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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2037 OF 2019

1. **BHARTI AIRTEL LIMITED,**
Having its registered office at 1,
Bharti Crescent, Nelson Mandela
Road, Vasant Kunj, Phase-III, New
Delhi 110 070
2. **MR. SAMEER CHUGH,**
1058, Sector-A, Pocket-B, Vasant
Kunj, New Delhi 110 070

...Petitioners

~ VERSUS ~

1. **MAHARASHTRA INFORMATION
TECHNOLOGY CORPORATION
LIMITED,**
Room No. 514, 5th Floor, Annexe
Building, Hutatma Rajguru Chowk,
Mantralaya, Mumbai, Maharashtra
— 400 032, through its Managing
Director
2. **BHARAT SANCHAR NIGAM
LIMITED,**
Bharat Sanchar Bhavan, Harish
Chandra Mathur Lane, Janpath, New
Delhi 110 001, through its Managing
Director
Also at:
Administrative Building, B-Wing,
Juhu Danda Telecom Complex, SB
Patil Road, Santacruz West, Mumbai



Suburban, Mumbai, Maharashtra —
400 054

**3. RELIANCE JIO INFOCOMM
LIMITED**

Reliance Corporate Park, No. 8A
Wing, 1st Floor, 5 TTC Industrial
Area, Thane Belapur Road,
Ghansoli, Navi Mumbai 4000 071,
through its Managing Director.

...
Respondents

APPEARANCES

**FOR THE
PETITIONERS**

Mr Aspi Chinoy, *Senior Advocate &
Mr Venkatesh Dhond*, *Senior Advocate*,
a/w Mr Harsh Kaushik, Dr Abhinav
Chandrachud, Mr Siddharth Ranade,
Ms Chitra Rewtala, Ms Shivani Garg and
Mr Mihir Dalwai, i/b Trilegal.

**FOR RESPONDENT
NO.1**

Mr A.Y. Sakhare, *Senior Advocate*
a/w Mr Joel Carlos

**FOR RESPONDENT
NO.2**

Ms Martina Sapkal, *Advocate*
a/w Priyanka Gaonkar, i/b M/s Arun
Sapkal & Co

**FOR RESPONDENT
NO.3**

Mr Darius Khambata, *Senior Advocate*
a/w Mr Gaurav Mitra, Mr Ankit Lohia,
Mr Amey Nabar, Mr Rishit Badiyani,
Mr Ketan Dave and Ms Swati N. Jain,
i/b M/s A.S. Dayal & Associates

ALSO PRESENT

Mr Mukesh Somkuwar,
Head, Project Management



**CORAM : S.C. DHARMADHIKARI &
G.S. PATEL, JJ.**

DATED 19th August 2019

:

ORAL JUDGMENT (per G.S. Patel, J):

1. The 1st Petitioner (“**Bharti Airtel**”), the 2nd Respondent (“**BSNL**”) and the 3rd Respondent (“**Reliance Jio**”; “**Jio**”) are all telecom service providers or TSPs. BSNL is State-owned. Bharti Airtel and Reliance Jio are privately controlled. The 1st Respondent (“**MahaIT**”) is a company wholly owned by the State of Maharashtra. It is the nodal agency to implement information and communication technology across India.

2. In this Petition filed on 29th July 2019, Bharti Airtel invokes our writ jurisdiction under Article 226 of the Constitution of India first for a certiorari to quash (i) MahaIT’s notification issued six months earlier on 2nd February 2019 declaring Reliance Jio’s bid of Rs. 1,25,659 as the lowest at a ‘reverse auction’; (ii) MahaIT’s letters 24th June 2019 (Exhibit “L” to the Petition) and 18th July 2019 (Exhibit “N” to the Petition); and (iii) ‘any letter of intent and/or contract’ issued to Reliance Jio by MahaIT pursuant to the 2nd February 2019. The second prayer is for a mandamus to recommence the ‘reverse auction’ under a Request for Proposal dated 7th December 2018 ‘starting with’ Bharti Airtel’s *negative* bid for Rs.-98,98,74,341.



3. Having heard the rival contentions, we are not persuaded that there is any ground made out to issue either writ, or that MahaIT's decision and notification suffer from such perversity, illegality or unreasonableness as would warrant our interference. We have rejected the writ petition for the reasons that follow.

