

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO.15548 OF 2022

- 1 TATA Motors Ltd. & Anr.
a company incorporated under the Companies Act, 1956/2013 having its registered office at Bombay House, 24-Homi Modi Street, Fort, Mumbai - 400001, India

- 2 Sumit Kumar,
Hindu, Indian Inhabitant, Deputy General Manager (Legal-S & M), Having his office at Tata Motors Ltd, 4th Floor Ahbura Centre, 82, Mahakali Caves Road, Andheri East, Mumbai - 400093

..... Petitioners

VERSUS

- 1 The Brihan Mumbai Electric Supply & Transport Undertaking (BEST)
A statutory corporation operating under the provisions of the Mumbai Municipal Corporation Act, 1888 through its Divisional Material Manager (DMM), Material Management Department, 2nd Floor, Transport Engineering Building, Tilak Road, Dadar (East), Mumbai - 400014
Email : sdkemkar@bestmmd.net

- 2 EVEY Trans Pvt. Ltd.
having registered office at Unit No.22, 2nd Floor, Technocrat Industrial Estate, Balanagar, Hyderabad, Ranga Reddy - 500037, Telangana, India
Email : infor@eveytrans.com
eveytransprivatelimited@gmail.com

..... Respondents

Dr. Abhishek Singhvi, Senior Advocate with Mr. Ashish Kamat,
Mr. Amit Bhandari, Mr. Ajay Vazirani, Mr. Shiraj Salekar, Ms. Aditi

Bhatt, Ms. Anuja Abhyankar, Ms. Ruchi, Ms. Stacie Rodrigues and Mr. Sarthak Gaur I/b. Lexicon Law Partners for Petitioners.

Mr. Venkatesh Dhond, Senior Advocate a/w. Mr. Nirav Shah, Mr. Anjan Dasgupta, Mr. Jash Shah I/b. DSK Legal for Respondent No.1.

Mr. Somasekhar Sundaresan a/w. Mr. Anshul Anjarlekar, Mr. Harjot Singh I/b. Ravan – Shah & Co. for Respondent No.2.

**CORAM: S.V. GANGAPURWALA &
MADHAV J. JAMDAR, JJ.**

**JUDGMENT RESERVED ON : 9th JUNE 2022
JUDGMENT PRONOUNCED ON : 5th JULY 2022**

PER :- (S.V. GANGAPURWALA,J) :

1 Respondent No.1 Brihan Mumbai Electricity Supply and Transport Undertaking (hereinafter referred to as the “**BEST**”) is engaged in service activity of public passenger transport covering areas in the City of Mumbai and its extended suburbs. On 26th February 2022 Respondent No.1 issued e-tender notice inviting two-bid e-tender for operation of Stage Carriage Services for public transport of 1400 (+ 50% variation) Single Decker AC Electric buses with driver.

2 In response to the said tender, eight parties including the Petitioner and Respondent No.2 submitted their technical and financial bid. The technical bid of five tenderers including Petitioner No.1 were rejected. Three bidders, including Respondent No.2 were

held responsive. Respondent No.2 is awarded the contract pursuant to the said tender. The technical bid of Petitioner No.1 is rejected. Aggrieved by the rejection of the technical bid, the Petitioner filed the instant Writ Petition. During pendency of the Writ Petition, Respondent No.2 is issued with the contract. The Petitioner has also assailed the same.

3 Dr.Abhishek Singhvi, learned Senior Advocate appearing for the Petitioner, during the course of his erudite arguments, put forth the following submissions:

a. The only reason for disqualifying Petitioner No.1 is that though it guaranteed operating range of buses as 200 kms qua Single Decker buses with 80% state of charge (20% reserve left upon running 200 kms in single charge) it added 'in standard test conditions as per AIS 040' in its Annexure F and Y.

b. AIS 040 standard is referred by the Petitioner only to inject certainty and uniformity since AIS 040 is the only sole prescribed standard in India for measuring range of a battery-operated / electric vehicle. The Petitioner's bid is compliant with Central Motor Vehicle Rules, 1989 (hereinafter referred to as the "**CMVR**") and the Tender conditions. Petitioner No.1's bid is accepted as "noted and agreed" without any

qualification or reference to AIS 040 and the same is part of the substantive tender document. Respondent No.1 ought to have considered this as substantial compliance of essential tender conditions for acceptance of bid. In Section 2 of Schedule-IX (Technical Disqualifications) Tender requires compliance of CMVR. Sr.No.5 of Schedule-III of the Tender requires submission of CMVR type approval at the time of prototype inspection. Same is mandatory as per the Mandatory Technical and Commercial Eligibility Criteria. Rule 124 of CMVR as amended vide Notification dated 13th December 2004 makes it mandatory to test battery operated vehicles as per AIS 040. Rule 144 (iii) of the General Finance Rules (hereinafter referred to as the “**GFR**”) provides that in all procurements, technical specifications in tender must be based on recognized national standards. GFR applies to Respondent No.1 also. It is submitted that not specifying relevant standards against the technical specifications, contrary to Rule 144 of GFR adds ambiguity and uncertainty in the tender conditions which is impermissible. The office memo referring to **FAME** (Faster Adoption and Manufacturing of Electric Vehicles)-ii Scheme under Ministry of Heavy Industries specifies for testing of range of battery operated /

