

*

HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 15th July, 2010

%

Judgment Pronounced on: 26th July, 2010

+

WP(C) No.4196/2010 & CMs 8327/10 & 8466/10

SUMITOMO CHEMICAL INDIA PVT. LTD. Petitioner

Through: Mr. Akhil Sibal, Adv. with
Mr. Deepak Khurana, Ms. Mihira
Sood, Mr. Pradeep Chiinndra, Advs.

Versus

UNION OF INDIA AND OTHERS Respondents

Through: Mr. Jatan Singh, Central Govt.
Standing Counsel for R-1

Mr. Parag P. Tripathi, ASG with
Mr. Anuj Bhandari, Mr. Pragyan P.
Sharma, Mr. Rupesh Gupta, Advs. for
Respondent No.2

Ms. Mini Pushkarna, Standing
Counsel for Respondent No.3/MCD

Mr. Mukul Rohtagi, Mr. Neeraj K.
Kaul, Sr. Advs. with Ms. Kanika
Agnihotri, Mr. Darpan Wadhwa,
Mr. Aseem Chaturvedi, Mr. Vaibhav
Agnihotri, Advs. for Respondent No.7

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

The present lis, though frescoes a picture and depicts a scenario at the very nucleus level pertaining to the stem principles in the realm of award of contract inclusive of the undeniable concept of the element of public interest regard being had to the essential power of flexibility bestowed on the owner called ‘allowable free play in the joints’, yet the said inherent features were differently graduated and calibrated to the arena of competition and no-competition, owner’s role in the field of adaptability due to necessity on one hand and guillotining of the same on the other by bending the norms with an undue sense of generosity and mal-adroit propensity of impropriety and malice judged on the scale of balance. Thus, the duty cast is to adjudge whether the decision taken by the respondents, in the ultimate eventuality, stands on the terra-firma or collapses like a pack of cards.

2. HLL Lifecare Ltd., the second respondent herein, floated tender No. HLL/PCD/MCD-01-10-11/BTI inviting bids for purchase of larvicide *Bacillus thuringiensis var israelensis* (Bti) (AS) in the quantity of 2,75,000 litres or 343.75 MT on 29.03.2010. The Invitation For Bids (IFB) was compartmentalized into two parts, namely, the Techno-commercial Bid and Price or Financial Bid. The IFB indicated that the Municipal Corporation of Delhi (MCD) intended to procure the items used for anti malaria operations for the year 2010-11 through the procurement and consultancy service division of M/s HLL Lifecare Ltd. It was stipulated that a complete set of bidding documents could be purchased by an interested eligible bidder on

the submission of a written application. In the Instructions to Bidders (ITB), it was postulated that the bid documents shall be read in conjunction with the Press Tender Notice dated 29.3.2010 which was annexed as part of the tender document. Clause 1 of the ITB stipulated the content of bidding documents which included the technical specifications and the qualification criteria. It also postulated various other aspects which included what a bidder is required to do and what would constitute a disqualification. Clause 5 dealt with documents comprising the bid, namely, Techno-commercial/Technical Bid and Price Bid prepared by the bidder. Clause 5(a) dwelled upon what should be included in the Technical Bid and clause (b) dealt with the Price Bid. Clause 7 provided about the Documents Establishing Bidders' Eligibility and Qualification. Clause 16 dealt with Clarification of Bids and Clause 17 dealt with Preliminary Examination. Clause 18 stipulated that the purchaser would evaluate and compare the bids on the basis of techno-commercial/technical evaluation followed by the price bid evaluation.

3. Section III of the IFB dealt with General Conditions of Contract and Section IV dealt with Special Conditions of Contract (SCC). Clause 4 of SCC provided for Qualification Criteria. Clause 5 dealt with Performance Statement. Section V provided the Schedule of Requirements (SOR) and Section VI dealt with Technical Specifications. Clause 2 of the same provides the criterion as regards the quality and storage of the product. Section VII is a section which is devoted to Qualification Criteria (QC). In

the said section, there is a reference to Clause 7.2(b) of ITB. Section VIII provides for Proforma-Sample Forms and there is a proforma in the same which relates to performance statement.

4. The petitioner, a company registered under the provisions of the Companies Act, 1956, is engaged in the business of import, sale and marketing of insecticides, larvicides, bio-larvicides, etc. The larvicide *Bacillus thuringiensis var israelensis (Bti)(AS)* (hereinafter referred to as the product) is manufactured by Valent Bio Sciences Corporation, a company incorporated in the United States. The said product is marketed by the petitioner - company under the brand name 'Vectobac 12 AS'. The petitioner had obtained a registration certificate to import/sell to market the larvicide by the Registration Committee of Central Insecticide Board (CIB) which is a body constituted under the Insecticides Act, 1968 under the Ministry of Agriculture. Be it noted, the initial certificate was granted in favour of M/s Aventis Crop Science India Ltd. and eventually, there was an endorsement in favour of the petitioner on 15.7.2004. The registration certificate issued to the petitioner for importing and marketing 'Vectobac 12 AS' approved that the product can be stored between temperature 15°C to 25°C. Subsequently, the temperature range for storage of the petitioner's product was modified and approved by the Registration Committee of CIB to 1.9°C to 44.9°C in its meeting held on 20.10.2009. It is urged in the petition that the product of the petitioner fulfills the entire criteria and parameters which are necessary as mandated by the National Vector Borne

Diseases Control Programme (NVBDGP). The product has been approved by the Technical Advisory Committee (TAC) which has the authority to consider the bio-efficacy of the product and the TAC had given the approval in that regard. It is contended that as per the requirement of the IFB, to fulfill the criteria, the product of a bidder should be registered and approved by CIB, TAC and NVBDGP under the National Programme and the product can be stored at a temperature not exceeding 42.5°C and, further, should be suitable for storage in Delhi. As pleaded, on 28.4.2010, the petitioner submitted the Techno-commercial/Technical Bid along with the requisite documents. It had also submitted the satisfactory performance certificate and the documentary proof that it has supplied more than 25% of the quantity for the specified product in any one year during the last three years prior to the date of bid opening. After the submission of the bid, the petitioner received a letter on 21.5.2010 from the second respondent asking whether the TAC had approved the aforesaid modification in the temperature range to 1.9°C to 44.9°C as endorsed by the CIB and RC for storage of the product of the petitioner. It is put forth that the said clarification came as a complete surprise inasmuch as the TAC was required to approve only the use of the product and not the storage temperature of the product. That apart, vide the said letter, the respondent No.2 further asked the petitioner to furnish satisfactory performance certificate from its clients for the supplies made after the modification of the storage temperature. On the same date, the second respondent entered into correspondence with the Director, NVBDGP seeking a clarification as to whether the modified