4. On 7th December 2018, MahaIT issued a Request for Proposal or RFP. This had a title of the usual unwieldiness: *Request for Proposal for Selection of Telecom Service Provider (TSP) for Implementation of Urban Mahanet for the State of Maharashtra*. Fundamentally, MahaIT was in search of TSPs to provide high-speed internet-based connectivity across the State, with all components: services, effective and stable bandwidth, cost-optimization. The project targeted e-Governance services to be rendered to citizens ("Government to Citizens" or "G2C"; healthcare, subsidies etc) and to various government agencies ("Government to Government" or "G2G"; payment consolidation and so on). The RFP itself had one vital feature: it provided major concessions and benefits in regard to what are usually high-cost elements, particularly 'Right of Way' fees. These are costs that TSPs incur while laying cables or lines along or across roads. The work involves digging up portions of public roads, many of which are vested in different authorities or agencies, laying the cables, and then closing, refilling and resurfacing the road. The RFP promised an across-the-board waiver of RoW fees, and, in addition, access to all roads and government buildings, including those of local bodies, schools, primary health care centres, hospitals, colleges and statutory corporations. Bharti Airtel says these benefits are of 'tremendous' value to any TSP. Specifically, it says these waivers



and benefits 'far outweigh the costs that the TSP would incur in providing the contracted services'.

5. The RFP said that the bidder would be selected by a Reverse Auction with decreasing bids, until the 'lowest bidder' was selected.

6. This is all fairly plain, so far as it goes, but unfortunately it tells us only part of the story. A reverse auction is exactly what the name suggests — an attempt to find the lowest bidder, by getting bidders to bid less and less, until some base floor price is reached. In a normal auction, competing bidders would bid higher and higher; this is the reverse. Both types of auction require a starting point. In a regular auction, this is called the reserve bid or reserve price. None may bid less than this. The starting bid has to be at or above this pre-determined reserve bid. The situation for a reverse auction is exactly the same. There must be a starting price, and all bidders must start by bidding *under* this specified price. This is necessary and only logical: bidders must know where to start. Consequently, it is self-evident that the fixing of the starting price or reserve bid is crucial to any such process. Where the auction is of goods (art, antiques, collectibles) or immovable property, setting the reserve price generally presents no difficulty. The item is valued, and this value is used, within a reasonable margin, to set the starting or reserve bid. But here, the person offering the goods or property is always the vendor. Where the proposed contract is by a *purchaser*, different considerations may apply. The purchaser evidently wants to pay the lowest possible price. Therefore, the starting point must be the maximum the purchaser is willing to pay, and a 'reverse auction' is then conducted to reduce the purchase price to the maximum extent



possible. The purchaser is always the paying party, and the bidders are the service providers who are beating each other down. They are the payees, albeit at the lowest price obtained. We do not think this situation, where the reverse auction is at the instance or for the benefit of a purchaser, can ever end in a result where the purchaser is the payee, and, far from paying out any money, receives money from the service provider.

7. We have discussed this at the forefront because it is central to Mr Chinoy's case for the Petitioners. His construct is this: once the maximum 'reserve' price was determined (i.e. the maximum MahaIT was willing to pay the successful service provider), bidders had to compete against each other to reduce this 'purchase price'. His submission is that this could go down to zero. But he does not stop at that. He says, further, that indeed the bid could be a *negative* value, i.e. a bidder could offer to pay MahaIT (far from receiving anything from MahaIT). The reason, he submits, is that the free or concessional benefits were so valuable that any telecom operator would actually pay for that benefit and also render the contracted services. Specifically, his submission is that if there was to be a minimum or a floor below which bids could not go, the tender document had to specify it. Absent such a specification, it was theoretically possible to keep the negative bids open-ended, presumably to an infinity or unknown value until there were no further bids. So long as the bids decreased according to the specified amount and in specified intervals, there could be no 'minimum' or 'floor' unless it was specified. Hypothetically, therefore, if the reverse auction bidding started at, say, Rs. 1000 crores, it was possible to bid Rs.-1000 crores, or even Rs. -10,000 crores: far from



paying out Rs.1000 crores, or some reduced value, MahaIT, the contractual ‘purchaser’ would *receive* from its ‘vendor’ a substantial amount; perhaps much more than the maximum price it had computed to begin with.

8. This seems to us to be counter-intuitive and without known or established precedent. As we shall see, there was a possible computer coding error displayed on screen, but this can hardly nullify contractual conditions. Where coders err, lawyers prosper, and it seems to us that this is all there is to it. To put it bluntly, Bharti Airtel’s case that it was willing to *pay* MahaIT to be the chosen service provider (meaning that it would both pay out and would deliver services) is possibly only ingenuity borne of desperation. Certainly we have seen nothing at all to indicate that from the very inception Bharti Airtel found the concessions and free access so very financially seductive, that it offered to do this work free or by paying MahaIT for the privilege of being a service provider. The record is to the contrary. Bharti Airtel first made this claim of the privileges and concessions being worth thousands of crores of rupees only after the Reverse Auction had closed against it.