electric vehicles as per AIS 040. FAME-II is formulated and floated by the Ministry of Heavy Industries and implemented by the Department of Heavy Industries. Respondent No.1 floated the tender with a clear intent to avail subsidy benefit under FAME-II. As per the tender, for subsidy benefits to extend to the operators, compliance with the guidelines of Department of Heavy Industries and FAME-II guidelines become mandatory. The reference to AIS 040 is reasonable, equitable and for ensuring the level playing field in the tender.

c. It is further contended by the learned Senior Advocate that the tender does not prohibit departure from tender conditions. It contemplates departure. A reference is made to Sr.No.15 of Schedule-III. Accordingly, Petitioner No.1 sought departure in Annexure-F of the Bid. Respondent No.1 did not provide any specific decision or a reasoned order on rejection of the said request for departure and without assigning any reasons, arbitrarily held Petitioner No.1 ineligible. There is no material deviation warranting disqualification / exclusion.

d. Learned Senior Advocate further contends that the action of Respondent No.1 is blatantly discriminatory, arbitrary and is vitiated by legal malice. On 28th April 2022

Respondent No.2 submitted its original bid specifying a deviation in Annexure-Y by adding opportunity charging time of 1 hour meaning it would charge enroute. The same is contrary to the tender conditions. On 2nd May 2022, Respondent No.2 revised its bid submitting the same Annexure-Y which continued to have the deviation of interruption. The said date was last bid submission date. Respondent No.2, in Annexure-F states that its bid contains no departures from tender conditions. Same is contrary to Annexure-Y. On 4th May 2022 the technical bids were opened by Respondent No.1. On 6th May 2022 Respondent No.2 was allowed to substitute Annexure-Y at 11.34 A.M. and one hour interruption (opportunity charging time) was allowed to be corrected. On 6th May 2022 technical evaluation was issued and Respondent No.2 was declared as eligible bidder at 2.05 pm. Respondent No.2 admits specifying opportunity charging time in Annexure-Y, but now refers to it as clerical mistake. Electronic portal of BEST still shows unamended bid of Respondent No.2. No opportunity charging time was a material condition of the tender. The same is reflected from clause 1(iii) of Schedule-VI and Section 12 of Schedule-IX, so also Annexure-Y. As on date of opening of technical bid, the bid

of Respondent No.2 carrying the material deviation of interruption was liable to be rejected. Clause-16 of Schedule-I of the tender categorically prohibits any addition, correction or submission of document after the technical bid opening. This was violated by Respondent No.2. Clause 17 of Schedule-II carries prohibition on a bidder unduly influencing Respondent No.1 by contacting it on any matter relating to its bid from the time of bid opening until the time contract is awarded. Respondent No.1 and 2 have breached the tender terms and also vitiated the sanctity of the tendering process. Respondent No.1 accepted communication from Respondent No.2 purporting to correct its bid vitiating the tender process. Respondent No.1 overlooked the action of Respondent No.2 contacting Respondent No.1 on its own, knowing that Respondent No.2's bid would suffer rejection if it did not replace its Annexure-Y. This further overreach is clearly an indicia of legal malice with which Respondent No.1 acts to favour Respondent No.2 by giving a complete go-bye to tender conditions and breaching the tender terms to entertain Respondent No.2's bid to make Respondent No.2 the successful bidder. Respondent No.1 in its arguments took a stand contrary to its pleadings. In the pleadings Respondent No.1

does not state that it took the decision *dehors* the e-mail dated 6th May 2022 of Respondent No.2 carrying the corrections. The arguments are after-thought.

e. The learned Senior Advocate for the Petitioner further submits that the tender stipulated matching of rates in Schedule-VII and allocation of quantity in Schedule-VIII which has been completely overlooked by Respondent No.1. Two eligible bidders match L1. Allocation as per formula provided in procurement guidelines was not carried out. By disqualifying Petitioner No.1, entire contract for 1400 (+/-) 50% i.e. 2100 buses has been awarded to Respondent No.2. This has been done despite the fact that under a tender issued by Nagpur Municipal Corporation for supply of 40 electric buses, Respondent No.2 has been unable to supply the buses and has delayed the prototype delivery by 13 months, leading to levy of penalty by Nagpur Municipal Corporation.

