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IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 4TH DAY OF FEBRUARY, 2008

BEFORE:

THE HON'BLE MR. JUSTICE ANAND BYRAREDDY

WRIT PETITION No. 15546 OF 2007 (GM-TENDER)

BETWEEN:

Spanco Telesystems and
Solutions Limited
A Company incorporated
under the Provisions of the
Companies Act, 1956
Having its Registered Office
at Spanco House, Plot No. 322/1
B. S. Deoshi Marg, Deonar
Mumbai-400 088
Represented by its
Senior Manager (Sales)
Mr. R. Vijay Kumar

Also having its Branch Office at
Spanco Telesystems and
Solutions Limited
Unit No. 302, House of Lords
15-16, St. Marks Road
Near State Bank of India
Bangalore-560 001

... PETITIONER

(By Shri Narasimha Murthy, Senior Advocate
for Poovayya and Company, Advocates)

AND:

1. The State of Karnataka
Department of Personnel and

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Administrative Reforms (AR)
M. S. Building
Dr. Ambedkar Veedhi
Bangalore-560 001
Represented by its
Secretary to Government

2. Centre for e-governance
A society registered under the
Karnataka Societies Registration
Act, 1960 and established by the
Government of Karnataka
Under e-governance Secretariat
Department of Personnel and
Administrative Reforms (AR)
Room No. 108, 1 Floor
M. S. Building
Dr. Ambedkar Veedhi
Bangalore-560 001
Represented by its
Chief Executive Officer
3. Software Technology
Parks of India
A Society registered under the
Provisions of the (Indian)
Societies Registration Act, 1860
Having its registered Head Office
at STPI Electronics Niketan
6 CGO Complex, Lodi Road
New Delhi 110 003
Represented by its
Director General
4. United Telecom Limited
A Company incorporated under
the Provisions of the
Companies Act, 1956
Having its registered office at
18A/19, Doddanekundi

Industrial Area, II Phase
Mahadevpura Post
Bangalore-560 048
Represented by its
Managing Director

5. Tulip IT Services Limited
A Company incorporated
under the provisions of the
Companies Act, 1956
Having its registered office
at C-160 Okhla Industrial Area
Phase 1, New Delhi-20
Represented by its
Managing Director
6. Bharat Electronics Limited
A company incorporated
under the provisions of the
Companies Act, 1956
Having its registered office
at Nagavera, Outer ring Road
Bangalore-560 045
Represented by its
Managing Director
7. Reliance Communications
Limited, A company
incorporated under the
provisions of the
Companies Act, 1956
Having its registered office
at Reliance Communications
Limited, Dhirubhai Ambani
Knowledge City
Navi Mumbai 400 709
Represented by its
Managing Director

8. ITI Limited

A Company incorporated
under the provisions of the
Companies Act, 1956
Having its registered office
at ITI Bhavan, Doorvaninagar
Bangalore-560 016
Represented by its
Managing Director

... RESPONDENTS

(By Shri. Shashidhar S Karmadi, High Court Government Pleader for Respondent No.1, Shri. Udaya Holla of Holla & Holla, Advocate for Respondent No.2, Shri. M. Karunakaran, Advocate for Respondent No.3, Shri. Chalapathy and Shri. Srinivas, Advocates for Respondent No.4, Shri. S. V. Prakash, Advocate for Respondent No.7, Respondent No.6 – Served, Respondents Nos. 5, 8 – Acknowledgment not yet returned)

This Writ Petition is filed under Articles 226 and 227 of the Constitution of India, praying to direct the Respondent No.1 and Respondent No.2, to reevaluate the technical bid submitted by the petitioner in Cover-II of its Bid and further consider its Commercial/Financial bid provided in Cover-III.

This petition having been heard and reserved and coming on for pronouncement of orders this day, the Court delivered the following:-

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ORDER

Heard the counsel for the parties.