storage temperature range of the petitioner's product from 1.9^oC to 44.9^oC was approved by the TAC. The petitioner replied to the aforesaid letter meeting all the queries made by the second respondent. The NVBDCP also sent its reply vide letter dated 26.5.2010 stating that the product of the petitioner is registered with the CIB and RC with all specifications as per the registration certificate. It was further mentioned therein that the TAC only approves the use of the product as per the specifications and changes made by the CIB. It is contended that the correspondence would show that the TAC has no role in approving the storage temperature range of the product. Temperature and other parameters are to be approved by the CIB and RC. It is set forth that the registration certificate issued to the petitioner by the CIB and RC specified 'Use Recommendation' under a separate heading from 'Storage Temperature Range' and thus, the distinction is quite clear. It is the case of the petitioner that to circumvent the aforesaid clarification issued by the NVBDCP vide letter dated 26.5.2010, the second respondent on 27.5.2010 wrote a letter to the Director, NVBDCP seeking a clarification with regard to the earlier letter whether it is stated by the NVBDCP that each and every change made by the CIB and RC in a registration certificate is consequently required to be approved by the TAC. When the matter stood thus, on 4.6.2010, the petitioner communicated to the second respondent highlighting that it had satisfactorily replied to the queries raised by the second respondent by letter dated 21.5.2010 and if there is any pending issue, the said respondent should communicate to the petitioner before taking any decision on the bid submitted by the petitioner.

5. As is evident from the factual matrix, the respondent No.2 vide letter dated 8.6.2010 rejected the technical bid of the petitioner as non-responsive without giving any reason for the same. It is averred that the respondent No.2 did not open the financial bid and has taken the view that the technical specifications in the tender document that the product should be TAC approved requires the modification in the storage temperature range of the petitioner's product to be approved by the TAC even though the same is not in the domain of the TAC. Reference has been made to the modifications in the storage temperature as regards the petitioner's product to highlight that the same is more than the range specified in the tender document. It is put forth that when the product of the petitioner was approved to be used in the National Programme in the year 2005, the approved storage range of the temperature of the product was 15^oC to 25^oC and when a clarification letter has been issued by the NVBDCP on 9.6.2010 that the TAC only approves the use of the product as per the specifications or "changes made in the use" by the CIB and nothing more than that, there was no justification to take the same as a ground to reject the technical bid. It is contended the conduct of the respondent No.2 is extremely arbitrary and discriminatory and it contravenes the instructions issued vide Office Memorandum of Ministry of Health and Family Welfare dated 29.8.2007 which provides that in case of a single responsive tender, retendering should be ordered with broad based similar specifications but in the case at hand, the second respondent instead of ordering for retendering has deliberately awarded the contract in favour of

the respondent No.7 with mala fide intentions. It is urged that the petitioner fulfilled all the technical criteria and parameters as set out in the tender documents but the second respondent has rejected the same on flimsy grounds. The ground which has been taken recourse to by the second respondent which basically pertained to the approval of the storage temperature range of the product by the TAC was never a part of the tender document and, hence, the whole approach is mala fide and perverse. It is also asseverated that it was obligatory on the part of the respondent No.2 to seek clarification from the petitioner before taking any decision as per the terms and conditions of the IFB and not reject his bid in extreme haste which smacks of arbitrariness. The respondent No.2 sought to modify the conditions prescribed in the IFB as far as the supply to the extent of 25% of the quantity concerned in respect of the petitioner by treating that the change in the storage temperature range constituted change in the composition of the petitioner's product. As the product of the petitioner can be stored between the temperature range of 1.9°C to 44.9°C, the requirement as per the tender which is 42.5°C is met with and, therefore, there was no warrant to reject the technical bid. It is alleged that the respondent No.2 has acted mala fidely and also against the public interest inasmuch as the financial burden is more on the acceptance of the bid of the respondent No.7, for the petitioner's financial bid is much lower.

6. In this backdrop, prayer has been made for issue of a writ of certiorari for quashment of the decision taken by the respondent No.2 rejecting the

technical bid of the petitioner which has been communicated to it by letter dated 8.6.2010 and also further quash the acceptance of the financial bid of the respondent No.7 and to issue a writ of mandamus to accept the technical bid of the petitioner and open the financial bid and award the contract as per the terms and conditions of the contract.

7. A counter affidavit has been filed by the respondent No.2 contending inter-alia that in terms of the tender, the said respondent analyzed the bid of the petitioner as per Clause 7 of Section II of the tender (Instructions to Bidders) and as per the said clause, the petitioner was required to supply complete documents with its bid to the tender and the said documents were subject to the complete satisfaction of the purchaser. As per Clause 7.2(b), the bidder/petitioner was required to satisfy the criteria stipulated in Section VII (Qualification Criteria) of the tender document. To satisfy the said condition, it was incumbent on the petitioner to submit documentary evidence in proof of the fact that it had actually supplied to the extent of atleast 25% of the tendered quantity of the tendered product in any one year during the last three years prior to the date of bid opening. The said proof was required to be submitted to the respondent No.2 as per the performance statement but the petitioner failed to comply with the said mandatory requirement and chose to submit the work order/consignments issued in its favour. The petitioner failed to attach the certificate as per the tender requirement from the said alleged purchasers/consignees confirming that the said larvicide was actually supplied by the petitioner/bidder and the same

was duly accepted by the purchasers/consignees to their entire satisfaction. It is also contended that another condition which finds mention in the tender is that the product should be stable when stored at ambient temperature (not exceeding 42.5°C), but the petitioner got changes made in the condition No. 5 of its registration certificate on 27.11.2009 from the CIB whereby the storage temperature range was modified from 1.9 °C to 44.9 °C. Based on the details given by the petitioner in the bid documents, its performance was not found to meet the qualification criteria of satisfactory supply of 25% of the product by the petitioner. Alternatively, it is put forth that prior to 27.11.2009, even if the satisfactory supply of the product of the petitioner is calculated for any one year of the past three years prior to the date of bid opening, it still failed to qualify due to non-submission of the required documents from the respective purchasers/consignees of the product. The petitioner was called upon to submit copies of the orders for the required quantity, if any, received by him after 27.11.2009 along with the certificate confirming the said supply and acceptance by the purchaser/consignee, but the petitioner failed to submit the same which led to rejection of the Techno-commercial bid as non-responsive. Emphasis has been laid on Clause 7.3 of the Instructions to Bidders to highlight that the petitioner has not satisfied the qualification criteria and, therefore, its bid has been rightly rejected.