9. There are only a few documents to consider. The principal one is, of course, the Government Resolution dated 28th September 2018 that preceded the RFP, then the RFP itself with its salient terms, and finally there is some subsequent correspondence.

10. The RFP was preceded by a Government Resolution dated 28th September 2018. A copy is at Exhibit “A”. This is how it reads.



Implementation of Urban Mahanet project and Delivery of E-Governance Services

Government of Maharashtra
General Administrative Department
Government Resolution No .. GAD-...2018/CR
25/Sect3/39
Mantralaya, Mumbai 400 032
Dated: 28/09/2018

Introduction:-

The prestigious MahaNet (Bharat Net: phase 2) project is being implemented for providing high speed internet connectivity to around 13000 Gram Panchayats in the State through the State led implementation model. The project is being executed by the 100% Government owned company, Maharashtra Information Technology Corporation (MahaIT), which is the Special Purpose Vehicle (SPV) & the State Implementation Agency (SIA) for the project. The project will comprise of underground optic fibre cable (for around 70% of the Gram Panchayats) and use of the aerial route using the electricity transmission and distribution network for the remaining Gram Panchayats. Providing connectivity to 12,740 GPs across 172 Talukas in 26 Districts with more than 50,000 KMs of fiber to be laid out during the implementation. The project aims at establishing a scalable, futuristic (IP-MPLS based), resilient (ringbased), high capacity State-wide optical fiber network with telecom carrier -grade capabilities and reliability. Setting up a strong ICT backbone, while optimizing the economy of effort in a time-bound manner. Ensuring connectivity from Taluka to GPs with availability of Points of Presence (POPs) and horizontal connectivity to Government institutions. Vital Public Purpose project that



would enable delivery of eGovernance services such as e-Health, e-Education, e-Agriculture, etc.

In line with the rural MahaNet, Urban MahaNet program will be a “Vital Public Purpose Project” aimed at providing high speed connectivity for delivery of services, through provision of cost-effective bandwidth connectivity, providing cost optimized broadband connectivity at various Government departments in Maharashtra, including point-to-point and Internet bandwidth at urban local bodies, municipal corporations, municipalities for all urban centers (cities and towns), so as to enable them to provide e-Governance services such as G2C services (e-Health, e-Education, etc.), as well as G2G services (e.g., e-data governance and access, payments consolidation). Deploy a faster, convenient, and cost-effective approach to leverage the existing Telecom Service Provider (TSP) network and extend its reach In cities and towns to support all present and future Government connectivity requirements.

It was under consideration of Government to rollout digital/e-Governance services (such as e-health, e-education, e-agriculture, etc.) in rural and urban areas planned to be covered under BharatNet (I & II) and Urban MahaNet programs. Expansion of coverage of existing programs being operated by various Government departments across the State such as healthcare, education, etc. Enhancement of eGovernance services attributes, and upgrade of underlying infrastructure currently being deployed by the departments for delivery of e-Governance services.



Government Resolution:-

Part I-Urban Mahanet:-

- (a) Urban MahaNet project is hereby declared as a “Vital Public Purpose Project”.
- (b) Government has approved the project for the implementation for scope, selection methodology, and timelines.
- (c) Project will be implemented by Maharashtra Information Technology Corporation Ltd. (MahaIT). MahaIT is hereby authorised to make necessary changes in plan and in tender document if required and float a tender for the selection of Telecom Service Provider (TSP).
- (d) **Right of Way (ROW) fees across the state (including underground and aerial) is hereby waived off for the project. TSP will pay restoration charges. TSP will be allowed to access all the roads and Government and para statal office buildings including those of local bodies, schools, Primary health centers, Hospitals colleges, Statuary Corporations of state Government.**
- (e) **No separate permission will be required to be taken by the TSP for ROW. Only prior intimation will be given to concerned authorities seven days before start of work (trenching/laying of Cable, connection, installation of equipments etc.) for both roads (bridges and flyovers) and buildings.**
- (f) **Necessary access will be given to all buildings and roads by local bodies, Schools, public hospitals,**



Colleges, state Government statutory bodies etc. to TSP for laying fiber (both underground and aerial), installation of poles etc. for the provision of bandwidth.