f. It is further submitted that the second ground for disqualification of the Petitioner's bid was violation of TOTO conditions. The Petitioner No.1's bid specified acceptance of TOTO conditions as "noted and agreed" thereby there is no departure from the said condition.

g. The learned Senior Advocate for the Petitioner submits that the Petitioner is a leader in the market of electric vehicles. The reference to standard conditions in Petitioner No.1's bid is only because the testing agencies run the test in standard conditions and not in actual conditions. It does not imply that Petitioner No.1 will not meet the range requirement in actual conditions. At pre-qualification stage, no actual bus is physically available. Without certification of testing agency, any undertaking, including what Respondent No.2 gives, is only a paper guarantee and there is no basis on the date of the impugned decision to assess if a bidder would meet the operating range when the actual / physical bus is not available at the time of evaluation of the technical - financial bid and award of the tender. An available AIS O40 certification guarantees performance by antecedent test. When read with acceptance of specifications, it shows that Petitioner No.1 has assured 200 kms range in terms of the tender. The declaration filed by Petitioner No.1 clearly states that its buses will meet 200 kms in actual road conditions.

h. It is further contended that the onus of providing operating range guarantee and consequent actions for default

applies to all bidders, therefore Respondent No.1 could have applied the same penalty provisions on other bidders in the event of default. Relying on penalty provision or withholding of payments for default does not serve public purpose of ensuring the buses run for the desired range without interruption. Equally, Petitioner No.1's disqualification keeps out a credible, more stable and more proven manufacturer. The tender process fails to get the most competitive and competent bid which has to be the objective of every public tender.

i. The learned Senior Counsel for the Petitioner urges that the bid submitted by the Petitioner accepts the specification of the type of battery as Li-ion. No deviation has been sought in this regard. Petitioner No.1 as well as Respondent No.2 will have to provide same kind of battery as stipulated in the tender, leaving no discretion to choose a battery with lower capacity. Petitioner No.1 is far superior to Respondent No.2 in financial, manufacturing and operational capacity. As against one manufacturing unit of Respondent No.2, Petitioner No.1 has seven manufacturing units and can ensure timely supply of buses.

j. The Courts under Article 226 has wide powers to set aside the tender and direct that a fresh tender be floated by Respondent No.1 and award of contract be completed within three months. Once tender is vitiated by illegality, such illegality is not severable and the entire tender must go. Fresh tender would ensure that legitimacy is not granted to tender process tainted with malice and favouritism. No public interest will be impacted as the earlier tender of 2021 for the same electric buses was withdrawn in February 2022 in which Petitioner No.1 was the L-1 bidder and the present tender was floated on 26th February 2022. At best, there will only be a lapse of three months. The withdrawal of 2021 tender in which Petitioner No.1 was the successful bidder was possibly done to ensure that the tender is awarded to Respondent No.2.

k. The learned Senior Advocate, in the alternative, submits that the principle of severability be applied and Petitioner No.1's bid be directed to be considered without reference of AIS standards in view of the declaration given by it that it would meet the operating range requirement under actual conditions.

4 Mr. Dhond, learned Senior Advocate for Respondent No.1, in his usual lucid manner, submitted that;

(a) the BEST has past experience in running electric buses as well. It was, before the tender, operating a fleet of electric buses. This experience shows that there is a difference in the rated range of an electric bus (determined under test conditions) and the actually observed range of an electric bus in real operating conditions prevailing in Mumbai. BEST, therefore, while framing its requirements, consciously opted for a specific reference to “in actual conditions” and consciously excluded any reference to “AIS 040” or “Standard Conditions”, in the tender specifications. As BEST’s buses presently run approximately 200 Kms in a day, therefore, floated the present tender document for electric buses which can run 200 Kms in a single charge with 80% SoC, in actual conditions for the relevant gross vehicle weight with Air conditioning, without any interruption. If they run less, the operator would be fined for every km less. If this was observed to be a frequent phenomenon, the contract could be terminated. Any reference to “test standards” or “rated range” would make 200 kms mandate unworkable and illusory, since this would open an escape for the tender / operator.

(b) Petitioner No.1, by its letter dated 11th March 2022 requested Respondent No.1 to consider (i) the electric buses

shall have a range of 200 kms per day with a 75 minutes charging time during the day operations; and (ii) Range testing conditions should be as per AIS040/FAME II. The said request was not granted by Respondent No.1. The Minutes of Meeting held on 15th March 2022 attended by representatives of Petitioner No.1 clearly records that only the changes to the tender document that are allowed / permitted by the BEST are recorded and other terms of the tender document remain unchanged. Despite knowing that their request for relying on AIS 040 and for 75 minute charging time had not been accepted by the BEST, Petitioner had submitted its bid by adding a reference to “standard conditions as per AIS 040 to be adhered”. In Annexure-F which is a Schedule of departure from the conditions in the tender document stated that the operating range shall be met as certified as per AIS 040. In Annexure-Y, Petitioner No.1 modified the undertaking to be provided by the original equipment manufacturer and stated that the minimum operating kms of the SD buses in a single charge will be 200 kms with 80% SOC certified as per AIS 040 and that the buses will run without any interruption under standard condition as per AIS 040 norms.