2. The factual background to this petition is as follows:

The petitioner is a company incorporated under the Companies Act, 1956. It is engaged in providing telecommunication systems integration and information technology services. It is said to undertake turnkey projects in networking, apart from innumerable other services. The petitioner has provided details of the several projects undertaken and successfully executed, to establish its track record. The petitioner has also provided details of the leading companies in the world from whom, the petitioner derives its technology. The Government of India through the Ministry of Communication and Information Technology, has under the National E-Governance Action Plan (NEGAP) intended to create a nation-wide network and in this endeavour various initiatives and projects are envisaged. In this regard, guidelines for establishing the State Wide Area Network have been issued. The State of Karnataka intending to introduce the system of Karnataka State Wide Area

Network (hereinafter referred to as the 'KSWAN' for brevity), whereby all Governmental departments within the State of Karnataka are connected electronically at all times, facilitating inter and intra departmental communications effortlessly, the object was to modernize the communication infrastructure of the Government of Karnataka. It envisaged establishing video, voice and data communication across the 27 districts of Karnataka State including all its talukas, at the block level.

3. The Government of Karnataka had by an order dated 07.6.2003 constituted a "Network Steering Committee" ('NSC' for short) to oversee the implementation of KSWAN, apart from a LAN for the South Block of Vidhana Soudha, Bangalore, consisting of eight members.

4. In this regard, the Government of Karnataka established the Centre for e-governance, a Society registered under the Karnataka Societies Registration Act, 1960, the second respondent herein. This was in terms of the guidelines issued for the implementation of KSWAN. Respondent no.2 was accordingly designated by

the Government of Karnataka as the "implementing agency" for the implementation of KSWAN and other e-governance projects funded under the National e-governance Plan, as per Government order dated 5.11.2005 (Annexure-R1 of the statement of objections of respondent no.2).

5. Respondent no.3 M/s. Software Technology Parks of India (STPI, for brevity) is registered as a Society under the Societies Registration Act, 1860 and is set up by the Ministry of Communication and Information Technology, Government of India, in the year 1991 with the object of promoting Software exports from India and in that direction to provide technology assessment and professional training services to set up and manage infrastructural facilities in the country. Respondents 1 and 2 had appointed this respondent as their consultant for its KSWAN Project.

6. By an advertisement dated 1.6.2007, respondent no.2 had issued a public advertisement inviting tenders for the selection of a Network Operator for setting up the KSWAN. The invitation to tender, or the "Request for Proposal" (RFP, for brevity), was to

be a "Three-cover" tender process the pre-qualification documents were to be submitted in cover no.1, the technical qualification documents were to be submitted in cover no.2 and the commercial (financial) bid was to be submitted in cover no.3. The project was proposed on a "Build-Own-Operate-Transfer"(BOOT) basis. The successful bidder was required to build the project, operate it for a period of five years and transfer it to the Government of Karnataka. Payments were to be made by the Government under a service level agreement, in installments. The petitioner, along with respondents 4 to 8, had submitted their bids by 10.8.2007. On 18.8.2007, the said bidders had assembled at the invitation of respondent for the purpose of choosing two from amongst them, by lottery, who in turn were to erect radio towers for certain demonstration tests that were proposed to be performed by all bidders, at Mangalore and Mysore, on 26.8.2007.

7. The second respondent had constituted a Tender Scrutiny Committee, by an order dated 28.5.2007, as contemplated under Section 10 of the Karnataka Transparency in Public Procurements

Act, 1999 and Rules 2000(KTPP Act, for brevity) consisting of the following:

1. Secretary(e-governance),DPAR(AR) - Chairman
- 2.Principal Secretary to Government, Finance Department or his representative
3. Secretary to Government, Public Works Department
- 4.Prof.Sadagopan, Director IIT, Bangalore - Special Invitee
5. Prof.R.Krishnamurthy, IISc, Bangalore - Special Invitee
6. Mr.Ashish Sanyal, Senior Director (e-Governance), Ministry of Communication & IT, New Delhi.
7. Sri R.K.Dave, Wide Area Network Consultant, GOI - Special Invitee
8. The State Informatics officer, National Informatics Centre
9. Director, Software Technology Parks of India
10. Joint Secretary to Government (e-Governance), DPAR(AR) & Chief Executive Officer, Centre for e-Governance - Member Convener

