhancement Project, the Assam Electricity Grid Corporation Limited (AEGCL) is the Client and Hitesh Kakati, Office of the Managing Director of AEGCL, is the Project Director of the said Project, where the said Client AEGCL specified that the Quality and Cost Based Selection Method (QCBS) shall be the selection method to select the Consultant amongst the seven Consultants to whom it forwarded the RFPs as per the Procurement Instructions for Recipients available in the website of the AIIIB/the Bank.

95) Relating to Clause-C submission, opening and evaluation of Section 2 of Instructions to Consultants – Data Sheet it is provided that for the evaluation of the Full Technical Proposals Criteria, sub-criteria and point system have been prescribed at Clause 21.1, where total points for the four criteria (i) – (iv) specified therein as Hundred (100) and the minimum technical score (St) required to pass was specified as seventy. Further, Clause 19.2 of said Clause-C submission, opening and evaluation, noted above, specified that “In addition, the following information will be read aloud at the opening of Technical Proposals” as “Not Applicable”.

96) Further, Data Sheet of the RFP also provides that with regard to Procurement-related Complaint, a Consultant may challenge – (i) the terms of the RFP (issued by the Client AEGCL), (ii) the Client’s (i.e., AEGCL) decision to exclude a Consultant from the procurement process prior to the award of contract and (iii) the Client’s (i.e., AEGCL) decision to award the contract in writing to the said Project Director, noted above.

97) In terms of said REOI dated 19.12.2019, twenty seven numbers of firms/consultants submitted their interest. Out of those twenty seven, on the basis of the criterias mentioned in the said REOI, the AEGCL shortlisted seven numbers of firms/consultants, namely, - (i) M/s Tata Consulting Engineers Limited, in association with Tata Power Company Limited, India, (ii) PT Feedback Infra Limited, Indonesia in association with Jade Consult Nepal and NIPSA, Spain of Indonesia, (iii) Tractebel Engineering Private Limited, India, (iv) AECOM Asia Company Limited-AACL (Lead Consultant), India in JV (Joint Ventures) with URS Scott Wilson India Private Limited – URSSWI (JV Partner) and N-Arc Consulting, India (JV Partner) from India, (v) SMEC International Pty Limited, Australia in association with SMEC India Private Limited, India, Australia, (vi) Maharashtra State Electricity Transmission Company Limited,

India and (vii) Rodic Consultants Private Limited (India) JV with Applus India Private Limited (India) and Applus Norcontrol, S.L.U. (Spain) from India for procurement of Consulting Services for Project Implementation and Management Support for the said Project funded by AIIB and forwarded it to the AIIB along with the draft Request for Proposal (RFP).

98) Though, as per the provisions of the Procurement Instruction for Recipients (PIR) of the AIIB shortlist has to be minimum of three and maximum of six, however, the AIIB had considered seven shortlists as requested by AEGCL and the AIIB issued no objection on 07.03.2020.

99) The AEGCL accordingly issued the corrected draft Request for Proposal (RFP) No. AEGCL/MD/AIIB/PMC/2019/37 dated 07.03.2020 inviting proposals to provide Consulting Services for Project Implementation and Management Support for the assignment of Assam Intra State Enhancement Project, funded by AIIB, to those seven shortlisted Consultants, including the petitioners and the respondent No. 3, through e-mail in their respective addresses/ids, fixing 24.04.2020 as the closing date of proposal submission. However, due to lockdown situation because of pandemic Covid-19 in India and other parts of the world, the closing date was extended thrice with the approval of the AIIB and the third and final extension vide Addendum-3 was made on 19.05.2020, fixing 14:00 hours on 16.06.2020 as the final time and date of submission of proposals. In the said RFP dated 07.03.2020 issued by the AEGCL, noted above, the Client has been specified as the Assam Electricity Grid Corporation Limited (AEGCL), Country-India.

100) As defined in the 'Procurement Instructions for Recipients' (PIR) of the AIIB/the Bank, 'Recipient' means the beneficiary of Bank financing for a Project, which is responsible for the procurement of goods, works and services required for the Project.

101) Further the said PIR of the AIIB provides that the Recipient is responsible for implementing the Project, including all aspects of the procurement process from strategic planning to the award and management of contracts and that the said Recipient shall retain all procurement documentation and records of procurement contracts financed by the Bank as required in the Legal Agreements.