- (g) Urban Development department will issue necessary instructions to all the local bodies to cooperate with Maha IT and its agencies for the ROW permissions.**
- (h) TSP will have option for installation of Smart Poles i.e. TSP can erect Smart Poles, which can be leveraged for deployment digital signage, microcells for 4G/5G, IoT based sensors, etc., and Wi-Fi provisioning, i.e. TSP to deploy access points inside the premises of inscope Government offices/ departments.**
- (i) Contract with TSP will be for 3 years with option to extend for next 2 years.**
- (j) A Steering Committee will be formed under the Chairmanship of Chief Secretary with Principal Secretary-IT, Principal Secretary-Home, Principal Secretary-Urban Development (UD2) and Director-General of Police (DGP) as a member of the committee. The committee will meet on a periodic basis to review and monitor RoW progress, and resolve issues related to obstructions to execution of the this project.**

Part II- Delivery of E-Governance Services:

- (a) Government has approved the proposed program for the implementation.**
- (b) Project will be implemented by Maharashtra Information Technology Corporation Ltd. (MahaIT).**



- (c) Public health, School education and Agriculture departments will make necessary fund provision in budget for the implementation of the project.
- (d) Concerned department can procure hardware or they can make the fund provision to MahaIT.
- (e) MahaIT will provide software and services for the project and department will department will make necessary fund provision to MahaIT.
- (f) All other departments in next three years will make necessary effort to implement the Maha Net project.
- (g) Public health, School education and Agriculture department each will make provision of Rs. 100 Cr for the current financial year.

This Government resolution is being issued based on the approval given in the cabinet meeting dated 18.09.2018.

This Government resolution of Maharashtra Government is available at the website www.maharashtra.gov.in. Reference no. for this is 201809281816318011. This order has been signed digitally.

By order and in the name of the Governor of Maharashtra.

(S.V.R. Srinivas)
Principal Secretary IT,
Government of Maharashtra.

(Emphasis added)



11. The scale of the project is evident; and it is equally evident that the Government was fully aware from the time even before the RFP was put out that the RoW and access issues, and waiver of charges, was going to be critical.

12. We now take up the RFP. A copy is at Exhibit “B” from pages 47 to 165 of the Petition. The benefits highlighted above were noted specifically in Section I of the RFP (at page 54):

Bidders to note:

MahaIT believes in reduction of transaction costs. Further, time is of great essence for completion of Urban MahaNet.

Right of Way (ROW) fees across the State (including underground and aerial) is hereby waived off for this project.

Bidder will be allowed to access all the roads and Government and parastatal office buildings including those of local bodies, schools, primary health centres, hospitals, colleges and statutory corporations of State Government.

Necessary access will be given to all buildings and roads by local bodies, schools, public hospitals, colleges, State Government statutory bodies etc to Bidder for laying fiber (both underground and aerial), installation of poles etc. for providing connectivity and provisioning of bandwidth as part of Urban MahaNet.

In addition, the project has been declared as a ‘Vital Public Purpose’ by Government of Maharashtra.

13. At pages 55 and 56 we find a detailed schedule. The RFP was to be issued (and was issued) on 7th December 2018. After several



intervening steps (downloading documents, seeking clarifications, etc), the last date and time for submitting bids was 29th December 2018 at 3:00 pm. Technical bids were to be opened on 3rd January 2019. Financial bids were to be opened two days later, on 5th January 2019. The reverse auction was to commence at 11:00 am on 7th January 2019.

14. Section II of the RFP contains General Instructions to Bidders. Mr Chinoy referred to some clauses and Mr Khambata for Jio to others. We collect them all in one place and set out clauses 4, 5, 11, 12, 13, 31 and 32.

4. Clarifications in the Tender

- 4.1 A prospective bidder requiring any clarification on the RFP may submit queries in-writing, at the Purchaser's mailing address viz.:

Managing Director
Maharashtra Information Technology
Corporation Limited
Room No. 514, 5th Floor Mantralaya Annexe,
Hutatma Rajaguru Chowk
Mumbai 400 032

Or through email
MahaNet.MahalT@maharashtra.gov.in as per
schedule indicated in Section I - Invitation to Bid

- 4.2 The queries submitted in the following format (in Excel file, *.xls) only shall be considered for clarification:

...



The soft copy of the clarification on RFP should be in MS Excel (*.xls) only and not any other format.

- 4.3 All queries on the RFP should be received on or before the clarification end date and time as mentioned in Section I - Invitation to Bid. The responses to the clarifications shall be notified on the website by means of Corrigendum to the RFP. Bidders are responsible for duly checking the website regularly for any clarifications.

Note: Inputs/ suggestions/ queries submitted by Bidders as part of the pre-bid meeting or otherwise shall be given due consideration by the Tender Committee. However, State is neither mandated to accept any submission made by the Bidder nor the Bidder shall be given any written response to their submissions. If an input is considered valid by the committee the same shall be accepted and incorporated as part of the Corrigendum.