At a meeting called for by respondent no.2 of all the bidders, as on 25.8.2007, it was announced that all the bidders were pre-qualified for further participation in the tender process. The bidders were required to perform demonstration tests, commencing from 30.8.2007, on the dates allotted to each of them. The bidders were

also required to make a presentation of their proposed techniques and strategies for the implementation of the project, on 11.9.2007. On 21.9.2007 respondent ^{M-2,}_A announced in ^{M-}_A presence of all the bidders that the petitioner and respondent no.8 had failed in the technical evaluation process. The petitioner having been jettisoned, from the tendering process, at that stage, the present petition is filed.

8. Shri R.N.Narasimhanurthy, Senior Advocate, appearing for the counsel for the petitioner contends as follows:

The invitation to tender being in respect of services that were sought to be procured by the Government of Karnataka, through the medium of respondent no.2, the rigour of the provisions of the KTPP Act and Rules were attracted. The conduct of respondents 1 and 2 in having rejected the technical bid of the petitioner was arbitrary and illegal as it was clearly in violation of the provisions of the said Act and Rules. The said illegal action compels the petitioner to highlight other infirmities in the tendering process which were clearly engineered to accommodate favoured parties or rather to eliminate the petitioner. This design becoming apparent by hindsight, the

petitioner would not be estopped from bringing it to the attention of the Court, so that the allegations may be considered on their merit.

a) Shri Narasimha Murthy would point out that Clause 2.12 of Volume IV of the RPF(Pre-Qualification Clarifications) indicated that the technical bid finalisation and the financial bid opening was re-scheduled to be held on 25.9.2007 and that the finalisation of the financial bid was re-scheduled to be held on 3.10.2007. However, respondents 1 and 2 by letter dated 17.9.2007 informed all the bidders that the technical bid finalisation and the Financial bid opening was again re-scheduled to be held on 21.9.2007, despite the fact that the petitioner had submitted its demonstration results only on 19.9.2007. The manner in which the petitioner has been hustled through the process is capricious and mala fide. This is glaringly evident when viewed in the back drop of the entire schedule, from the date of submission of bid documents leading upto the opening and finalisation of the technical bid documents, were not adhered to. But despite the delay at every step, the process of announcing the results of the technical bid and opening of the commercial bids

were inexplicably pre-poned and conducted post-haste. It is alleged that a possible explanation would be the eagerness of the respondents to ensure the completion of the entrustment of the contract to a favoured bidder at the possible behest of an outgoing political party which was to make way for its coalition partner at the helm, in the month of October 2007.

b) That by a cryptic message dated 17.9.2007, the bidders were informed that their commercial bid would be opened on 21.9.2007. It is contended that as there was no indication as on that date that the technical bid had been finalised – The decision to pre-poned the opening of the financial bid was inexplicable and fraught with mischief. This misgiving of the petitioner was confirmed when, on 21.9.2007 the petitioner was informed, orally, of the rejection of its technical bid and on being asked to leave the premises, as the commercial bids of the other bidders was to be opened. It is contended that the technical bid finalisation not having been advanced from 25.9.2007 – The respondents could not have decided to advance the commercial bid from 25.9.2007 to 21.9.2007.

c) The respondents 1 and 2 had deliberately refrained from issuing any communication, nor was there any notification as regards the rejection of the technical bid of the petitioner. This according to counsel, was a deliberate move to prevent the petitioner from approaching any forum of law, in appeal. The mala fides of the said respondents in seeking to defeat the rights of the petitioner is hence plain.

d) It is contended that with reference to the provisions of the KTPP Act and Rules, it is apparent that the Act was intended to curb irregularities in the processing of tenders and to dispel the lack of transparency in evaluation and acceptance of tenders, hence compliance with the express provisions of the Act and Rules was imperative and crucial in order that a level - playing field is provided to any tenderer.