102) It is seen that it is the AEGCL who issued the relevant RFP on 07.03.2020 being the

Client and it is the same AEGCL, who is also the Project Implementing Agency responsible for implementing the Project. Further it is the AEGCL who selected the Consultant, i.e., respondent No. 3 amongst the seven short listed consultants, including the petitioners, for Consultancy Services for Project Implementation and Management Support in respect of its said Project, noted above, and further signed the contract with regard to said consultancy service with the respondent No. 3.

103) Considering the above, the Court is of the view that it is the AEGCL alone, who in law, is entitled to defend its decision to award the contract of said Consultancy Services in favour of the respondent No. 3 and its decision to exclude the other six bidders including the petitioners from the procurement process of said Consultancy Services. It is seen that the petitioners have made said AEGCL as party respondents in the present writ proceeding.

104) For such reasons noted above, the Court is of the opinion that for not making the concerned funding agency namely, the Asian Infrastructure Investment Bank (AIIB/Bank) for the assignment of 'the Assam Intra State Enhancement Project', as a party respondent in the present proceeding, this writ petition cannot be treated to be not maintainable for non-joinder of necessary party.

105) The respondent No. 3 also raised an issue that the petitioners filed this petition belatedly and having after thought so as to harass the said respondent. In this regard Mr. Mannan, learned counsel for the respondent No.3 placed reliance on the Judgment of the Hon'ble Apex Court, in the case of *Tridip Kumar Dingal Vs. State of West Bengal*, reported in (2009) 1 SCC 768 wherein it is held that – "*while exercising discretionary jurisdiction under Articles 32, 226, 227 or 136 of the Constitution, the Court takes into account certain factors and one of such considerations is delay and laches on the part of the applicant in approaching a writ court. It is well settled that power to issue a writ is discretionary. One of the grounds for refusing reliefs under Article 32 or 226 of the Constitution is that the petitioner is guilty of delay and laches*".

106) In the case in hand, it is seen that petitioners have filed this petition on 10th December, 2020, whereas, Financial Proposals were opened on 05.10.2020, the respondent AEGCL on 13.10.2020 issued the Notification of Intention to Award in favour of the

respondent No.3 and further, the AEGCL awarded the contract of Consultancy Service to the respondent No. 3 on 02.11.2020.

107) Moreover, the petitioners on 06.10.2020 wrote to the AEGCL claiming higher technical scores on self assessment made by it requesting to provide it with the break-up of Technical Score including criterion and sub-criterion wise on priority that was received by the AEGCL through e-mail on 09.10.2020. The AEGCL replied the same on 20.10.2020 and thereafter, the petitioners on 21.10.2020 through e-mail submitted procurement related complaint regarding the decision of the AEGCL to award the contract in favour of the respondent No. 3 and also requested for de-briefing in relation to the evaluation of their proposal, which was replied by AEGCL on 22.10.2020. The petitioners again communicated with the AEGCL on 26.10.2020 and the AEGCL replied on 27.10.2020 treating the matter with the petitioners as closed.

108) In determining the delay or laches against a person who approaches the writ Court under Article 226 of the Constitution of India, law is well settled that there is no inviolable rule of law that whenever there is a delay, the Court must necessarily refuse to entertain the petition; it is rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

109) Considering the above, the Court is of the view that there is no such inordinate delay and wilful laches on the part of the petitioners in preferring this writ petition.

110) Records reveal that on 16.06.2020, the authorities in the AEGCL opened the proposals submitted by the seven shortlisted Consultants relating to Project Management Consultant for the said AIIB funded Project, serially one after another in presence of representatives of four such Consultants including petitioners and that of respondent No. 3 and two others, where the technical and financial proposals of each of the seven Consultants were found in the sealed condition as per the specified RFP clause, where financial envelopes were kept in safe custody and technical envelopes were opened with the observation that evaluation of technical proposals shall commence shortly.

111) From the records, it is also seen that in respect of the appointment of Project Manager Consultant for the AIIB funded Assam Intra State Transmission System and

Enhancement Project, the respondent AEGCL initially on 19.06.2020 constituted two committees, (1) Ground Level Evaluation Committee and (2) High Level Review Committee, whereby, the responsibility of the Committee No. (1) was to (i) scrutinize the documents submitted by the firms in their Technical Proposal of the RFP of PMC, (ii) segregate their credentials submitted in their proposal as per the qualification criteria prescribed in the RFP and (iii) recommend marks to the respective traits mentioned in the narrative as per the credentials of the firm. Further, the responsibility of the Committee No.(2) was to review the recommendation of the Committee No. (1) and to submit their final recommendation to the Managing Director of AEGCL.