8. It is the stand of the respondent No.2 that the bid of the respondent No.7 had been approved and a formal contract had already been entered into with the respondent No.7 on 5/8.6.2010 as it had acted fairly and in a

transparent and justified manner. It is its further stand that the said respondent has not acted in haste by placing at least three months requirement order for the present to meet out urgent requirement of larvicide for effective control of mosquito breeding for prevention of malaria and dengue during summer and rainy season in Delhi region keeping in view the Commonwealth Games which is going to be organized in the month of October, 2010. It is denied that the petitioner submitted the requisite documents with the Techno-commercial bid. The petitioner did not submit the satisfactory performance certificate documentary proof that it had supplied more than 25% of the quantity of the specified product as per Section VII of the tender. It is further put forth that the content of the letter dated 26.5.2010 has been erroneously interpreted by the petitioner. The clarification was sought as the CIB changed the storage temperature range on 27.11.2009 and that compelled the respondent No.2 to seek the clarification. It is set forth that the product of the petitioner required TAC approval as per the registration certificate and as per the tender and, accordingly, clarification was sought from the respondent No.6 which was replied by the respondent No.6 by letter dated 26.5.2010 the contents of which are self explanatory. It is contended that the stand urged that the petitioner was not intimated the reasons for non-acceptance of its Techno-commercial bid is not tenable as it was not obligatory on the part of the second respondent to seek any further clarification from the petitioner as the tender conditions were plain and clear. The ground of treating the respondent No.7 in a different manner on extraneous considerations has been

categorically denied. It is the stand of the respondent that the bid process is completely fair, transparent, competitive and justified and does not require any interference in exercise of power of the judicial review.

9. A rejoinder affidavit has been filed by the petitioner to the counter affidavit filed by the respondent No.2 contending, inter alia, that the said affidavit does not answer the issues raised by the petitioner, namely, that no reason was ascribed while treating the technical bid of the petitioner as non-responsive and, second, the directive issued by the Ministry of Health and Family Welfare dated 29.8.2007 with regard to the single responsive tender has not been dealt with. Highlighting on these two aspects, it is averred that in a Welfare State, when the competent authority rejects the bid, it has an obligation to explain the reason for the same and, second, the non-reply to the directive issued by the Ministry of Health and Family Welfare reflects the blatant bias, discrimination and malafide. It is asserted that the plea taken with regard to the non-fulfillment of the performance statement is totally erroneous inasmuch as the petitioner had duly and completely fulfilled the condition as it had supplied a total quantity of the product in question from April 2007 to March 2007 which is well excess of even the total tender quantity. Detailed enumeration has been made as to how the petitioner satisfied the said criterion and how it had filed the performance statement at the time of submitting the bid. It is urged that the certificate supplied subsequently by the respondent No.7 is not in conformity with the prescribed format of the performance statement. It is highlighted that there

is no requirement at all that the satisfaction certificates of the purchasers / consignees should be over 25% of the tender quantity in respect of any one year as the clause relating to the same only mentions “sizeable value both in quantity and cost”. It is urged that the respondent No.2 had afforded an opportunity to the respondent No.7 to submit the satisfaction certificate while the same had not been returned but similar opportunity was not afforded to the petitioner and that smacks of arbitrariness and discrimination. The determination of cut-off date qua the petitioner as 27.11.2009 is totally unacceptable as the product that was sought to be supplied remained the same and the modification in the storage temperature of the petitioner’s product from 15°C - 25°C to 1.9 °C - 44.9°C was approved and endorsed by the CIB & RC and had nothing to do with the product. The plea of the respondent No.2 that the product should be stable when stored at an ambient temperature not exceeding 42.5°C and the petitioner got modification at a later stage is fundamentally a misreading of the terms and conditions of the tender specification specifically in para 2 of Section VI which when properly appreciated clearly indicates that there is a stipulation that the product should be stable when stored at an ambient temperature not exceeding 42.5°C but there is no requirement at all in para 2 of the Section VI that this particular feature or property of the product offered should be set out either in the TAC approval or in the CIB registration certificate. The petitioner’s product is stable at an ambient temperature of 42.5°C and, therefore, the petitioner’s bid could not have been rejected on that ground. The TAC approval is merely in respect of the capability of the use of the product

offered as a larvicide and the said approval has nothing to do with the condition of storage of the product in question. Quite apart from the above, it is contended that the performance statement need not be confined only to the items which are absolutely identical with the product but can include the products which are similar to those products as the employment terms have been implied in the terms and conditions of the tender. Reliance has been placed after the study conducted in 2002 in respect of the product of the petitioner that it was found to be stable at 42.5°C and, hence, the ground put forth by the respondent No.2 is absolutely unsustainable and, in fact, exposes total discrimination. Various other averments have been made with regard to the undue hasty action taken by the respondent No.2 though there was no urgency for opening of the tender bids. It is further urged that the comparison made by the said respondent as regards the product of the petitioner is not within its authority and it cannot clothe itself with the powers to analyse the bid. Thus, it is also put forth that the assertions made in the said counter affidavit in respect of the petitioner are totally unwarranted and, in fact, have no nexus with the controversy raised.

10. The respondent No.2 has not brought on record the letter dated 21.5.2010 written by it to the respondent No.7 whereas the communication dated 21.5.2010 to the petitioner has been brought on record. It is discernible from the said letter that the petitioner was only afforded an opportunity to supply performance certificate after the opening of the bid in respect of the supplies made after 27.11.2009 and not given any opportunity

to file documents to satisfy the factum of supply of 25% of the tender quantity for any one year in the last three years. Had such an opportunity been extended, it would have been in a position to comply with the said requirement. Thus, denial of equal opportunity tantamounts to total unfairness and if the same is done in the process of negotiation, it will also take the colour of arbitrariness. The documents that have been brought on record will go a long way to show that the respondent No.7 had not satisfied the condition as regards the production of performance certificate but he was treated in a different way than the petitioner thereby making the whole decision making process absolutely unfair. The communication dated 26.5.2010 issued by the MCD in favour of the respondent No.7 makes it quite clear that it had not satisfied the condition.