9. Shri Narasimhanurthy would point out that in keeping with the definition of a "procurement entity" under Section 2 (d) of the KTPP Act, the first respondent having named the second respondent as the "implementing agency" and given the role of the said respondent it may be concluded that it is to be considered as

the "procurement entity". Section 6 of the Act mandates that no tender shall be invited, processed or accepted by a procurement entity except in accordance with the provision of the Act and Rules. It is pointed out that the provisions of the Act contemplate the appointment of a:

- i) Tender Inviting Authority (appointed by the procurement entity)
- ii) Tender Accepting Authority (appointed by the procurement entity)
- iii) Tender Scrutiny Committee (constituted by the Tender Accepting Authority).

Further, from the material on record the appointment and constitution of the said Authorities and Committee is not in accordance with the Act. A Tender Scrutiny Committee is constituted even before the appointment of a Tender Accepting Authority. Most significantly a Tender Scrutiny Committee having been constituted, which itself was not done in terms of the Act and Rules, the irregularity was compounded by the illegal and irregular appointment of a Sub-Committee to the Tender Scrutiny Committee, to aid the said Committee, consisting of rank

outsiders – This is a measure which has resulted in a total frustration of the provisions of the Act and Rules. Such appointment of a Sub-Committee is clearly without authority of law. Hence it is contended that any evaluation of the technical bid by such a process lacks transparency and is contrary to the KTPP Act. Further, the evaluation report of the Tender Scrutiny Committee and its Sub-Committee referred to at its meeting on 21.9.2007, was required to be sent to the Tender Accepting Authority for acceptance. There is no material on record to indicate such acceptance. In the proceedings of the Networking Steering Committee dated 27.9.2007, which is the Tender Accepting Authority, does not disclose that the evaluation report of the Tender Scrutiny Committee was accepted. This is clearly violative of Rule 26 of the Rules. It is also pointed out that not only is the very constitution of the Technical Sub-Committee impermissible – The fact that total strangers have been permitted to participate in their deliberations, as per minutes of meetings held on 6.9.2007 and 11.9.2007, which is highly irregular and vitiates the entire evaluation process. In this regard, Shri Narasimhanurthy places reliance on the following authorities:



1. Ramachandra Keshav Adke and others Vs. Govind Joti Chavare and others reported in 1975(1) SCC 559
2. Hukam Chand Shyam Lal Vs. Union of India and others reported in 1976(2) SCC 128
3. State Of Karnataka and others Vs. Jaigson Municipal Council and others reported in 2003(9) SC 731.

To support the contention that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden, as then it would be violative of the fundamental principles of natural justice. It is hence contended that the petition be allowed.

10. Per contra, Shri Udaya Holla, Senior Advocate, appearing for the counsel for the respondent no.2, leading the arguments for the respondents contends as follows:

The contention that there is violation of the provisions of the KTPP Act and Rules in the appointment of the Tender Inviting Authority, the Tender Accepting Authority and the constitution of the Tender Scrutiny Committee is sought to be met by pointing out that the State Government had constituted the Network

Steering Committee for overseeing the implementation of KSWAN by a Government order dated 13.6.2003 (Annexure-R6). This Committee at its meeting on 21.5.2007 had opined that the Network Steering Committee would itself act as the Tender Accepting Authority. This was followed by an order dated 28.5.2007 appointing the Network Steering Committee as the Tender Accepting Authority(Annexure-R13). Insofar as the constitution of the Tender Scrutiny Committee being irregular is concerned, it is again ill-founded. In that, though the Committee was to be constituted by the Network Steering Committee as opined at its meeting on 21.5.2007, the same is given effect to only by the order dated 28.5.2007 (Annexure-R-3).