112) Later, by another Office Order dated 25.06.2020 the AEGCL replacing the earlier Office Order dated 19.06.2020, reconstituted the Committee for the said purpose with Committee No. (1) as Layer-1 Evaluation Committee and Committee No. (2) High Level Review Committee incorporating another member in the Layer-1 Evaluation Committee without making any other change in the Committee Nos. (1) and (2) as well as their responsibilities as determined in the Office Order dated 19.06.2020, noted above.

113) The 'Procurement Instructions for Recipients' (PIR) of the AIIB provides various selection methods for firms under its heading 'Particular Selection Method for Firms' at Clause 13.3 including 'Quality Cost Based Selection' (QCBS) which provides that it involves a competitive process amongst short-listed firms that takes into account the quality of the proposal and the cost of the services in the selection of the successful firm, where the relative weight is given to the quality and cost is determined for each assignment and depends on the nature of the assignment.

114) Section 2 of the RFP relating to the Project Management Consultancy, involved in the case, relates to Instructions to Consultants (ITC) and Data Sheet. Part A of said ITC relates to 'General provisions', Part B concerns to 'Preparation of Proposals', Part C regards to 'Submission, Opening and Evaluation', Part D is on the subject of 'Negotiations and Award', and Part E is in relation to 'Data Sheet'.

115) Clause 2.1 of the 'Data Sheet' of the said RFP specifies that Assam Electricity Grid Corporation Limited (AEGCL) is the Client, whereas Quality & Cost Based Selection Method

(QCBS) as per the Procurement Instructions for Recipients shall be the method of selection of the Consultant for the Consulting Services for Project Implementation and Management Support.

116) Clause 21 of Section 2 of the ITC provides for 'Evaluation of Technical Proposals' which stipulates that – The Client's evaluation committee shall evaluate the Technical Proposals on the basis of their responsiveness to the Terms of Reference and the RFP, applying the evaluation criteria, sub-criteria, and point system specified in the Data Sheet, where each responsive Proposal shall be given a technical score and a Proposal shall be rejected at this stage (technical evaluation) if it does not respond to critical requirements of the RFP or if it fails to achieve the minimum technical score indicated in the Data Sheet.

117) Clause 23 of Section 2 of the Data Sheet of the ITC provides for 'Public Opening of Financial Proposals for QCBS'. Clause 19.2 of Section 2 of the ITC under Part C relating to 'Submission, Opening and Evaluation' provides that - In addition, the following information will be read aloud at the opening of the Technical Proposals as "N/A" (not applicable) followed by Clause 21.1 of said Part C pertaining to Criteria, sub-criteria and point system for the evaluation of the Full Technical Proposals (FTP), in total of 100 Point Technical Scores with the break-up as follows:

- (i) Specific experience of the Consultants (as a firm) relevant to the Assignment — Total points for criteria (i): 10,
- (ii) Adequacy and quality of the proposed methodology, and work plan in responding to the Terms of Reference (TORs) — Total points for criteria (ii): 20,
- (iii) Key Experts' qualifications and competitions for Assignment — ,
 - (a) position K-1: Team Leader (25);
 - (b) position K-2: Substation Expert (15);
 - (c) position K-3: Senior Environmental Safeguard Expert (10);
 - (d) position K-4: Senior Social Safeguard Expert (10);Total points for criteria (iii): 60,
The number of points to be assigned to each of the above positions shall be determined considering the following three sub-criteria and relevant percentage weights:
 - 1) General qualifications (general education and experience): 20%
 - 2) Adequacy for the Assignment (relevant education, training, experience in the sector/similar assignments): 70%



3) Relevant experience in the EAP funded projects: 10%

Total weight: 100%

(iv) Transfer of knowledge (training) program and methodology for implementation of Project Management Information Software (PMIS) — Total points for criteria (iv): 10,

Total points for the four criteria (i) - (iv): 100

The minimum technical score (St) required to pass is: 70.

118) Clause 27.1 of Section 2 of the Data Sheet contained in the ITC relates to the QCBS Method (Quality cum Cost Based Selection Method) only, which stipulates as follows:

The lowest evaluated Financial Proposal (Fm) is given the maximum financial score (Sf) of 100.

The formula for determining the financial scores (Sf) of all other Proposals is as following:

$S_f = 100 \times F_m/F$, in which "Sf" is the financial score, "Fm" is the lowest price, and "F" is the price of the proposal under consideration.