11. The insistence for production of performance certificate at the time of submission of the bid is contrary to Clause 5 of Section IV of the special conditions of contract inasmuch as the performance statement is to be given for the last three years as per the format given in Section VII in respect of same or similar items satisfactorily executed to sizeable value and the petitioner did comply with the said condition precedent and, therefore, his bid could not have been treated as non-responsive. The stand of the respondent No.2 that the performance statement for 25% of the quantity in any one year was required to be submitted because of Clause 4 in Section VII cannot be read into Clause 5 of Section VII as such a combined reading

is not permissible inasmuch as Section IV itself makes a distinction between the qualification criteria and the performance statement.

12. It was obligatory on the part of the respondent No.2 to expressly state in the tender document the requirement of the performance statement failing which he cannot be permitted to introduce any requirement contrary to the plain language implied in the tender document.

13. The petitioner had provided performance certificates for 53,660 ltrs. of the product (approximately 20% of the tender quantity) as against the alleged requirement of 68,750 ltrs. (25% of the tender quantity) for the period 22.9.2008 to 1.9.2008. Quite apart from the above, a year has to be construed as a financial year and not a calendar year, or 12 months period as the same would be counter to the basic meaning of the term 'year' and thereby creating confusion which is impermissible. The stand of the respondent No.2 that the petitioner has not submitted performance certificate for one year is nowhere appositely stipulated and, therefore, deserves to be rejected as the purchaser cannot interpret the terms of the contract at its whim and fancy. The restriction imposed on the petitioner by fixing the cut-off date to 27.11.2009 has nothing to do with the performance certificate or ability to supply and, in fact, is untenable, for the simple reason that the Central Insecticides Board and the Registration Committee had endorsed such a modification without altering the registration certificate and the said modification has been further endorsed by the Director, National Vector

Borne Diseases Control Programme. The respondent No.2 has failed to exercise its discretion since the qualification criteria makes a reference to Clause 7.2(b) of Instruction to Bidders and Clause 4 of Section VII requires supply of 25% of the quantity of the specified product in any one year in the last three years without any prescribed documents required to be submitted. Clause 4 which refers to Section VII indicates furnishing of documentary evidence but the same is subject to further determination. Under these circumstances, it has been alleged that non-acceptance of tender of the petitioner by the respondent No.2 would tantamount to non-exercise of its discretion in terms of Clause 7.2 as a consequence of which the decision making process has been vitiated. The petitioner had submitted work orders along with dates and quantity of actual supplies but the same was not considered and no clarification was sought which is a deliberate abandonment of the procedure for affording an opportunity to the bidder which leads the tendering process to the path of vitiation.

14. Mr. Akhil Sibal, learned counsel appearing for the petitioner, has raised the following submissions:

- (a) That the notice inviting tender is compartmentalized into various sections and Sections 1 and 2 which incorporate Clause 7 under the heading 'Documents Establishing Bidder's Eligibility and Qualification' especially Clause 7.2(a), (b) and (c) does not precisely state the nature of the document and further the production of documentary evidence to the satisfaction of the purchaser/owner

would only arise at a later stage but not at the stage as has been conceived by the respondent No.2. To elaborate; it is urged by him that once the documents have been filed, the same have to be scrutinized by the respondent No.2 and if anything is wanting, the bidder has to be afforded an opportunity to satisfy the same as such a discretion is vested with the purchaser.

- (b) The clause occurring under the heading ‘Late Bids and Modifications/withdrawal of Bids’ and ‘the clarification of bids and preliminary examinations’ as well as Clauses 17.3, 17.4, 17.5 and 18.1 go a long way to show that there is a process for determination and determination in its conceptual essentiality would not entitle the owner to reject the bid without determining, and determination means an expression of opinion after affording an opportunity to the bidder and the same cannot be crucified in an arbitrary manner.
- (c) The qualification criteria which occur under the special conditions of contract specifically refers to Clause 7.2(b) of Instructions to Bidders (in short “ITB”) and Clause 0.4 therein also clearly postulates that the manufacturer must be in the business in similar or identical goods and the petitioner has been dealing with similar and/or identical goods, and, therefore, his bid could not have been rejected.
- (d) The reference to 25% of the quantity for the specific project indicated in Section 5 in one year during the last three years prior to the date of bid opening cannot be singularly treated as a condition precedent as

the language employed in Clause 7.2(b) and the qualification criteria are quite different.

- (e) The performance statement, as has been stipulated, does not prescribe that there has to be supply of 25% in one year and the same would throw immense light that the supply of 25% in one year is not to be treated as a condition precedent but is to be taken into consideration at a later stage, since a bidder has a right to produce the documents at a later stage and the purchaser is bound to consider the same.
- (f) Assuming for the sake of argument that the clauses pertaining to the eligibility criteria are treated as conditions precedent yet when the purchaser was required to use his discretion to seek clarification and the same has been given an indecent burial, it destroys the very base of the decision making process.
- (g) The petitioner had the licence w.e.f. 2002 and he was engaged in manufacturing of the product and was granted benefit on the basis of an application dated 23rd November, 2009 which has also been ratified by National Vector Borne Diseases Control Programme but the purchaser without taking note of the same by letter dated 21st May, 2010 has restricted the period of supply after 27th November, 2009 without unfathomable reason and the same creates a concavity in the decision making process.
- (h) The reasons given by the respondent no. 2 that the bid of the petitioner was not responsive because of failure to submit performance certificates to the extent of at least 25% of the quantity of the specific

product indicated in Section V (Schedule of Requirements) in any one year during the last three years prior to the date of bid opening is highly arbitrary and unfair inasmuch as the respondent no. 2 by its communication had asked the petitioner to produce the performance certificate after 27.11.2009.

- (i) The respondent No. 2 has treated the petitioner and the respondent No. 7 unequally since the respondent No. 7 was afforded an opportunity by letter dated 21.5.2010 with time limit up to 26.5.2010 whereas the said opportunity was not given to the petitioner.

15. Mr. Parag Tripathi, learned Additional Solicitor General for the respondent No.2, has raised the following proponentes:

- (i) The ITB does not permit that the bid documents are to be read in separation; on the contrary, it is quite vivid that they have to be read in conjunction with the press tender documents and with any other instructions appended elsewhere in the NIT inasmuch the language employed in the ITB clearly stipulates that the bid documents should be read in conjunction with the Press Tender Notice / IFB No. HLL/PCD/MCD-01/10-11 dated 29.3.2010 and all the clauses are to be read in conjunction with the instructions given elsewhere in the document on the same subject matter.
- (ii) The qualification criteria which finds place in Section VII of the tender that specified the satisfaction of supply of at least 25% of the

quantity of the specific product (Bti) in any one year during the last three years prior to the date of bid opening has to be read along with the NIT. Similarly, the performance statement which finds mention in Section VII of the tender cannot be alienated or isolated from the compartment of tender notice regard being had to the purposive understanding of the tender documents and the requirement of the purchaser.