5. Amendments to the RFP

- 5.1 At any time prior to the last date for receipt of bids, the purchaser, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Bidder, may modify the tender document by an amendment. The amendment shall be notified on <https://mahatenders.gov.in> and should be taken into consideration by the prospective Bidders while preparing their bids.
- 5.2 In order to provide the prospective Bidders reasonable time to take the amendment into account in preparing their bids, the Purchaser may, at its discretion, extend the last date for the receipt of Bids.



11. Bid Prices

- 11.1 *The Bidder shall indicate in the prescribed proforma, the unit rates and total bid prices of the equipment/ services, i proposes to provide under the Contract. Prices should be shown separately for each item as detailed in Annexure 4.8 - Financial Bid given in Section IV - Bid Submission Formats.*
- 11.2 In the absence of above information as requested in Clause 11.1, bid shall be considered as incomplete and be summarily rejected.
- 11.3 The Bidder shall prepare the bid based on the details provided in the RFP. It must be clearly understood that the Scope of Work is intended to give the Bidder an idea about the order and magnitude of the work and is not in any way exhaustive and guaranteed by the Purchaser. The Bidder shall carry out all the tasks in accordance with the requirement of the RFP and it shall be the responsibility of the Bidder to fully meet all the requirements of the RFP.

12. Firm Prices

- 12.1 *Prices quoted in the bid must be firm and final and shall not be subject to any upward modifications, on any account whatsoever. However, the Purchaser reserves the right to negotiate the prices quoted in the bid to effect downward modification. The bid prices shall be indicated in Indian Rupees (INR) only.*
- 12.2 *The Financial Bid should clearly indicate the price to be charged and the taxes shall be applicable as per actual. It is mandatory that such charges wherever applicable/ payable should be indicated separately in Annexure 4.8 - Financial Bid given in Section IV - Bid*



Submission Formats. In case there is a change in the applicable taxes, the same shall apply.

13. Discount

- 13.1 *The Bidders are advised not to indicate any separate discount in the Financial Bid. Discount, if any, should be merged with the quoted prices.* Discount of any type indicated separately, shall not be taken into account for evaluation purpose. However, in the event of such an offer is found to be the lowest without taking into account the discount, the Purchaser shall avail such discount at the time of award of contract.

31. Evaluation of Financial Bids (Cover - III)

- 31.1 Financial Bids submitted by only those Bidders, who qualify the Eligibility Criteria shall be opened and be eligible for further evaluation.
- 31.2 Evaluation of bids and selection of successful Bidder shall be done in two phases:

31.2.1 Phase I: Evaluation of Financial Bids

31.2.2 Phase II: Electronic-Reverse Auction (e-RA).

- 31.3 In phase 1, the bids quoted as per the attachment titled 'Financial_Bid.xls' included as part of the tender shall be considered for financial evaluation. Further Financial Evaluation by the purchaser shall be done on Net Present Value (NPV) to be discounted at the effective quarterly rate of 1.895%.
- 31.4 L1 Bidder will be determined on the basis of lowest pricing quoted by Bidder. Value of Z (bid price) will be calculated as follows:

Formula set out



- 31.5 The Bidder who shall have the least/lowest value of “Z” shall be declared as “L1”. State/MahaIT’s decision shall be final and binding.
- 31.6 *The L1 price of first phase of bidding will be used to determine the applicable Ceiling Price of the second phase i.e. e-RA.*
- 31.7 *All Bidders who qualify the Phase I of Financial Bid evaluation will be eligible to participate in Phase II of e-RA.*
- 31.8 Bidders quoting unrealistic cost of items shall be rejected straightaway by the committee and EMD of such Bidder shall be forfeited. Any bid found to have unsatisfactory response in any of the Eligibility Criteria as mentioned may be rejected and shall not be considered for further evaluation.
- 31.9 The Purchaser will examine the Financial Bid (Cover - III) to determine whether they are complete, whether any computational errors have been made, whether the documents have been properly signed, and whether the bids are generally in order.
- 31.10 The Financial Bid containing any deviations and omissions from the contractual and commercial conditions which have not been identified in the Cover - II are liable to be rejected.
- 31.11 Arithmetical errors will be rectified on the following basis. If there is a discrepancy between the unit price and the total price, which is obtained by multiplying the unit price and quantity specified by the Purchaser, or between subtotals and the total price, the unit or subtotal price shall prevail, and the quantity and the total price shall be corrected.



However, in case of items quoted without indicating any quantity or the items for which the quantities are to be estimated by the Bidder, the total price quoted against such items shall prevail. If there is a discrepancy between words and figures, the amount in words will prevail.