The weights given to the Technical (T) and Financial (P) Proposals are:

$T = 80$, and

$P = 20$

Proposals are ranked according to their combined technical (St) and financial (Sf) scores using above weights (T = the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; T + P = 1) as following:

$$S = St \times T\% + Sf \times P\%.$$

119) Though the authorities in the AEGCL submitted the Technical Evaluation Reports relating to each of the seven shortlisted Consultants on the basis of the Technical Proposals submitted by them, but after necessary verification before sending it to the AIIB for its appraisal and approval, it was found that the said technical evaluation deviated from the provision of the clauses referred in the RFP that was approved by the AIIB where, the relevant clauses of the approved RFP are already in the public domain. As such on 11.09.2020 the authorities concerned in the AEGCL returned the Technical Evaluation Report, which was submitted by the Layer-1 Evaluation Committee on 27.08.2020, for a fresh evaluation and consideration as per the marking structure as approved in the RFP by the Bank and for submission of the same at the earliest.

120) After re-submission of the Technical Evaluation Reports of the shortlisted seven Consultants by the concerned committee, the authorities in the AEGCL verified the same and

on 22.09.2020 forwarded it to the AIIB for its approval for selection of PMC for AEGCL.

121) On 22.09.2020 itself the AIIB wrote back to the AEGCL to use the Technical Evaluation Report (TER) template attached with the said e-mail, which is similar to the approved RFP. Accordingly, on 24.09.2020 the AEGCL re-submitted the Technical Evaluation Reports of the seven shortlisted Consultants before the AIIB as per the template shared by the said Bank for its review and approval. It is seen from the records that as per the instruction of the Bank, the authorities in the AEGCL prepared and highlighted the 'Strength' as well as 'Weakness' in three blocks each with regard to each of the shortlisted seven Consultants, including the petitioners and the respondent No. 3, which were also forwarded to the AIIB along with the Technical Evaluation Reports of those consultants.

122) After reviewing the submission based on the information provided, the said Bank on 28.09.2020 intimated the AEGCL that the Bank have no objection to the recommendation of the firms who have scored the minimum qualifying marks of seventy (70) points subject to incorporation of its observations, directing to notify those Consultants indicating the date and time set for opening of the financial proposals, further directing the AEGCL to send them the minutes of financial proposal opening for their information and record on the same day.

123) Records also reveal that the AEGCL had discussion with the authorities of the Bank, where from the AEGCL understood that in the notification of the opening of Financial Proposal the total marks obtained by each of the firms need to be notified in tabulated manner so that the Consultants can know the technical marks scored by each participants to encourage transparency. Records also reflect that the authorities in the AEGCL were also aware about the Clause No. 23.2 of the RFP dated 07.03.2020.

124) The AEGCL on 28.09.2020 notified all the seven short listed consultant that at 12:00 Hours on 05.10.2020 in the conference room of Managing Director, AEGCL, Bijulee Bhawan, Paltan Bazar, Guwahati their Financial Proposals shall be opened for selection of Consultancy Service for the Project Implementation and Management Support, indicating them all the seven shortlisted Consultants scored above seventy in their Technical Scores out of Hundred. By the said notice dated 28.09.2020, the AEGCL also informed all the seven shortlisted Consultants about the total Technical Scores obtained by each of them out of the total

hundred, where the first position was obtained by the AECOM Asia Company with 83.03 scores; second position was obtained by the petitioners SMEC International with 82.43 scores; third position was obtained by the respondent No. 3, PT Feedback Infra Limited with 82.18; fourth position was obtained by the Rodic Consultants with 75.90 scores; fifth position was obtained by the Maharashtra Consultants with 74.20 scores; sixth position was obtained by the Tractebel Engineering with 74.05 scores and seventh position was obtained by the Tata Consulting Engineering with 71.30 scores.

125) Thereafter, on 05.10.2020, the AEGCL opened the Financial Proposals of those seven technically responsive Consultants, who scored above seventy in their Technical Scores, at notified time and venue as detailed in its notice dated 28.09.2020, noted above, in presence of the respective representatives of those seven Consultants, including the representatives of the petitioners.

126) On opening of the Financial Proposals of those seven technically responsive Consultants on 05.10.2020, the AEGCL found that the Tractebel Engineering quoted Rs. 35,26,40,000.00 scoring 100 Financial Scores; respondent No. 3, the PT Feedback Infra Limited quoted Rs. 36,56,04,433.77 scoring 96.45 Financial Scores; Petitioner No.1, the SMEC International quoted Rs. 40,14,98,654.58 scoring 87.83 Financial Scores; the Maharashtra State Electricity quoted Rs. 40,78,81,548.00 scoring 86.46 Financial Scores; the Rodic Consultants quoted Rs. 50,12,51,406.00 scoring 70.35 Financial Scores; the Tata Consultant quoted Rs. 68,39,21,767.00 scoring 51.56 Financial Scores and the AECOM Asia Company quoted Rs. 68,52,78,211.00 scoring 51.46 Financial Scores.