11. The further allegation that the constitution of a Technical Sub-Committee as per Annexure-R-4 being illegal, is concerned, it is contended that there is no apparent bar under the Act or Rules to constitute such a Sub-Committee. As is evident from the minutes of the meeting of the Tender Scrutiny Committee dated 13.8.2007(produced along with a memo dated 17.1.2008, in Court), this was an informed decision of the Committee in order

to address the highly technical nature of the technical bid evaluation – The need for forming such a Sub-Committee was in the interest of all bidders and to leave no stone unturned. This measure cannot by any standard be termed as illegal or irregular affecting the tender process. Especially in the face of the members of the Sub-Committee being technical experts from prestigious institutions in the country and the Chairman of the Sub-Committee being already a member of the Tender Scrutiny Committee.

12. Further, it is pointed out that as is evident from the Technical Bid Evaluation Report which has been produced by the petitioner itself, the summary of the Evaluation is available at page 62 of the Rejoinder to the statement of objections, it consists of five parts, the second part is again sub-divided into six sub-parts and it is item no.1 of these sub-parts, "Solution Description", which was evaluated by the said Sub-Committee and a report on the award of marks in respect of this sub-component, submitted to the Tender Scrutiny Committee. The total marks allocated for this sub-component was '11' marks. The petitioner was awarded 4 marks. Hence, it is contended by Shri Holla, that if the

induction of a Sub-Committee is to be held illegal and the assessment by such Sub-Committee is to be eschewed and the entire 11 marks is to be awarded to the petitioner, the petitioner would yet be unable to make the grade of securing over 70 marks to qualify to enable its commercial bid being opened, as its total marks would still be "59.20".

13. It is pointed out by Mr.Holla that the above and other alleged infirmities raised by the petitioner are not discoveries made by the petitioner in retrospect, as sought to be made out. The petitioner has participated in the tender process at all stages without demur and it is only upon realising that the petitioner had not qualified, that the petitioner seeks to raise contentions even before this Court, in installments, as is evident from the pleadings which are improved upon, in fits. In this regard, Shri Holla places reliance on the following authorities:

1. M/s. New Bihar Biri Leaves Company and others Vs. State of Bihar and others reported in AIR 1981 SC 679.
2. Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others reported in AIR 1986 SC 1043.

3. M/s. Tafcon Projects(I) Private Limited Vs. Union of India and Others reported in AIR 2004 SC 949.
4. Poddar Steel Corporation Vs. Ganesh Engineering Works and Others reported in 1991(3) SCC 273.
5. Delhi Development Authority Vs. Delhi Cloth Mills Limited and Others reported in 1991(3) SCC 277.
6. G.J Fernandez Vs. State of Karnataka and others reported in 1990(2) SCC 488
7. Kerala Hotel and Restaurant Association and others Vs. State of Kerala and others reported in 1990(2) SCC 502.
8. Mohan C.S. Vs. Assistant Commissioner Chikballapur and others reported in 1978(2) Kar.L.J 186.
9. Ranjas Foundation and others Vs. Union of India and others reported in 1993 Supp(2) SCC 20.
10. Shri Ishwar Chandra Vs. Shri Satyanarain Sinha and others reported in 1972(3) SCC 383.

These authorities are cited to support the fundamental principle that if a person accepts one part of the document or transaction he cannot be allowed to adhere to and abide by some of the terms

of the same which proved advantageous to him and repudiate the other terms of the same instrument or transaction which might be disadvantageous. The maxim is *qui approbat non reprobat* (One who approves cannot reprobate).

14. Shri Holla has placed reliance on a large number of authorities in support of the several incidental contentions urged, apart from seeking to meet the factual assertions as regards the alleged arbitrariness in the tender process. He has also highlighted the importance of the KSWAN Project and the immense loss of benefits that would have accrued to the public, if not for the present proceedings. He would emphasize the need for expedition in the disposal of this petition.

15. The Government Pleader appearing on behalf of the State Government seeks to adopt the contentions putforth by Shri Uday Holla.