(c) Petitioner No.1 was conscious of the distinction between

the “test conditions” or “rated range” or “standard conditions” and “actual conditions” what BEST was insisting. Except the Petitioner, none of the bidders submitted bids making reference to AIS 040 standards or departure from actual tender conditions. At best, the AIS 040 standards prescribe “manufacturing standards” which every electric bus must adhere to. They are a minimum threshold to secure type registration and/or subsidy benefits. They do not constitute a prohibition against everyone asking for more. The conditions mentioned in the CMVR and other Notifications / Rules highlighted by the Petitioner No.1 are manufacturing conditions and not Respondent No.1’s requirement for its electric buses. The BEST conditions in AIS 040 is different from the actual road conditions in city like Mumbai. Respondent No.1 has phased out its diesel and CNG buses gradually. Due to this, fleet strength of the BEST is drastically decreasing and difficult to maintain bus services. Thus, considering the same and in order to avoid any ambiguity with respect to operating range of the electric buses. Respondent No.1 specifically required the electric buses of the bidders to run 200 Kms in a single charge with 80% SoC on actual conditions for the relevant gross vehicle weight with air

conditioning, without any interruptions. Since Petitioner No.1 admittedly failed to comply with the same, Respondent No.1 declared the bid of Petitioner No.1 as non responsive.

(d) Learned Senior Counsel for Respondent No.1 further submits that Respondent No.1 has legitimately accepted the bid of Respondent No.2 as it was compliant in all respects. At Annexure-F Respondent No.2 clearly stated that there is no deviation in the bid submitted by it. As per clause 3.5 (e) and 12 of Schedule-IX, Respondent No.2 agreed to comply with Respondent No.1's tender condition of running the electric buses for 200 Kms in a single charge with 80% SoC, on actual conditions for the relevant gross vehicle weight with air conditioning without any interruptions. In Annexure-Y submitted by Respondent No.2 along with its bid, inadvertently stated that Respondent No.2 would require one hour charging time for running the 200 Kms distance. Annexure-Y discrepancy was an inadvertent error of something which was peripheral or incidental. On the basis of the substantive representation (actual offer) made by Respondent No.2, Respondent No.1 had accepted the bid of Respondent No.2 and declared the same as technically responsive. What BEST did was pragmatic, sensible and accorded with robust common

sense.

(e) Respondent No.1 did not introduce any extraneous standards / measure. It had acted on the basis of the actual conditions. It asserted that the bid was not in any manner deviated. However, the statement of OEM (in Annexure-Y) was not in sync. Respondent No.1, therefore, relied upon the substantial representation / bid and not something incidental or peripheral. The Petitioner is making a hue and cry of the email issued on 6th May 2022 at 11.36 a.m. by Respondent No.2 on its own volition submitting the correct version of Annexure-Y. This was a few hours before the award of the bid. This correspondence did not make any difference insofar as Respondent No.1 is concerned. A large tender such as the present, goes through an elaborate process and the decision on whom to award a particular tender goes through various levels of approvals before the same is awarded. It is a little unrealistic on the part of the Petitioner to suggest that till a few hours before the final award, the bid of Respondent No.2 was not technically compliant and became so only on receipt of the e-mail dated 6th May 2022 and in a matter of hours was declared as successful. On 20th May 2022 Respondent No.1 issued letter of acceptance of Respondent No.2 on 26th May

2022, a contract was also executed between Respondent Nos.1 and 2 for 2100 buses. The arguments of discrimination or favouritism does not merit any consideration. Respondent No.1 in its reply had clearly stated that the decision to treat the bid of Respondent No.2 as technically responsive had nothing to do with communication dated 6th May 2022. The substantive bid of Respondent No.2 would prevail over an OEM's statement.

(f) The learned Senior Counsel submits that due to bidders making their own charging facilities, it was operationally inconvenient to have multiple bidders due to lack of space for charging stations and as such, it would be difficult to allow the compliant bidders to match the lower offer and quantity of buses being distributed between them. Further, two other bidders whose bids were found responsive also could not match with the production time-line as required by Respondent No.1. Therefore, Respondent No.1 was constrained to award the tender for supply of all buses to Respondent No.1.