127) The combined Technical and Financial arithmetical evaluation of all those seven Consultants, following the QCBS method noted above, the AEGCL on 05.10.2020 itself found that the PT Feedback Infra Limited, respondent No. 3 scored 85.035 and stood at Rank No. I whereas, the SMEC International, Petitioners scored 83.510 and stood at Rank No. II. Similarly, the Tractebel Engineering scored 79.240 and stood at Rank No.III; the AECOM Asia Company scored 76.716 and stood at Rank No.IV; the Maharashtra State Electricity scored 76.651 and stood at Rank No. V; the Rodic Consultants scored 74.790 stood at Rank No. VI and the Tata Consultant scored 67.352 and stood at Rank No. VII.

128) On 06.10.2020, the AEGCL forwarded the minutes of the financial proposal dated 05.10.2020 as per the prescribed format along with the combined evaluation report of the Project Management Consultant (PMC) to the AIIB for their perusal and approval. On 07.10.2020 the AIIB informed the AEGCL about its approval with regard to the minutes of the financial proposal dated 05.10.2020 of the AEGCL as well as its combined evaluation report of the PMC requesting the AEGCL to finalise the same and to send them a signed copy along with a draft of the proposed contract at the earliest considering the fact that proposed validity were only up to 14.10.2020, with the note that the AEGCL took a long time to evaluate the PMC bids.

129) A negotiation meeting with the respondent No. 3 was held with the AEGCL on 08.10.2020, the highest rank holder consultant in terms of the RFP and the AEGCL on 13.10.2020 at 17:30 hours issued the Notification of Intention to Award relating to the Consultancy Services for Project Implementation and Management Support in terms of its RFP dated 07.03.2020 in favour of the successful consultant respondent No. 3 specifying that the transmission of the said Notification begins the Standstill Period, proving further that during the Standstill Period the consultants may (a) request a debriefing in relation to the evaluation of their Proposal and (b) submit a Procurement-related Complaint in relation to the decision to award the contract.

130) The AEGCL on 13.10.2020 along with its said Notification of Intention to Award also enclosed the overall Technical Scores including each of the four criteria scores/points as well as the total points for the four criteria (i) - (iv) out of 100, their Financial Proposal Price, Evaluated Financial Proposal Price and Combined Scores (Technical + Financial) as per QCBS Method and Ranking notified that the Standstill Period is due to end at Midnight on 27.10.2020 at 24:00 hours as per IST (Indian Standard Time) and that the Standstill Period shall last ten (10) Business Days after the date of transmission of the said Notification of Intention to Award. By the said Notification of Intention to Award dated 13.10.2020 those seven Consultants were also informed that if they have any questions regarding the said Notification, they should not hesitate to contact the AEGCL.

131) Relating to the Project Management Consultant (PMC), after the said Notification of Intention to Award dated 13.10.2020, on 01.11.2020 a draft Contract Agreement was signed

between the AEGCL and the respondent No. 3, on 02.11.2020 AEGCL issued the Notification of Award in favour of respondent No. 3 and on 10.11.2020 Minutes of the Negotiation Meeting of Contract was held between them. Subsequent to that on 17.11.2020 the AEGCL issued the Award of 'Consultancy Service for Project Implementation and Management Support' for its said Project funded by the AIIB at total amount of remuneration of Rs. 36,56,04,433.47 excluding GST and with Rs. 65,80,87,52.52 as GST @18% total amount of contract at Rs. 43,14,13,185.99 (Rs. 36,56,04,433.47 + Rs. 65,80,87,52.52) including GST.

132) It is already noted above that Clause 23 of Section 2 of the ITC to the RFP under Part C 'Submission, Opening and Evaluation' relates to 'Public Opening of Financial Proposals for QCBS Methods'. Clause 23.2 of Section 2 of said ITC to the RFP provides that the Client shall simultaneously notify in writing those Consultants whose proposals were considered responsive to the RFP and TOR and that they have achieved the minimum qualifying technical score advising them the following - (i) their proposal was responsive to the RFP and TOR and met the minimum qualifying technical score; (ii) provide information relating to the Consultants overall technical score as well as scores obtained for each criteria and sub-criteria; (iii) their financial proposal will be opened at the public opening of financial proposals and (iv) notify them the date, time and location of the public opening and invite them for the opening of the financial proposals.