16. Shri G.S.Bhat appearing for respondent no.4 M/s.United Telecom Limited, who has since been selected as the successful bidder, contends as follows:

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That the petition is not maintainable in view of the bar under Section 21 of the KTPP Act. That even if the petitioner is aggrieved by an alleged arbitrary action of the respondents, there is an alternative remedy of appeal under the Act and hence, the petition is not maintainable. Insofar as the allegations in the petition against the said respondent are concerned, the same are met at length in the statement of objections and are sought to be reiterated by the Counsel. Reliance is placed on a large number of authorities in support of the contentions.

17. By way of reply, Shri R.N.Narasimhamurthy would point out that insofar as the crucial Technical Evaluation Report is concerned - There is no denial that the Technical Evaluation Report had been placed before the Technical Acceptance Authority for its formal acceptance.

18. In the above facts and circumstances and other incidental aspects that arise from the pleadings on record and elaborate arguments advanced, the following are the material issues, in the opinion of this Court, that would arise for consideration.

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- a) Whether the disqualification of the petitioner on the basis of the procedure leading upto the evaluation of its technical bid, is arbitrary and vitiated?
- b) Whether the appointment of the Tender Accepting Authority was inconsistent with the provisions as stipulated under the KPPP Act and Rules?
- c) Whether the Technical Sub-Committee constituted by the Tender Scrutiny Committee is impermissible and Whether the evaluation of ^{the Petitioner's} Technical bid is vitiated?
- d) Whether the several infirmities sought to be highlighted in the tender process, from inception, would disclose an intention by respondent no.2 to facilitate awarding the tender in favour of a particular entity before a change of guard in the popular Government?

19. It is to be seen from the material on record that the State of Karnataka with an intention to introduce the system of KSWAN in order to modernise the Communication Infrastructure of the State, under the aegis of the Ministry of Communication and Information Technology, Government of India, as a part of the NEGAP, had by its order dated 7.6.2003 constituted NSC,



consisting of the Additional Chief Secretary of the State Government as its Chairman, with the Principal Secretary of DPAR and Secretaries of the Information Technology Department, the Finance Department, the Public Works Department, E-Governance and the Project Director, Board for Information Technology Education Standards, Bangalore as members with two other invitees, one from the Government of Gujarat and a representative of the Tele-communications Consultants India Limited.

20. This NSC was given the responsibility, (i) to examine the recommendations received from the Government's Consultants (Respondent No.3) on the implementation of KSWAN and the administrative requirement in setting-up the network, (ii) to finalise the Draft Proposal Documents and the evaluation criterion and (iii) to consider the recommendations of the Consultant on the preparation of the tender documents and detailed evaluation criterion in respect of the same as well as to examine the selection of the bidder as recommended by the Consultant and to recommend to the Government the final bidder for the network. The appointment of NSC is not under challenge in this petition.

21. Under the scheme of things, as envisaged under the KTPP Act, Section 9 provides that the "procurement entity" may appoint a Tender Inviting Authority and a Tender Accepting Authority. The said section also provides that where a Multi-member Committee is already appointed for any procurement entity for discharging the function of accepting the tenders, such Committee shall be deemed to be a Tender Accepting Authority under this Act. Hence, the terms of reference given to the above Committee would fit the description of a Multi-member Committee appointed in terms of the said proviso.

22. The services sought to be procured was for the benefit of the State Government and the supervision of the implementation of the project having been conferred on the NSC and the said committee having been conferred with the power to finalise the acceptance of the tender and to recommend the final bidder, is deemed to be a Tender Accepting Authority for purposes of the Act. The argument canvassed as regards there being an ambiguity in the appointment of a Tender Accepting Authority and the Tender Scrutiny Committee, in that, the latter being recommended

for appointment, even before the appointment of a Tender Accepting Authority, being an inconsistency is, therefore, not tenable.