(g) Learned Senior Counsel further submits that if the request of the Petitioner is accepted to cancel the tender, then the same would lead to having unfair treatment to Respondent

No.2. There would be significant time and financial loss to the stakeholders which should be avoided. Petitioner No.1 knew that its reliance on AIS -040 has not been accepted by the BEST in the light of pre-bid meeting held on 15th March 2022. Further in the previous similar tender, in which Petitioner No.1 was declared L-1 but was cancelled due to lack of subsidy by the Central Government, no reliance was placed by the Petitioner on AIS 040. Thus, reliance on AIS 040 was something Petitioner No.1 deliberately chose to do for the present tender as it was aware its buses would not run 200 Kms with actual on-road conditions. After rejection of its request in the pre-bid meeting, Petitioner No.1 proceeded to submit its bid with various deviations from the specifications required by Petitioner No.1.

(h) The learned Senior Counsel submits that the Court should exercise restraint if the tender process is in consonance with the language of the tender document or sub-serve the purpose for which the tender is floated. A tenderer is a best person to interpret its tender document. It is further submitted that the principles of equity and natural justice stay at a distance and no judicial interference is warranted even in

cases of procedural aberration or error in assessment, if a decision is *bona fide* and in public interest.

5 Mr. Sundaresan, learned Counsel for Respondent No.2, in addition to the submissions of the learned Counsel for Respondent No.1 emphatically submits that the tender entailed a “wet lease” of the buses to be operated by the successful bidder. The metric to be met in the tender was one of the performance and not one of the manufacturing standard. The manufacturing standard, the rating to be met by the manufacturer at the time of supply of the buses are industry standard AIS O40. Every bidder’s buses must meet the standards of buses at the time of delivery. The Petitioner was rightly declared to be non compliant and deviant from the core requirement of the tender. If the performance standard is not met by a bus, deductions would follow. If the stipulations at Clause 3.5(e) and Clause 12 were to be diluted by reference to a manufacturing standard at delivery of prototype (dehors the actual performance), the very substratum of the contract i.e. the provision of seamless bus service to the citizens of Mumbai at the risk of financial penalty, would be disturbed.

6 The learned Counsel submits that it is nobody’s case that the conditions were incapable of being met or that Respondent No.2

alone agreed to an incomprehensible requirement. All bidders understood the terms at Clause 3.5(e) and Clause 12 *ad idem* and did not raise the issue that the Petitioner raised. The Petitioner No.1 has admitted the deviation in Annexure-F and Annexure-Y changing an actual performance requirement into certification at delivery. Respondent No.2 made no such deviation as the Petitioner did. Annexure-F filed by Respondent No.2 explicitly confirms that there are no deviations at all. The learned Senior Counsel for Respondent No.2 submits that in Annexure-Y of Respondent No.2, the OEM who had also provided an undertaking in an earlier tender of 2021 also floated by Respondent no.1 had made an inadvertent error by using the earlier document as the base. No sooner than the error was realized, Respondent No.2 issued a clarification. Even without the e-mail of 6th may 2022, a conjoint and contextual reading of Respondent No.2's bid documents would show that Respondent No.2 had no doubt at all in its mind that it would be accepting for performance, the standards as stipulated in Clause 3.5(e) and Clause 12 without demur or conditions, and its buses would run 200 Kms without more than 80% of the battery being used and without interruptions for charging. Annexure-Y as originally filed contains inherent emphatic commitments to the foregoing. The learned Counsel submits that there is no question of

favouritism to Respondent No.2. The tender of Respondent No.2 was in accordance with the tender conditions. E-mail dated 6th May 2022 was not an after-thought. It was sent suo motu by Respondent No.2 no sooner than the potential for any confusion in Annexure-Y was discovered. None of the clauses 8, 56 and 65 stand violated by the e-mail dated 6th may 2022, which was neither an attempt to lobby nor a material change of the bid documents. Grant of any relief to non meritorious Petitioner in the form of re-tender would cause irreparable harm and injury to the provisions of the provision of electric bus service to the citizens of Mumbai.

7 We have considered the submissions canvassed by the learned counsel for the parties.

8 The present petition basically assails the action of Respondent No.1 holding the Petitioner's technical bid non responsive. The Petitioner's bid is held to be non responsive on the ground that the Petitioner had deviated from the mandatory condition of the tender viz. Clause 3.5 (e) and Clause 12 of Section 2 of Schedule-IX. Clause 3.5(e) and Clause 12 of Section 2 of Schedule-IX read thus:

3.5 (e)	Minimum Operation Range per bus per day	The minimum operating Km of the buses offered in single charge will be 200 Km, for SD buses respectively with (80% SOC). These ofered buses should run above mentioned minimum Km without any interruption.
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12	Operating range	<p>Presently the BEST buses operate for around an average of 200 kms. per day (mostly uninterrupted). Keeping the above in mind, the EV manufacturers have to provide vehicles which can run 200 km. in single charge for SD AC Buses in actual conditions for the relevant GVW with Air Conditioning. The Operating schedule shall be provided by BEST and the successful bidder has to ensure the uninterrupted operation of the schedules through adequate spare buses.</p> <p>In case the successful bidder is unable to maintain uninterrupted operation of schedules for want of charging, then BEST shall take suitable action by levying additional penalty by non-payment towards assured kms for that entire day per instance and if the instance keep on recurring for a long period of time then the BEST may resort to even termination of Contract.</p>
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9 Reading the aforesaid, it is unambiguous that operating range provided in the tender document is that the electric vehicles manufacturers have to provide the vehicles which can run 200 kms in single charge for SD air conditioning buses in actual conditions for relevant GVW air conditioning. The *prima donna* requirement of the tender document it appears is that the electric vehicle offered should run 200 Kms in a single charge for Single Decker air conditioning bus in actual conditions with 80% SoC without any interruption.

10 Petitioner No.1 herein, before pre bid meeting on 11th March

2022, requested Respondent No.1 and sought amendment to Clause 3.5(e) of the tender document. Petitioner No.1 wrote to Respondent No.1 requesting for certain modifications to the tender document. Petitioner No.1, under letter dated 11th March 2022 requested amendment to Clause 3.5(e) viz. bus shall cover 200 Kms per day with 75 minutes of opportunity charging time during the day operations. It further suggested that single charge criteria is to be removed, as it shall only lead to additional dead battery weight on the bus and additional KWH/KM consumption while in operations for 12 years period leading to loss of power. It further required that range testing conditions should be as per AIS 040 / FAME-II. The said relevant amendment sought by the Petitioner in the tender condition is as under:

“Request clause to be amended as:

The bus shall cover 200 Kms per day with 75 minutes of opportunity charging time during the day operations.

Single charge criteria is to be removed, as it shall only lead to additional dead battery weight on the bus and additional KWH/KM consumption while in operations for 12 years period leading to loss of power which is national reserve.

Also range testing conditions should be as per AIS 040 / FAME-II.”

11 The pre-bid meet with various tenderers took place. Suggestions by various bidders were discussed and deliberated upon.

The minutes of the pre bid meeting did not record that the amendment suggested by the Petitioner to Clause 3.5(e) was accepted. Annexure-F deals with Schedule of Departures from Technical Specifications. The Petitioner by filling Annexure-F specifically disclosed that there is variation. As per Clause 3.5 (e) and Clause 12 of Section 2 of Schedule-IX, the departures Petitioner No.1 was resorting to is that, the Petitioner shall meet the operating range requirement of 200 km @ 80% SOC in single charge as certified as per AIS 040. Annexure-F submitted by Petitioner No.1 reads thus:

ANNEXURE-F
SCHEDULE OF DEPARTURES FROM TECHNICAL SPECIFICATIONS

Sr. No.	Ref. to Section-1 to Section-8 of Technical Specifications, Schedule-IX & Special Conditions of Contract	Departures	Justification / Reasons
1	Schedule IX, Section 2 Pt.3.5(e), 12 : Presently the BEST buses operate fro around an average of 200 kms. per day (mostly uninterrupted). Keeping the above in mind, the EV manufacturers have to provide vehicles which can run 200 km. in single charge for SD AC buses in actual conditions for the relevant GVW with Air Conditioning. The Operating schedule shall be provided by BEST and successful bidder has to ensure the uninterrupted operation of the schedules through adequate spare buses.	Shall meet the operating range requirement of 200 km @ 80% SOC in single charge as certified as per AIS 040.	AIS 040 standard under CMVR norms for battery operated electric vehicles measures operating range of vehicles on which all EV vehicles are certified by ARAI/VRDE/ICAT etc. Vehicle offered by TML shall meet range requirement in line with AIS 040 norms and corresponding certificate shall be produced during prototype delivery.

12 Petitioner No.1 was aware of the fact that it was making a departure from actual condition of the tender. Petitioner No.1 has filled in Form F accepting deviation from the conditions of the tender though it was aware that the request for amendment to Clause 3.5(e) (12) of the tender document was not accepted in the pre-bid meeting. 200 Kms road range as per the AIS 040 certification would be upon the standard conditions such as maintaining the standard speed, climate and other things. Whereas, it may not take into account the traffic conditions on the road, the temperature, traffic jam, opening of the doors of the air conditioned buses at every stop. It is with the same view Respondent No.1 had incorporate covenant in the tender that the buses shall run 200 Kms in a single charge with 80% SoC “in actual conditions” for the relevant gross vehicle weight with Air Conditioning, without any interruption. It is for the bidder to use a battery that would maintain the same after considering the traffic conditions and all other aspects and not on mere the standard range certified under AIS 040. Moreover, Petitioner No.1 was aware of the distinction between the actual conditions and the standard conditions as per the AIS 040 norm, that is why has filled in Form-F accepting deviation from the conditions of the tender. Prior to the pre bid meet also, Petitioner No.1 sought for amendment of the said clause and instead “in actual

conditions” it wanted to be replaced by AIS 040 standard. The tender of the Petitioner was not compliant with the requirement of Respondent No.1. Even under Clause 3.5 (e) of the tender document, Petitioner No.1 responded that it is noted and agreed for achieving the range of 200 Kms @ 80% SoC in single charge as certified as per AIS 040.