133) Further, Clause 23.5 of Section 2 of said ITC to the RFP provides that RFP that provides that – at the opening (of the Financial Proposals), the names of the Consultants and the overall technical scores, including the break-down by criterion, shall be read aloud. The Financial Proposals will then be inspected to confirm that they have remained sealed and unopened. These Financial Proposals shall be then opened and the total prices read aloud and recorded. Copies of the record shall be sent to all the Consultants who submitted Proposals and to the Bank

134) In the case in hand it is seen that though the AEGCL in its Notice dated 28.09.2020 provided the information to all the seven Consultants about their respective overall Technical Scores out of Hundred and as they have been found technically responsive, scoring more than seventy, they were informed that at 12:00 hours on 05.10.2020 their Financial Proposals will be opened in the notified venue. However, the AEGCL in their said Notice dated

28.09.2020 except the total technical scores; it did not provide the technical scores obtained by each of them against each criteria and sub-criteria, including the petitioner.

135) It is also seen that since the issuance said Notice dated 28.09.2020 upto 05.10.2020, the date when their Financial Proposals were opened, none of those seven technically responsive Consultants, including the petitioners asked for and/or requested and/or demanded the technical scores obtained by them against each criteria and sub-criteria and rather, without raising any objection in that regard allowed the respondent AEGCL to open their respective Financial Proposals on 05.10.2020. It is to be noted herein that the representatives of the four of the technically responsive Consultants, i.e., Petitioners, the respondent No. 3, the Maharashtra State Electricity Transmission Co. Ltd and the Rodic Consultants were present on 05.10.2020 during opening of the financial proposals, whereas the other three technically responsive Consultants, namely, (i) Tractebel Engineering; (ii) the Tata Consultant and (iii) the AECOM Asia Company did not appear, neither physically nor through video conferencing.

136) It is seen that only after opening of their Financial Proposals on 05.10.2020 the petitioners, SMEC International on 06.10.2020 wrote a letter to the AEGCL stating that it violated Section 2 – Instructions to Consultants (ITC) Clause 23.2 (ii) and Section 2 – Instructions to Consultants (ITC) Clause 23.5 noted above and requested the AEGCL to provide the break-up of Technical Score including the break-down by criterion and sub-criterion. The AEGCL on 09.10.2020 acknowledged the Petitioners about the receipt of their said letter dated 06.10.2020 and informed that as per the Procurement Instruction of the funding Agency AIIB and relevant clause of the RFP it can provide its response only after the issuance of the Notification of Intention of Award to the successful consultant.

137) Another technically responsive consultant, but unsuccessful bidder, namely, Tractebel Engineering on 16.10.2020 submitted a representation before the AEGCL for a debriefing in relation to the evaluation of their proposal submitted for the RFP dated 07.03.2020 so that they can prepare better in future.

138) The petitioners on 16.10.2020 again submitted a letter to the AEGCL, forwarding a copy of it to AIIB, stating that on receipt of the Notification of Intention of Award dated

13.10.2020 made a self assessment of their proposal as per the criterion provided in the RFP dated 07.03.2020 and its technical scores should have been 58.76 and its rank would be 'First' among all the bidders and that evaluation team of AEGCL might have inadvertently evaluated its proposal on minimum criterion. As such the petitioners in their letter dated 16.20.2020 requested AEGCL – (i) to revisit its CVs and confirm the scoring provided as per the RFP, (ii) to reevaluate their proposal comprehensively and (iii) for a debriefing as per ITC Clause 33 in relation to the evaluation of their proposal.

139) The Bank on 17.10.2020 informed the AEGCL that the letter of the petitioners dated 16.10.2020 is not for debriefing but to de-rail the entire selection process and that its complaint is baseless and if opportunity is given anyone can rate themselves as the best and as it was not satisfy with their score, they should have raised the issue before opening of financial proposal, and it is too late to discuss even.

140) On 19.10.2020 the AEGCL informed the Bank about the letters of the petitioners, SMEC International and that of the Tractebel Engineering and further informed that the standard format of Notification of Intention of Award provides that if the combined score already reveals the reason as to why their proposal is unsuccessful, then debriefing to the unsuccessful consultant may not be required and that debriefing request of only technically disqualified consultant should only be entertained.