If there is a discrepancy between the quantity specified by the Purchaser and the quantity indicated by the Bidder in any price schedules, the quantity specified by the Purchaser shall prevail and shall be corrected accordingly.

The prices of all such item(s) against which the Bidder has not quoted rates/amount (viz., items left blank or against which “-“ is indicated) in the Price Schedules will be deemed to have been included in other item(s).

If the discount(s)/ rebate(s) offered by the Bidder is a percentage discount and the price component(s) on which the said discount is not indicated in the bid, the same shall be considered on the total bid price (Le. proportionately on each price component), in the event of award. However, if lump-sum discount is offered, the same shall be considered in full on the Ex-works price component (by proportionately reducing Ex-works price of individual items), in case of award. Further, conditional discounts/ rebates, if any, offered by the Bidder shall not be taken into consideration for evaluation. It shall, however, be considered in case of award.

In respect of taxes, duties and other levies indicated by the Bidder in the bid, which are reimbursable in line with the provisions of the bidding documents, the applicable rate and amount thereof shall be ascertained by the Purchaser based on which, if



required. necessary rectification and arithmetical correction shall be carried out by the Purchaser. The rate and amount so ascertained by the Purchaser shall prevail.

The subtotal, total price or the total bid price to be identified in Bid Form for this purpose, irrespective of the discrepancy between the amounts for the same indicated in words or figures shall be rectified in line with the procedure explained above.

If the Bidder does not accept the correction of errors as per this clause, its bid will be rejected and the amount of EMD forfeited,

- 31.12 The extra cost of work, services, hardware etc., required are to be Bidder's responsibility.

32. electronic-Reverse Auction (e-RA)

- 32.1 *The electronic Reverse Auction shall be conducted for further reduction in the price in the manner as indicated herein below.*
- 32.2 Based on evaluated bid price determined in the Phase I of financial evaluation, the Bidders shall be ranked in an ascending order.
- 32.3 "N" eligible Bidders shall be invited to participate in the e-Reverse Auction (e-RA), where "N" is the number of Bidders whose bids have been found to be responsive and their bid
- 32.4 However, in case only bids of two Bidders are found to be responsive whose bid price has been determined in accordance with tender compliance, the e-RA would be carried out with both the parties.



- 32.5 The applicable Ceiling Price for e-RA for Bidders shall be L1 bid price determined in accordance with Phase I of Financial Bid evaluation. During e-RA, these Bidders shall be permitted to place their price1 lower than the applicable Ceiling Price.
- 32.6 The e-RA will happen as per the date and time specified In Section I - Invitation to Bid after the declaration of eligible Bidders through technical and commercial evaluation.
- 32.7 Thee-RA shall be conducted on a designated electronic platform of MahaTenders portal for and on behalf of the Purchaser,
- 32.8 **Duration:** *The duration of the e-RA will be 3 hours.*
- 32.9 **Bid Auto Extension Time In Minutes:** *If a valid bid is placed within 15 minutes of end time of e-RA (Elapsed Time in Minutes), then the reverse auction duration shall get automatically extended for another 15 minutes from the existing end time. It may be noted that the auto-extension win take place only if a valid bid comes in those last X minutes. If a bid does not get accepted as the lowest bid, the auto-extension will not take place even if that bid might have come in the last X minutes. The above process will continue till no bid is received in last X minutes, which shall mark the completion of reverse auction. However, Bidders are advised not to wait till the last moment to enter their bid to avoid complications related to internet connectivity, their network problems, system crash down, power failure etc.*
- 32.10 **Minimum Decrement Amount:** *Minimum Decrement Amount for auction would be INR 1,00,00,000 (one crore).*



- 32.11 **Maximum Seal Percentage:** Maximum Seal Percentage would be determined and informed to all Bidders prior to the auction.
- 32.12 The Purchaser, will intimate the Bidders, regarding details of electronic platform, procedure/ modality of e-RA process and other details, prior to e-RA.
- 32.13 Notwithstanding above, the Bidder(s) who do not participate in e-RA, their Financial Bid as opened, if valid, shall be considered for evaluation.
- 32.14 **Bid price:** The Bidder has to quote single % of the estimate value or single total price as called for in the tender schedule.
- 32.15 **Post e-RA Procedure:** After reverse auction, Bidders would be ranked in ascending order as. RL-1 1 RL-2, RL-31 RL-4 and so on with RL-1 being the lowest.
- 32.16 RL-1 will be awarded the work for Urban MahaNet implementation. Only in case of RL-1 not accepting the award of work or declaring connectivity to links in the scope of work infeasible, the award of work will by to next lowest bidder (RL-2) at the bid price quoted by RL-1 in the reverse auction.
- 32.17 After reverse auction, if item-wise rate and taxes & duties are called in the tender, then the Bidder has to submit the price break-up for all components of their quoted price including Taxes & Duties such that the summation of quoted price and Taxes & Duties shall be equal to the lowest quoted bid price during reverse auction, Also, the Bidder has to furnish the price break-up in multicurrency as per the ratio quoted in the original price bid.