13 Petitioner No.1 did not submit its bid for 200 Kms @ 80% SoC in single charge on actual condition but at standard test conditions as per AIS 040. As per the tender condition if a person to whom the contract is awarded i.e. lessee does not comply with the condition of achieving range of 200 Kms at 80% SoC in single charge then he is penalized for the same. Meaning thereby, Respondent No.1 was conscious that the standard test conditions as per AIS 040 is different than the actual condition. The tender of the Petitioner certainly was not compliant with the said clause. The Petitioner has deviated from the material and the substantial term of the tender. The Petitioner, as such, is rightly disqualified for deviating from the material requirements stipulated in the tender.

14 This takes us to the next challenge raised by the Petitioner viz. the technical bid of Respondent No.2 was also not responsive, as such, ought not to have been accepted.

15 Respondent No.2, while filling in the tender, did not state that it is deviating from the tender. Respondent No.2 agreed to comply with clause 3.5(e) and Clause 12 of Section 2 of Schedule IX and represented that the electric bus would run 200 Kms in a single charge with 80% SoC, in actual conditions for the relevant gross vehicle weight with air conditionings without any interruption. In Annexure-F, Respondent No.2 had made a declaration that there are no deviation in the bid submitted by it viz. the tender document. However, in Annexure-Y, which is a letter to be issued by the OEM to Respondent No.2 along with its bid, it was stated that Respondent No.2 would require one hour charging time for running 200 Kms distance. Annexure-Y submitted by Respondent No.2 certainly was not in conformity with the requirement of Respondent No.1.

16 In matters of tender, this Court would be slow to exercise its writ jurisdiction. The writ jurisdiction would be exercised sparingly and not as a matter of course. This Court would be more concerned with adherence to the decision making process. However, if the Court finds that the decision making process smacks of arbitrariness then this Court in matters of contract and tender may step-in and exercise its jurisdiction under Article 226 of the Constitution of India. Arbitrariness is antithesis to the rule of law, justice, equity, fair play and good conscience and arbitrary decision cannot be

sustained. Arbitrariness has no role in the society governed by Rule of Law.

17 It is on the touchstone of the aforesaid principle, we will have to consider whether Respondent No.2's acceptance of the bid by Respondent No.1 satisfies fairness in action. The following dates would be relevant. The last date for filling in tender it appears was 2nd May 2022. On or about 4th May 2022, the technical bids were opened. On 6th May 2022, the technical evaluation was issued and Respondent No.2 was declared as eligible bidder. Clause 16 of Schedule-I of tender document (invitation of proposal) specifically prohibits any addition/correction or submission of document after the technical bids were opened. The technical bids admittedly were opened on 4th May 2022. On 6th May 2022 Respondent No.2 intimated Respondent No.1 that it had submitted two deviation statements in its bid document and had also wrongly mentioned that in single charge the buses can run 200 kms with 80% SoC in technical specifications of its bid and in Annexure-Y it had mentioned that the buses can run 200 kms with 80% SOC on single charge without any interruption but wrongly mentioned "intermediate charge requirement". Hence, it is submitting a revised Annexure-Y (undertaking from OEM for operating range as per single charge requirement) and thereafter submitted a revised

Annexure-Y i.e. undertaking from OEM for operating range.

18 As per clause 16 of Schedule-1 of the tender, after opening of the technical bids on 4th May 2022 no bidder is allowed to revise/correct or add any technical bid. The said letter was issued by Respondent No.2 to Respondent No.1 on 6th May 2022 at 11.35 a.m. In the afternoon, Respondent No.2's bid was held to be responsive. The stand of Respondent No.1 is that the communication on 6th May 2022 by Respondent No.2 of revising his Annexure-Y was not material nor was taken into consideration in holding the bid of Respondent No.2 responsive and/or qualified and that Respondent No.1 did not commit any illegality by accepting the bid of Respondent No.2 and that Annexure-Y was a clear an inadvertent error. The same was peripheral and incidental. It is further case of Respondent Nos.1 and 2 that Respondent No.2 had clearly stated in its bid that its buses will run 200 Kms in single charge with 80% SoC in actual conditions for the relevant gross vehicle weight with air conditioning without any interruption and that in Annexure-F' stated that there were no deviations in the bid and as such Respondent No.2 had squarely and unconditionally accepted Schedule IX Section 2 Clause 12. It is on the basis of substantial representation made by Respondent No.2, Respondent No.1 accepted the bid of Respondent No.2.