141) On 20.10.2020 AEGCL informed the petitioners that it had given opportunity to all the consultants to raise their concern before opening of the financial proposals and if the petitioners were not satisfied with the score it should have raise the issue before opening of the financial proposals and therefore, AEGCL informed the petitioners about its regret that the issue raised by the petitioners cannot be entertained at that stage. AEGCL by the said letter dated 20.10.2020 also informed that debriefing is done when a consultant is technically not qualified in the selection process and since petitioners are technically eligible consultant and as the Notification of Intention of Award that was already issued on 13.10.2020 combined (technical and financial) scores have already been disclosed, that is self revealing as to why their proposal was unsuccessful, therefore AEGCL clarified that further debriefing is not required. The AEGCL also forwarded the copy of the said letter dated 20.10.2020 to the Bank for its information.

142) On 21.10.2020, the petitioners submitted a Procurement related Complaint to award the Contract of Consulting Service relating to the said Project to the respondent No.3 in terms of the RFP dated 07.03.2020 before the AEGCL and also for debriefing as per ITC Clause 33 in relation to the evaluation of its proposal, who in turn forwarded the same to the Bank on 22.10.2020.

143) On 22.10.2020 itself AEGCL wrote back to the petitioners that it reiterates that the Notification of Intention of Award dated 13.10.2020 states the reason for its proposal being unsuccessful and that if they still insist on debriefing then the AEGCL shall do in accordance with the relevant RFP clause requesting to inform the mode of debriefing.

144) On 26.10.2020, the petitioners again submitted a Procurement related Complaint in relation to the decision to award the Contract of Consulting Service relating to the said Project to the respondent No.3 in terms of the RFP dated 07.03.2020 before the AEGCL and also made a request for debriefing as per ITC Clause 33 in relation to the evaluation of its proposal. On 27.10.2020, the AEGCL forwarded the same to the Bank with its observation that there is no additional point to be addressed and that it has treated the matter as closed and that as insisted it will debrief in writing as per the relevant clause of RFP accordingly.

145) On 27.10.2020 the AEGCL informed the petitioners that AEGCL had already responded by its email on 22.10.2020 and that there is nothing further to add and accordingly treated the matter as closed.

146) Considered the judgments cited by the parties as well as their arguments and submissions.

147) It is already noted above that the Assam Intra-State Transmission System Enhancement Project pertains to strengthening the power transmission capacity to deliver reliable and affordable electricity, to improve access to electricity through grid electricity, to enhance efficiency and quality of power supply and to ensure financial health of the power sector through continued power sector reform in the State of Assam under the Assam Electricity Grid Corporation Limited (AEGCL) for which the Government of India applied for the financial assistance from the Asian Infrastructure Investment Bank in the form of a loan towards the cost of implementation of the said Project.

148) It is also seen that the plan of the Project is to promote a sustainable state electricity sector with increased transmission capacity to support inclusive and low carbon economic growth and to enhance the quality and expanded service delivery of clean electricity in Assam through improved technical, commercial and financial performance and compatibility of the AEGCL and it is for selection of the Consultancy services for Project Implementation and Management Support pertaining to the said Project involved in the case the AEGCL issued the RFP on 07.03.2010. As such it is clear from the above that the entire Project of the AEGCL as well as selection of the Consultancy services for the said Project is for the best interest of public.

149) Petitioners are aggrieved as because the AEGCL did not comply with the provisions prescribed in the Clauses 23.2 and 23.5 of Section 2 of the ITC to the RFP dated 07.03.2020 under Part C 'Submission, Opening and Evaluation' relating to 'Public Opening of Financial Proposals for QCBS Methods' as AEGCL neither on 28.09.2020, the date on declaration of technical scores on the proposal submitted by the petitioners nor before opening of its Financial Proposal on 05.10.2020 provided the information relating to the technical scores obtained by them against each criteria and sub-criteria and thereby violated the said two provisions.

150) It is seen that the petitioners failed to place and prove that the AEGCL committed any bias or favoritism, acted arbitrarily or irrationally or unreasonably or in perversity and in malafide while allotting the technical scores to any one of the seven shortlisted consultants including them and/or in determining the Financial Scores of those seven shortlisted Consultants as specified in the Data Sheet of the ITC to the RFP dated 07.03.2020 or that the AEGCL committed any arithmetical wrong in determining technical and financial scores by any or all of the seven shortlisted consultants. It is also seen that the petitioners are totally silent with regard to the lower financial proposal quoted by the respondent No. 3 in comparisons to theirs.