- (iii) The format of performance statement clearly mandates that the certificates are to be produced from the purchasers / assignees and the same to be attached with the bid confirming the supply and acceptance of the stores with a further stipulation that there has to be cross reference of order, date, value and confirmation of supply and acceptance of stores and it has its own imperative purpose and sanctity and does not allow any kind of deviance.
- (iv) The submission advanced on behalf of the petitioner that the conditions prescribed in the notice inviting tender was vague and ambiguous does not stand to reason, for it was clearly provided in the notice inviting tender that documentary evidence was required to be produced, and the colossal complaint that production of documentary evidence itself was not adequate enough has to pale into insignificance when the same is read in conjunction with other conditions which deal with what types of documents are requisite to be filed. The emphasis laid on order, date, value and confirmation of

supply and acceptance has to be followed in stricter sense. That apart, when the bidder had understood the conditions stated in the tender as it had clearly mentioned that it had qualified and produced the requisite certificates, it cannot take a somersault and propound to suit its convenience.

- (v) The total quantity to be supplied was 275,000 liters and 25% thereof came to 68,750 liters but the actual evidence of the quantity supplied by the petitioner bidder did not specify the said criterion. The purchaser had the right to reject the bid if it failed to comply with the qualification criteria and when the petitioner had not satisfied the requisite criteria, the ingenious subterfuge taken recourse to that the year was not defined has no legs to stand upon.
- (vi) It was obligatory on the part of the purchaser to determine the substantial responsiveness of each bid on the base of the bidding documents. In the case at hand, the techno-commercial bid of the petitioner being not substantially responsive, the same was not accepted and, hence, no fault can be found in the decision making process of the respondent No.2.
- (vii) The grievance that uniform treatment was not given to the petitioner and the respondent No.7 is sans substance inasmuch as representatives of both the bidders had attended the pre-bid conference called by the purchaser on 6.4.2010 and they were extended the right to ask for any clarification in respect of the bid document; that both the bidders were

declared preliminary responsive in the first phase of evaluation; that both the parties were given opportunity to furnish certain information regarding performance by letter dated 21.5.2010 stipulating the deadline, that is, 26.5.2010 for submission of requisite information; that the respondent No.2 did not submit details as required while the respondent No.7 submitted the documents as asked for; that the petitioner was required to produce goods acceptance certificate for 68750 liters quantity from the consignee / purchaser whereas he could produce documentary certificate only for 38900 liters as a consequence of which there was non-satisfaction of Clause 4 of the qualification criteria.

- (viii) The techno-commercial responsive bid of the respondent No.7 was opened on 5.6.2010 and it was found that he had offered the price of Rs.7,45,192.31 per MT plus CST@4% as against their quote of Rs.953080.00 plus CST @4% per MT against the previous tender which is 21.81% less than the last purchased price. Keeping the same in view, a three months supply contract was awarded to the respondent No.7 as per the requirement of MCD with the purchaser reserving the right to purchase the tendered quantity at the price, terms and conditions of the subject tender within one year.
- (ix) The decision taken by the respondent is in consonance with the fair procedure and totally bereft of any kind of malafide and, in fact, it is

in accord with the element of public interest and, hence, this court in exercise of the power of judicial review should not interfere.

- (x) The conditions had been imposed to ensure that the bidder has the capacity and resources to execute the work and when the petitioner had not produced the performance certificate, the purchaser had valid reasons to discard him and the same cannot be treated as unreasonable or unfair or against the conceptual element of public interest.

16. The learned counsel for the respondent No.3 supported the stance put forth by the respondent No.2.

17. Mr. Mukul Rohtagi and Mr. N.K. Kaul, learned senior counsel appearing for the respondent No.7, resisting the submission put forth by learned counsel for the petitioner, submitted that:

- (a) The bidder on whose behalf the bid is being made as per Clause 7.2 (b)(4) has to be a manufacturer of the product itself and must be in the business of similar and / or identical goods for at least last three years and must have manufactured and supplied to the extent of at least 25% of the quantity of the specific product indicated in Section V of the schedule of requirements but in the case at hand, the petitioner is not a manufacturer. The terms ‘manufactured’ and ‘supplied’ have to be read in a cumulative manner and not in a segregable way because the

tender condition has a definite purpose keeping in view the nature of supply and the problem that is required to be sought.

- (b) The petitioner as per own showing had not satisfied the performance criterion inasmuch as from the chart filed by the petitioner, it becomes clear crystal that it had supplied only 56,660 liters of the product whereas it was incumbent upon him to have supplied 68,750 liters (25% of the tendered quantity of 275,000 liters) in any of the three preceding years.
- (c) The tender conditions read in a holistic manner would convey that it had used the terms 'sizeable' which if understood in the common parlance regard being had to logical sense would convey that it should be fairly large portion but the purchaser has restricted it to 25% only to have the bidders and not to hit the bidders at bay and, therefore, the mercurial plea that the bid clauses in the bid were vague does not deserve any acceptance.
- (d) The terms and conditions of the tender postulates that the products should be stabled when stored at an ambient temperature (not exceeding 42.5°C) but the CIB registration of the petitioner mandates that the product must be stored at a temperature range of 15 to 25°C. The product as per the latest Material Safety Data Sheet (MSDS) issued by the manufacturer (Valent Biosciences) on 13.8.2009 indicated that the product should be stored between 15°C to 30°C. The local environment has been kept in view by the respondent No.2

and, hence, no fault can be found in accepting the bid of the respondent No.7.

- (e) The commercial transaction of the present nature requires expertise and the experts have weighed the material and keeping in view the requirement which is in accord with the terms and conditions of the co-tender had accepted the bid and, therefore, this Court, in exercise of its power of judicial review, should not substitute the view as certain matters do remain in the domain of experts. The asseveration that the discretion was not used to ask for clarification from the petitioner is totally sans substratum as the same cannot be claimed as a matter of right since such a right does not flow from the tender documents more so when the petitioner had not satisfied the conditions precedent.

18. At this juncture, it is worthwhile to mention that in the course of hearing, the learned counsel for the respondent No. 2 has produced the original file and the bid documents for our perusal.