19 The question whether Annexure-Y would be an incidental or peripheral document. Annexure-Y is an undertaking from the Original Equipment Manufacturer (OEM) for operating range. Under the tender document, the bidder was required to give an undertaking of the Manufacturer from whom the bidder would be purchasing the equipment i.e. the battery of the operating range. The undertaking of OEM cannot be said to be incidental or peripheral. Annexure-Y submitted by Respondent No.2 reads thus:

**ANNEXURE-Y
UNDERTAKING FROM OEM FOR OPERATING RANGE**

“i) The minimum operating Km of the Single Decker buses offered in single charge will be 200 Km with (80% SOC).

The operating range with opportunity charging time are as follows:

Sr. No.	Type of Bus	Run Km	Opportunity charging time
1	Single Decker (SD)	200 Km	1 hour

ii) These offered buses will run above mentioned minimum Km without any interruption.

iii) Also, we are aware that in case, we are unable to maintain above operating range of buses, then BEST shall take suitable action by levying additional penalty by non-payment towards assured kms. for that entire day per instance and if the instance keep on recurring for a long period of time then the BEST may resort to even termination of Contract.”

The said undertaking from OEM for operating range is signed by Respondent No.2 also.

20 It has been contended by Respondent No.1 that letter issued by Respondent No.2 on 6th morning did not influence the decision to hold the bid of Respondent No.2 responsive in the afternoon of 6th May 2022. The same is not borne-out from the facts and circumstances of the case. Clause-16, as stated above specifically and categorically prohibits additions / corrections / submission of documents after opening of technical bid. Technical bids have been opened on 4th May 2022. Thereafter no such letter could have been entertained. The proximity of the time i.e. 6th May at 11.35 a.m. the letter issued by Respondent No.2 along with the modified Annexure-Y and after two hours, the bid of Respondent No.2 held responsive, does not support the contention of Respondent No.1 that the said revised Annexure-Y and the letter written on 6th May morning did not weigh in holding Respondent No.2's bid responsive. First of all, accepting the letter from Respondent No.2 by Respondent No.1 on 6th May morning itself was against the specific terms of the tender (clause 16). It is further case of Respondent No.1 that on 6th morning revised Annexure-Y forwarded by Respondent No.2 was *sou motu* and not at the instance of Respondent No.1, may not be relevant here. The fact remains that Respondent No.2 was allowed to submit the letter and revised Annexure-Y after two days of the opening of technical bids. It is also

the fact that on 28th April Respondent No.2 had submitted the bid and on 2nd May it had submitted the revised bid, however, with same Annexure-Y clearly stating that it would require opportunity charging time of one hour. The same would not be in tune with the tender conditions.

21 From the aforesaid facts, it is clear that; (i) the tender documents submitted by the Petitioner contained deviation in Annexure-Y i.e. the undertaking from OEM stating that one hour charging time would be required for achieving operating range of 200 Kms.; and (ii) Respondent No.2 submitted the revised Annexure-Y on 6th morning i.e. two days after the opening of technical bids and after acceptance of revised Annexure-Y on 6th May morning, the technical bid of Respondent No.2 was accepted in the afternoon of the same day.

22 The aforesaid does not depict fair play in action. The facts create doubt about, whether the decision was a fair one or was the decision reached fairly? The same does not appear to be so in view of the facts discussed above while accepting the bid of Respondent No.2 as responsive.

23 We are aware that principle of equity and natural justice stay

at a distance and no judicial interference is warranted in case of an error in assessment. However, the same holds good, if the decision is bona fide. We are also aware that interference of the Court would lead to some delay. It would be seen that earlier also the tenders were issued. However, because of non sanction of subsidy, the earlier tender process was scrapped and fresh tender process is issued. For accepting the bid of Respondent No.2, 90 days' time is provided to it for getting the prototype vehicle. The said period is not over. It is not even one month, the Respondent No.2's tender is accepted. The Courts upon coming to the conclusion that the decision making process was not fair, same lacked fair play in action and arbitrary, will have to step in.

24 In the light of the above, we set aside the decision of the Respondents of acceptance of tender of Respondent No.2. Respondent No.1, if it so desires, may proceed with fresh tender process.

25 Rule made absolute accordingly in the above terms.

26 The Writ Petition stands disposed of. No costs.

(MADHAV J. JAMDAR, J.)

(S.V. GANGAPURWALA, J.)