32.18 The Purchaser shall be the sole judge in this regard.

(Emphasis added in italics)

15. We pause in the factual narrative at this stage to note a few salient aspects that emerge from these provisions. MahaIT was clearly the paying party or the purchaser. The entire bidding was in two phases. Phase I was used to determine the ceiling price. Phase II was the e-Reverse Auction to reduce this ceiling price. But the fact that there were two phases did not wipe out Phase I considerations, nor did Phase I cease to be relevant. Clause 31.6 links the two phases. Further, Clause 32.13 makes it clear that even those who put in technical and financial bids and qualified for Phase I were not dropped because they stayed out of the e-Reverse Auction process. This is rational and reasonable, for a Phase I bid might have been competitive with the final e-Reverse Auction bid. Further, clause 32.17 is a direct reference to Phase I financial bid rates and prices. Discounts and rebates referred to above would obviously also apply to the final price knocked down at the e-Reverse Auction. Clause 32.1 makes it clear that the e-Reverse Auction had only one purpose: to further improve, to MahaIT's benefit, the final project bid. Rather than run the inherent risks of engaging in negotiations with a handful of bidders, MahaIT chose this open and transparent method of obtaining the lowest possible price from its vendors or bidders.

16. BSNL, Jio and Bharti Airtel put in bids. BSNL's bid was a little over Rs.1329 crores. Jio came in with a bid for over Rs.1799



crores. Bharti Airtel's bid was over Rs. 2904 crores. These three were thus placed as L1, L2 and L3 respectively in Phase I.

17. What is notable from this is that none of the three ventured to make a negative bid at the outset. No one offered to pay MahaIT, even for the 'great value' of the concessions and free access benefits.

18. MahaIT followed the RFP to fix the Ceiling Price at Rs.997,01,25,659. The three bidders went to the e-Reverse Auction. It commenced on 29th January 2019, after some delay but there is no complaint about this delay. MahaIT suspended the Reverse Auction on 30th January 2019 at 3:24 am. By then, the lowest bid that had come in was Rs.370,01,25,659 — about 28% of BSNL's Phase I bid, 21% of Jio's Phase I bid, and as low as 12.7% of Bharti Airtel's opening Phase I bid. MahaIT rescheduled the Reverse Auction to 11 am on 31st January 2019; it was then further postponed to 1st February 2019. It resumed that day at 11:00 am. Bids kept coming in, dropping in multiples of Rs.1 crore. At about 6:14 pm that day, Bharti Airtel put in a bid of Rs.128,01,25,659. These figures are interesting: throughout the bidding so far, the tail end of the figure remained at 1,25,659, as it had to since the decrements were mandated in multiples of Rs.1 crore.

19. At 6.23 pm on 1st February 2019, Jio put in a bid for Rs.1,25,659, dropping its bid by Rs.128 crores (Bharti Airtel's immediately previous bid). The RFP conditions operated to allow for a further extension of 15 minutes. Bharti Airtel says that the screen flashed the next possible bid as Rs.1 crore lower, i.e. a



negative figure of Rs.-98,74,341, meaning this would be the amount Bharti Airtel now proposed to pay to MahaIT. Bharti Airtel's staff tried to input this negative figure. The system baulked and would not allow it. Bharti Airtel says it took a screenshot and told MahaIT that it's negative bid was not being accepted, but it received no response. The 15-minute window slammed shut at 6:45 pm at Jio's final bid of Rs.1,25,659.

20. On 2nd February 2019, MahaIT notified Jio as the successful bidder at the Reverse Auction. Bharti Airtel protested in writing by an email and letter of that day agitating that it was entitled to put in a negative bid. On 6th February 2019, MahaIT wrote back saying that giving the Ceiling Price and the specification of Rs.1 crore decrements, the minimum possible bid was Rs.1,25,659. It said the system was not configured to accept bids below this or values less than or equal to zero. It also said that the law required a positive monetary consideration. On 7th February 2019, Bharti Airtel wrote to MahaIT again. A copy of this letter is at Exhibit "I", at pages 187 to 189. Here, Bharti Airtel said that its negative bid ought to have been accepted because the privileges and facilities themselves were of the value of over Rs.5000 crores. It maintained that the Reverse Auction was vitiated. A further letter to the same effect followed on 5th March 2019. MahaIT replied on 24th June 2019 (Exhibit K, page 193), and, specifically referencing Bharti Airtel's claim that the benefits were worth Rs.5000 crores, said that pursuant to legal opinion it had taken it would give Bharti Airtel one further opportunity provided Bharti Airtel deposited Rs. 2500 crores, 50% of Bharti Airtel's own estimation of the value of these concessions and benefits, in ten days by way of a bank guarantee. In other words,