23. The NSC at its meeting on 21.5.2007, as per Annexure-R.7 having named the members of the Tender Scrutiny Committee and the observation that the Steering Committee "would be appointed" as the Tender Accepting Authority, does not result in any incongruity, in the light of the proviso to Section 9 where it is deemed that the NSC is, in fact, the Tender Accepting Authority. The formality of naming the said Committee as the Tender Accepting Authority has been completed by the order dated 28.5.2007. Similarly, the NSC also having passed an order on 28.5.2007, insofar as the Tender Scrutiny Committee is concerned, cannot be said to be irregular or illegal. Hence, no serious infirmity can be found in the appointment of the authorities contemplated under the KTPP Act, namely, the Tender Inviting Authority, the Tender Accepting Authority and the Tender Scrutiny Committee.

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24. The further contention that the Tender Scrutiny Committee in turn could not have appointed a Technical Sub-Committee to assist the Tender Scrutiny Committee, which is neither contemplated under the terms and conditions of tender or under the provisions of the KTPP Act and Rules, is a contention that appears to be significant. However, having regard to the magnitude of the project and the apparent complexities in its technical detail, requiring the State Government to prepare over several years, even in inviting the tenders with the assistance of the Technical Experts from within and outside the State. The further circumstance that in proceeding to make a technical evaluation of the bids, the Tender Scrutiny Committee having found that it would require the assistance of other experts in assessing the technical aspects and having taken an informed decision to appoint such a Technical Sub-Committee consisting of a Chairman, who was already a member of the Tender Scrutiny Committee and two other individuals from prestigious institutions with apparent specialised knowledge in the area, is a matter of record. The terms and conditions of the tender or the provisions of the KTPP Act and Rules not providing for such an exigency,

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cannot be said to result in an unfair practice or an illegality which has caused prejudice to any tenderer. On the other hand, the interest of the tenderer and the complexity of the technical details furnished by each such tenderer is sought to be assessed closely and with the help of experts. This cannot be characterised as resulting in an irregularity which vitiates the tender process insofar as the technical evaluation of the bid is concerned.

25. Yet another manner of considering the contention of the petitioner is as the respondents seek to do, namely, that even if the total of 11 marks which were assigned for that part of the technical evaluation component, which was made by the Technical Sub-Committee and in which, the petitioner was awarded only 4 marks is to be ignored and if the petitioner is, in fact, awarded all the 11 marks which the petitioner could have possibly gained if it is to be accepted that the Technical Sub-Committee was biased in awarding only 4 marks to the petitioner, the petitioner would yet not achieve the total marks of 70 which was prescribed to qualify for the opening of the commercial bid. This is not an illogical or an unreasonable point of view.

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26. In this regard, the judgment of the Supreme Court in the case of Reliance Airport Developers Private Limited Vs. Airports Authority of India, (2006) 10 SCC 1 may usefully be referred to. The facts of the case therein was that the Government of India in order to privatise Airports at Mumbai and Delhi, invited tenders and constituted an Empowered Group of Ministers (EGOM for brevity) to decide the detailed modalities including the bid evaluation criterion based on which a joint venture partner was to be selected. The EGOM in turn, appointed a Inter-ministerial Group (IMG for short) to assist it in this regard. Later, the EGOM appointed a Committee of Secretaries (COS for short) to advise EGOM on all issues of the project. The COS was required to consider and recommend the selection of appropriate bidders. The COS in turn, appointed a Group of Eminent Technical Experts (GETE for short) to recommend to the COS on the overall validation of the evaluation process. The EGOM having finally acted on the recommendation of the GETE, was in question in the above case.

27. The appellant therein contended that EGOM should have accepted the recommendations of an Evaluation Committee (EC

for brevity) consisting of a Global Technical Advisor, the Legal Consultant and the Financial Consultant for the project, and should not have carried out the exercise of a further examination through the GETE. The High Court had decided that EGOM had the absolute discretion in the matter and that therefore, there was no irregularity. The Supreme Court on a detailed examination of the decision making process and on an exhaustive study of the case law pertinent to the fact situation, dismissed the appeal.