19. In this factual backdrop, we think it apposite, before dwelling upon the facts that have emerged from the pleadings, to appreciate the rival submissions raised at the bar to refer to certain citations in two spheres, namely, the law relating to acceptance or rejection of a tender, the essential conditions in a notice inviting tender, the ancillary conditions in the domain

of tender, etc. and the role of a owner or a purchaser and secondly, the duty of the court while scrutinising the tender documents.

20. First, we shall refer to the authorities which deal with the principles relating to the acceptance and other aspects of tender and, thereafter, we shall delineate in regard to the construction of a tender document.

21. In ***Poddar Steel Corporation v. Ganesh Engineering Works & Ors.***, (1991) 3 SCC 273, a two-judges Bench of the Apex Court has held as follows:

“.....As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories- those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.”

22. In ***Sterling Computers Ltd. V. M.N.Publications Ltd.***, (1993) 1 SCC 445 = AIR 1996 SC 51, the Apex Court, while dealing with the concept of judicial review in respect of contracts entered into on behalf of the State, had expressed the view as follows: -

“18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the “decision making process.” By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, Chief Constable of the North Wales Police v. Evans (supra), the Courts can certainly examine whether “decision making process” was reasonable, rational, not arbitrary and violative of Art. 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract.”

23. In ***New Horizons Ltd. & Anr. v. Union of India & Ors.***, (1995) 1

SCC 478, the Apex Court in para 17 opined thus:

“17. The decision of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognized that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere [See : Ramanna Dayaram Shetty v. The International Airport Authority of India, (1979) 3 SCC 489; Kasturi Lal Lakshmi Reddy v. State of J&K : (1980) 4 SCC 1; Fasih Chaudhary v. Director General, Dooradarshan (1989) 1 SCC 89; Sterling Computers Ltd. v. M&N Publications Ltd. and

Anr. (supra); Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499.”

It is worth noting that in the said case, their Lordships ruled that the terms and conditions of a tender should be construed from the standpoint of a prudent businessman and the terms of the offer of the tenderer should be first considered and if found suitable, then only its credentials and ability to perform the work should be considered from a practical point of view.

24. In *Tata Cellular v. Union of India*, AIR 1996 SC 1, the Apex Court has laid down as follows: -

“94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere.

However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

25. In ***Asia Foundation and Construction Ltd. V. Trafalgar House Construction (I) Ltd. And Others***, (1997) 1 SCC 738, it has been held that the principles of judicial review cannot be denied to be applicable to contractual powers of government bodies but it is intended to prevent arbitrariness or favouritism and it is to be exercised in the larger public interest.

26. In ***Raunaq International Ltd. v. I.V.R. Construction Ltd.***, (1999) 1 SCC 492, the Apex Court, while laying emphasis on public interest and commercial consideration in the award of contract, expressed thus:

“11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation.....”

And again:

“.....Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene

under Article 226 in disputes between two rival tenderers.”

In the said case, their Lordships also emphasised upon the fact that an expert committee has special knowledge which plays a decisive role in deciding as to which is the best offer. The past record of the tenderers, the quality of the goods or services which are offered and the assessment of such quality on the basis of the past performance of the tenderer have an important role in deciding to whom the contract should be awarded.

27. In ***Air India Ltd. V. Cochin International Airport Ltd.***, (2000) 2 SCC 617, their Lordships expressed the view that the award of a contract, whether by a private party or by the State, is essentially a commercial transaction. It was held therein that when even some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 of the Constitution with great caution and should exercise it only in the furtherance of public interest. Emphasis was laid, apart from legal point, on public interest. The Apex Court has observed that in the matters of award of contract, the larger public interest has to be kept in view and when it is vivid that public interest commands that there has to be interference, then the Court should interfere.

28. In ***M/s Moarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others***, AIR 2000 SC 2272, the Apex Court held that if a term of the tender is deleted after the players entered into the

arena, it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions, fresh process of tender was the only alternative permissible. By reason of deletion of a particular condition, the wider net will be permissible and a larger participation or more attractive bids could be offered.

29. In ***Centre for Public Interest Litigation & Another v. Union of India & Others***, (2000) 8 SCC 606, after referring to a passage from ***Kasturi Lal Lakshmi Reddy v. State of J&K***, (1980) 4 SCC 1, it has been held thus:

“20. It is clear from the above observations of this Court that it will be very difficult for the courts to visualise the various factors like commercial/technical aspects of the contract, prevailing market conditions, both national and international and immediate needs of the country etc. which will have to be taken note of while accepting the bid offer. In such a case, unless the court is satisfied that the allegations leveled are unassailable and there could be no doubt as to the unreasonableness, mala fide, collateral considerations alleged, it will not be possible for the courts to come to the conclusion that such a contract can be prima facie or otherwise held to be vitiated so as to call for an independent investigation, as prayed for by the appellants. Therefore, the above contention of the appellants also fails.”

30. In ***W.B. State Electricity Board v. Patel Engineering Co. Ltd. & Ors.***, (2001) 2 SCC 451, the Apex Court emphasised on maintaining the sanctity and integrity of the process of tender / bid and also the award of a contract.

Adherence to the instructions cannot be given a go-by as the very purpose of issuing rules / instructions is to ensure their enforcement, lest the rule of law should be a casualty.

31. In *State of NCT of Delhi & Anr. v. Sanjeev (alias Bitto)*, (2005) 5 SCC 181, while dealing with the scope of judicial interference in matters of administrative decisions, the Apex Court has held that the authority must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously.

32. In *Laxmi Sales Corporation v. Bolongir Trading Co. & Ors.*, AIR 2005 SC 1962, the Apex Court disallowed the order passed by the High Court which had held that the rejection of the offer made by the second respondent therein was arbitrary and unfair. The Apex Court took note of the fact that the necessary documents were not filed along with the tender form solely on the ground that the same were not mandatory. Thereafter, their Lordships proceeded to state that on a reading of the various conditions in the tender form and the annexures annexed thereto, it was quite clear that proof of turnover of the firm over the last two relevant years with supporting documents were to be filed.

33. In *M/s. B.S.N.Joshi and Sons Ltd. V. Nair Coal Services Ltd.*, AIR 2007 SC 437, their Lordships reiterated the principles of judicial review which have been developed for interference in contractual matters. The Apex Court summarized the principles as follows:

“(i) If there are essential conditions the same must be adhered to:

(ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully:

(iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing:

(iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.

(v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

(vi) The contractors cannot form a cartel. If despite the same their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.”