it confronted Bharti Airtel with its own case, viz., that if Bharti Airtel was willing to be the paying party rather than the party to be paid, and Bharti Airtel itself estimated the value of the concessions at over Rs.5,000 crores, then it was only reasonable that Bharti Airtel be made to demonstrate its bona fides by depositing about 50% of this estimated benefit. Bharti Airtel protested by its letter of 3rd July 2019. MahaIT responded on 18th July 2019 saying Bharti Airtel was fully aware of all terms and conditions, and that MahaIT had conducted such e-Reverse Auctions before. Bharti Airtel knew the system did not allow negative bids; yet it participated throughout. At page 200 is a sentence in MahaIT's letter that in a conference call, it had addressed all the bidders' issues, and that the e-Reverse Auction started only thereafter.

21. Mr Chinoy makes these points. First, he says that there could be no such clarification by a conference call. It had to be a corrigendum on the website. Second, he submits that if there was a floor (the ceiling being known), this had to be notified in the RFP or in a properly made corrigendum. Third, he submits that there is no material distinction between Jio's bid of Rs. 1,25,659 and a negative bid. Jio's bid might as well be zero. It is meaningless, he says, and if a negative bid was beyond contemplation, so too was a bid of Rs.1,26,659.

22. Mr Khambata for Jio and Mr Sakhare for MahaIT contest this formulation. Mr Khambata submits, and we think correctly, that Mr Chinoy's submission on what ought to have been notified inverts the legal requirement. If negative bids *were* to be accepted, then this ought to have been notified. Otherwise, just as the Ceiling Price was



known, the floor price was a mathematical certainty given that reductions were in multiples of Rs.1 crore. Once, therefore, the bidding hit rock-bottom, i.e., no further reduction of Rs.1 crore was possible while still remaining a positive bid, the auction ended. Just as the starting point was known, so too was the lowest possible ending point. Apart from this, we think Mr Chinoy's formulation totally upends the substratum and fundamental premise of the proposed contract and project. This is inter alia evident from the pro forma of the final contract, Annexure 4.7 to the RFP at page 109. This describes MahaIT as the purchaser, and at page 110 the proposed contract says that in consideration of payments to be made by MahaIT to the TSP, the TSP covenants to provide the services (as defined). This can only mean that MahaIT is, and was always intended and recognized by all, to be the paying party, never the payee. Indeed, if what Bharti Airtel says is correct — viz., that the privileges and concessions are worth several thousands of crores, and there is no embargo on a negative bid — then nothing stopped it from making a negative Phase I bid in the first place. One of two things would have happened had it done so: it might have been disqualified (possibly under Clause 31.8), or, and at a minimum, its bid would have vastly driven down the starting Ceiling Price. That Ceiling Price was the result of a mathematical formula set out in the RFP itself. While we lay no claim to understanding it fully, it seems to us self-evident that inserting a negative number anywhere in that formula would have had the result of generating a greatly reduced Ceiling Price. Perhaps no Reverse Auction might have been necessary. However, there is no dispute ever raised about the nature of the deal or proposed transaction. MahaIT was not selling the RoW or any concessions but was seeking to obtain services from the



participants at the tender process, for which, all knew from inception, MahaIT had to pay. Hence, MahaIT's endeavour to pay as little as possible for quality services to be provided to the ultimate beneficiary or beneficiaries. Viewed from this perspective, it seems to us that the Petitioners' case requires a wholesale rewriting of the contract in its essential elements. That is evidently not something that ever find support from a writ court.

23. Beyond this, we find nothing to persuade us to interfere. We are concerned only with the decision-making process. It must be shown to suffer from illegality, perversity, mala fides or unreasonableness at the level of the Wednesbury unreasonableness — a decision no person in possession of the facts could reasonably ever take. This is not demonstrated. In our view, what Mr Sakhare and Mr Khambata say must be accepted. Finally, as to the argument that Jio's bid is illusory, we can only observe that it is not for us to examine the financial dealing and structuring of any bidder or contract.

24. In our view, the Petition is without merit. It is rejected. In the facts of the case, there will be no order as to costs.

(S.C. DHARMADHIKARI, J.)

(G.S. PATEL, J.)