28. *By the same line of reasoning, S*
 In the case on hand whereby, the assistance of a Technical Sub-Committee has been requisitioned, cannot therefore be said to be capricious or irregular vitiating the tender process.

29. As held by the Supreme Court in the above case, where the challenge was to the constitution of the GETE and the scope for its constitution. It was held that the ultimate authority to take the decision in the matter was the EGOM. It was within the powers of EGOM to decide as to what inputs it could take note of and the source of these inputs. Therefore, the necessity of taking views of various Committees constituted appears to be a step in the right

direction. This was a step which appears to have been taken for making the whole decision making process transparent. There was no question of having a view of one Committee in preference to another. The EC was a Committee constituted as a part of the decision making process like other Committees. In the multi-tier system in the decision making process, the authority is empowered to take a decision in accepting the view expressed by one Committee in preference to another Committee for plausible reasons. The Committees having been constituted to assist the decision making authority in arriving at a proper decision, need not be emphasized. It is a matter of discretion of the authority to modify the norms. The appointment of a Technical Sub-Committee in the discretion of the Tender Scrutiny Committee, in the case on hand, employs a vigilant circumspection and care and it cannot be said that it was a whimsical or mala-fide action to discredit or disqualify any tenderer including the petitioner. There are no allegations of mala-fides or bias as regards the Technical Sub-Committee. It is the very appointment that is sought to be questioned and going by the facts and circumstances and the informed decision of the Tender Scrutiny Committee as to the

need for the assistance of such a Committee, the exercise cannot be faulted and the tender process cannot be said to be vitiated on account of this.

30. The petitioner having participated in the tender process cannot feign ignorance of the constitution and appointment of the authorities or the Committees referred to hereinabove. The petitioner seeking to question the modalities after the petitioner was disqualified, on an evaluation of its technical bid, would certainly disentitle the petitioner from seeking to question the propriety or otherwise or even the appointment or constitution of the said Committees. In the above background, it cannot be said that the disqualification of the petitioner on an examination of the sequence of events, leading up to the evaluation of its technical bid, is arbitrary and hence, the rejection of the petitioner's bid cannot be said to be vitiated.

31. As held by the Supreme Court, the Courts ought to interfere only when it is possible to arrive at a conclusion in a case such as this, that there is an overwhelming public interest in entertaining the petition and that it is not "every wandering from the precise

path of best practice that lends fuel to a claim for judicial review", the same would be available only if a public law element is apparent and which would arise only in a case of "bribery, corruption, implementation of unlawful policy and the like", while reiterating the decision in *Ramaq International Limited Vs. I.V.R. Construction Limited*, (1999) 1 SCC 492 and a decision of the Queen's Bench in *R. v. Department Of Constitutional Affairs*, 2006 All ER (D) 101

32. The other allegation as regards the motives of the respondents in seeking to depart from the schedule in the tender process, as being in order to ensure the award of a contract in favour of a particular entity at the behest of an erstwhile popular Government is also ill-founded. There is no material basis for the same and the petitioner not having complained of any prejudice having been caused on account of such rescheduling, cannot be permitted to raise any such contention as a ground for challenging the tender process.

33. Insofar as the inconsistencies that are sought to be highlighted in the respondents not having complied with the

provisions of the KTPP Act and Rules are concerned, it is to be noticed that the very provisions of the Act are wanting in precision and cohesion. It is necessary that the entire Act and Rules be reviewed by the legislature in seeking to implement the objects sought to be achieved by the Act. Hence, the inconsistency, if any, in the respondents adhering to the procedural rules may even be attributed to the poor manner in which the provisions of the Act are drafted and the fact that the project concerned in the case on hand was an unusual project involving several expert bodies and Committees and the strict adherence to the letter of the Act found wanting, cannot by itself, in the absence of other serious infirmity which, as already stated does not involve overwhelming public interest or unlawful policy, would warrant the interference of this Court.

Accordingly, the petition does not make out any ground for interference by this Court and is dismissed.

Sd/ 
Judge