34. In *Jagdish Mandal v. State of Orissa and Others*, 2007 (8) SCJ 359, the Apex Court opined that the power of judicial review in administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. It was further opined that when exercising the power of judicial review in the matters relating to tender or award of contract, certain special features should be kept in mind regard being had to the fact that a contract is a commercial transaction. Emphasis was laid on the fact that it is essential to consider whether the process adopted or the decision taken is so arbitrary or irrational that it could be said with certitude that no responsible authority acting reasonably and in accordance with the relevant law would have reached such a conclusion. In the said decision, the concept of public interest was reiterated.

35. In *Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. & Ors.*, (2007) 8 SCC 1, their Lordships laid emphasis on level playing field to all bidders and the reasonableness of the State action.

36. In *Siemens Public Communication Networks Pvt. Ltd. And another v. Union of India and Others*, 2009 (1) SCJ 634, it has been held as under:

“..... A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decisions relating to award of contracts is bonafide

and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.”

37. In ***Sorath Builders v. Shreejirupa Buildcon Limited & Anr.***, (2009) 11 SCC 9, it was laid down that it was obligatory on the part of the bidder to submit his pre-qualification documents within the time schedule.

38. In ***Meerut Development Authority vs. Association of Management Studies***, (2009) 6 SCC 171, it has been held as follows:

“27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

39. In ***Triveni Engineering & Industries Ltd. v. D.J.B. & Anr.***, 2009 (5) AD Delhi 265, the necessity to satisfy the essential pre-condition of the minimum eligibility requirement to participate in the tender and the nature of the necessity was dealt with and the Bench expressed the view that the nature of the project needed work experience and the petitioner had not

satisfied the mandatory minimum eligibility criteria in respect of the work experience and was, therefore, not entitled to be considered.

40. Presently, we shall refer to the principles with regard to the construction to be placed on a deed / document or a contract.

41. Before advertng to the principle, it is condign to refer the introduction that occur Instruction to Bidder (ITB). It reads as follows:

“This bid documents should be read in conjunction with the Press Tender Notice / IFB No. HLL/PCD/MCD-01/10-11 dated 29.03.2010, ‘a copy of which is enclosed in this documents and all clauses to be read in conjunction with any other instruction given elsewhere in this document, on the same subject matter of the clause.’”

Keeping the aforesaid guidance in view, we shall refer to certain authorities which do act as a laser beam on this score.

42. In ***Union of India v. The Central India Machinery Manufacturing Co. Ltd. and others***, AIR 1977 SC 1537, their Lordships, while dealing with the construction of a contract, expressed thus-

“29..... A correct construction, in turn, depends on a reading of the Standard and Special conditions as a whole. It would not be proper to cull out a sentence here or a sub-clause there and read the same in isolation. What is required is not a fragmentary examination in parts but an overall view and understanding of the whole. Again, it is the substance

of the documents constituting the contract, and not merely the Form which has to be looked into.

30. The real intention of the contracting parties is primarily to be sought within the four corners of the documents containing Standard and Special Conditions of the Contract.....”

[emphasis supplied]

43. In ***M/s Hindustan Shipyard Ltd. V. State of Andhra Pradesh***, AIR 2000 SC 2411, the Apex Court has also emphasized the need of looking into the substance and not merely the factum of the contract. Their lordships also stated that the terms and conditions of the contract should be read as a whole.

44. In ***Ramdev Food Products Pvt. Ltd. v. Arvinbhai Rambhai Patel & Ors.***, AIR 2006 SC 3304 their Lordships expressed thus-

“31. In Delta International Ltd. v. Shyam Sundar Ganeriwalla [(1999) 4 SCC 545], this Court noticed:

“17. For construction of contracts between the parties and for the interpretation of such document, learned Senior Counsel, Mr. Desai has rightly relied upon some paragraphs from The Interpretation of Contracts by Kim Lewison, Q.C. as under:-

“1.03 for the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning.

6.09 Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

Sir Edward Coke [Co. Litt. 42a] expressed the proposition thus:

'It is a general rule, that whensoever the words of a deed, or of one of the parties without deed, may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.' ”

32. *It is further stated:*

“For that purpose, he referred to the following observations of Buckley, J. from the paragraphs which are sought to be relied upon from The Interpretation of Contracts by Kim Lewison, Q.C.: “My first duty is to construe the contract, and for the purpose of arriving at the true construction of the contract, I must disregard what would be the legal consequences of construing it one way or the other way”.”

33. *Moreover, the document is to be read as a whole. It is equally well settled that the deed has to be construed keeping in view the existing law.*

34. *It is now a well-settled principle of law that a document must be construed having regard to the terms and conditions as well as the nature thereof. [Union of India v. M/s Millenium Mumbai Broadcast Pvt. Ltd. 2006 (5) SCALE 44]”*

45. In view of the aforesaid enunciation of law, there cannot be trace of doubt that the said principles would be attracted while dealing with the tender document as the tender document is basically and fundamentally a singular document.

46. The present factual matrix has to be tested on the touchstone of the aforesaid principles of law which we have categorized into two compartments. The main thrust of the submission of Mr. Sibal is that the

respondent No.2 could not have read certain eligibility criteria into the sphere of acceptance of the techno-commercial bid as they occur in different Sections. As is demonstrable, the Municipal Corporation of Delhi desired to procure certain items for anti malaria operations for the year 2010-11 through M/s HLL. The said advertisement reads as follows:

“Date : 29.03.2010
 IFB No. : HLL/PCD/MCD-01/10-11

Brief description of item (s)	Required Quantity	Bid Security (in Rupees)
Bacillus thuringiensis var israelensis (Bti)(AS) (For polluted water) OR Bacillus thuringiensis var israelensis (Bti)(WP) (For polluted water)	2,75,000 Litres OR 343.75 M.T.	68,15,000.00

47. Clause 7 which occurs in Section II deals with the documents establishing the bidder’s eligibility and qualification and reads follows:

“7. **DOCUMENTS ESTABLISHING BIDDER’S ELIGIBILITY AND QUALIFICATION:**

- 7.1 The Bidder shall, furnish, as part of its Bid, documents establishing the Bidder’s qualifications to perform the contract if its Bid is accepted.
- 7.2 *The documentary evidence of the Bidder’s qualifications to perform the contract if its Bid is accepted, shall establish to the Purchaser’s satisfaction:*

- (a) *that, in the case of a Bidder offering to supply Goods under the contract which the Bidder did not manufacture or otherwise produce, the Bidder has been duly authorised by the Good's manufacturer or producer to supply the Goods. In this regard, the Bidder should submit an Authority Letter from their manufacturers as per Proforma given in Section VIII.*
- (b) *The Purchaser will determine to his satisfaction whether the Bidder selected is qualified as per requirement of minimum qualifying criteria stipulated in Section VII, to satisfactorily perform the contract;*
- (c) *The determination will take into account the Bidder's financial, technical and production capabilities. It will be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder as well as such other information as the Purchaser deems necessary and appropriate;*

Notwithstanding anything stated above, the Purchaser reserves the right to assess the capability and capacity of the Bidder to perform the contract, should the circumstances warrant such as assessment in the overall interest of the Purchaser.