151) It is already noted above that petitioners raised the issue relating to non compliance of the Clauses 23.2 and 23.5 of Section 2 of the ITC to the RFP dated 07.03.2020 that the AEGCL did not provide them the technical scores obtained by them against each criteria and sub-criteria as per the requirement of those two provisions, which they have complaint of

only after opening of the Financial Proposals on 05.10.2020, though since 28.09.2020 the petitioners were aware about their total technical scores as well as that of the other six shortlisted consultants. Further, even on 05.10.2020 the petitioners without raising any objection in that regard allowed the AEGCL to open the financial proposals submitted by those seven shortlisted and technically responsive consultants and accordingly, the AEGCL on 05.10.2020 opened the financial proposals of all the seven shortlisted and technically responsive consultants, wherein it was found that following the formula of QCBS Method prescribed in the Data Sheet of Section 2 of the ITC to the RFP dated 07.03.2020, the respondent No.3 ranked at No. I and the petitioners ranked at No. II.

152) In matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates its decision-making power and it must give effect to the same, otherwise it may result in illegality. The principle of “judicial review” cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest.

153) The scope of judicial review in the matters of tenders, contract and public auctions of the government and public sector undertakings have been considered in depth by the Hon’ble Apex Court in catena of decisions. Following those and from the Judgments cited by all the parties to this proceeding it can be seen that the Hon’ble Apex Court have held that —

- (i) The Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, the Courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters.
- (ii) The Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out.
- (iii) As many public sector undertakings compete with the private industry now a days, the contracts entered into between private parties are not subject to scrutiny under writ jurisdiction.
- (iv) No doubt, the bodies which are State within the meaning of Article 12 of the

Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior Courts, but this discretionary power must be exercised with a great deal of restraint and caution.

(v) The acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer.

(vi) The soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision that no responsible authority acting reasonably and in accordance with relevant law could have reached.

(vii) Before the Constitutional Court interferes with the decision-making process or the decision the threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met.

(viii) A mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a Constitutional Court to interfere.

(ix) It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

(x) The Courts must realise their limitations and the havoc which needless interference in commercial matters could cause.

(xi) In contracts involving technical issues, the Courts should be even more reluctant as the Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and to adjudicate upon technical issues beyond their domain. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. This limitation should be kept in view.

(xii) The approach of the Court should be not to find fault. The courts using a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. The Courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. The Courts must also not interfere where such interference would cause unnecessary loss to the public exchequer.

- (xiii) The need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the Courts should exercise restraint and caution, give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable.
- (xiv) 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.
- (xv) 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.
- (xvi) 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.
- (xvii) The authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings.
- (xviii) 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.
- (xix) 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.
- (xx) 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.
- (xxi) 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.
- (xxii) If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract.
- (xxiii) The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer

twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.

(xxiv) The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade Courts to interfere by exercising power of judicial review, should be resisted.

(xxv) Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.

(xxvi) The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

(xxvii) While exercising the power of judicial review of any contract of public service the Court should not interfere with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good as the grant of interim injunction by the Court helps no one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone. (emphasis provided)

[Ramana Dayaram Shetty Vs. International Airport Authority of India, (1979) 3 SCC 489; Tata Cellular Vs. Union of India (1994) 6 SCC 651; Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517; Michigan Rubber (India) Ltd. Vs. State of Karnataka, (2012) 8 SCC 216; Central Coalfields Ltd. Vs. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622; Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818; Silppi Constructions Contractors Vs. Union of India, (2020) 16 SCC 489; Galaxy Transport Agencies Vs. New J.K. Roadways, (2021) 16 SCC 808; Uflex Ltd. Vs. State of T.N., (2022) 1 SCC 165; N.G. Projects Ltd. Vs. Vinod Kumar Jain, (2022) 6 SCC 127; National High Speed Rail Corpn. Ltd. Vs. Montecarlo Ltd., (2022) 6 SCC 401]

154) Following the above and after considering the entire aspect of the matter and also considering the involvement of public interest in the matter, the Court did not find any arbitrariness, irrationality, unreasonableness, perversity, favoritism, bias and mala fide on the part of the respondent AEGCL in selecting and appointing the respondent No.3 as the Consultant for Project Implementation and Management Support for the AIIB funded Assam



Intra State Transmission System and Enhancement Project in terms of the RFP dated 07.03.2020 issued by the AEGCL, noted above.

155) In view of the above, this writ petition being devoid of merit stands dismissed.

156) The interim order passed earlier in this proceeding on 08.02.2021 stands vacated.

157) If the petitioners are still aggrieved with the action of the respondent AEGCL appointing the respondent No. 3 as the Consultant for the AIIB funded project, noted above, they can always approach the Civil Court for damages, if so advised.

158) All the records be returned to the learned counsel for the AEGCL obtaining necessary acknowledgement.

159) No order as to the costs.

JUDGE

Comparing Assistant