7.3 Techno Commercial Bid and Price Bid should be complete in all respects without any iniquity. Techno Commercial Bid incomplete in any respect will be rejected without further reference to the bidder and their Price Bid will be unopened.

[Emphasis added]

48. Clause 17 of Section II deals with preliminary examination. It reads as follows:

"17. PRELIMINARY EXAMINATION:

17.1 The Purchaser will examine the Bids to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the documents have been properly signed, stamped and whether the Bids are generally in order.

17.2 Arithmetical errors will be rectified on the following basis: - If there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected if the supplies does not accept the correction of the errors, its Bid will be rejected. If there is a discrepancy between words and figures, the amount in words will prevail.

17.3 The Purchaser may waive any minor informality or non-conformity or irregularity in a bid, which does not constitute a material deviation, provided such a waiver does not prejudice or offers the relative ranking of any Bidder.

17.4 Prior to the detailed evaluation, pursuant to ITB Clause 18, the Purchaser will determine the substantial responsiveness of each bid to the bidding documents. For purposes of these Clauses, a substantially responsive bid is one, which conforms to all the terms and conditions of the bidding documents without material deviations. Without prejudice to the generality of the foregoing deviations from or objections or reservations to critical provisions such as those concerning Performance Security (GCC Clause 6), Warranty (GCC Clause 26), Force Majeure (GCC Clause 17), Applicable law (GCC Clause 22) and Taxes & Duties (GCC Clause 24), will be deemed to be material deviation. The Purchaser's determination of a bid's responsiveness is to be based on the contents of the bid itself.

17.5 If a bid is not substantially responsive, it will be rejected by the purchaser."

49. Clause 18 of Section II which deals with evaluation and comparison of bids reads as follows:

"18. EVALUATION AND COMPARISON OF BIDS:

18.1 The Purchaser will evaluate and compare the Bids on the basis of techno commercial/technical evaluations followed by price bid evaluation.

49-A. It is extremely apposite to refer to certain Clauses of Section IV which deal with Special Conditions of Contract (SCC). They read as follows:

“4. Qualification Criteria (QC):

Qualifying minimum requirements (For Insecticides / Larvicides) (To be supported with documentary evidence). Refer to Section – VII.

5. Performance Statement:

Bidders should give performance statement for last 3 years, as per Format given in Section VIII, of orders for same and / or similar items satisfactorily executed to sizeable value both in quantity and cost in comparison to item offered in the price bid.”

50. The Schedule of Requirements (SOR) occurring in Section V is as follows:

“SCHEDULE OF REQUIREMENTS (SOR)

<i>Brief description of item (s)</i>	<i>Required Quantity</i>	<i>Bid Security (in Rupees)</i>
<i>Bacillus thuringiensis var israelensis (Bti)(AS) (For polluted water)</i> <i>OR</i> <i>Bacillus thuringiensis var israelensis (Bti)(WP) (For polluted water)</i>	<i>2,75,000 Litres</i> <i>OR</i> <i>343.75 M.T.</i>	<i>68,15,000.00</i>

Note: -

- 1) All the materials should be well packed to avoid any breakage during transit.*
- 2) **Terms of Delivery** - Free delivery at the consignees and i.e. freight and all other levies pre paid up to destination at consignees end.*
- 3) **Delivery period** - 91667 Litres of BTI(AS) or 114.584 MT of BT(WP) should be offered for Inspection & Testing within 10*

days from the date of issue of Notification of Award or earlier. The remaining quantity is to be offered for Inspection & subsequently supplied as per the requisition from the Purchaser.

- 4) *Available shelf life at the time of supply should be 5/6th of the CIB approved shelf life.*
- 5) *Stores should be suitable for storage and use in Delhi.*
- 6) *Consignee list is as enclosed at Section IX.”*

[Underlining is ours]

51. Clause 2 occurring in Section VI (Technical Specifications) reads as follows:

“2. **Bacillus thuringiensis var israelensis (Bti), Sero-type, H-14 (AS): -**

Description of Stores : ***Bacillus thuringiensis var israelensis (Bti), Sero-type, H-14 AS (TAC approved). As per specifications given in CIB registration certificate.***

- *For use in NVBDCP the product should be registered with Central Insecticide Board.*
- *The packaging of the product should conform of the specifications of CIB*
- *The product should have cleared the long term trials by/under the supervision of ICMR Institutes, NICD for 1 year / following common protocols published by MRC-VCRC.*
- *The product should be stable when stored at ambient temperature (not exceeding 42.5°C).”*

[Emphasis supplied]

52. The Qualification Criteria (QC) in Section VII wherein Clause 7.2(b) of ITB has been referred lays the following postulates:

“QUALIFICATION CRITERIA (QC)

(refer to clause 7.2 (b) of ITB)

01. *The bidder must be a manufacturer or his authorized agent (specifically against this invitation for bid for the subject goods) and had successfully executed contracts for similar and/or identical goods at least for the past 3 years prior to the date of bid opening.*

02. *Bidders, meeting the above requirements except for successful execution of contracts for last three years, may also participate in the bidding process provided they have valid on going collaboration agreement with a manufacturers, who in turn, fully meets the criteria specified in clause 01, above and provided also the bidder furnishes an undertaking jointly executed by it and the collaborator for satisfactory designs, manufacture and performance of the goods and services offered including all warranty obligations.*

Bidders who are subsidiaries and have recently established production line in India for the product for which bids are invited, can also be considered as meeting with the criteria, provided the parent company (Principals) meets with the above criteria in full and agrees to furnish (either jointly with the bidders (subsidiary) or separately (a) a legally enforceable undertaking to guarantee quality, timely supply, performance and warranty obligations as specified for the contract; and (b) performance security as stipulated in GCC & SCC.

03. *The bidder shall furnish a brief write-up, packed with adequate data explaining and establishing his available capacity/capability (both technical and financial) to perform the contract (if awarded) within the stipulated time period, after meeting all its current/present commitments. The bidder shall also furnish details of equipment and quality control in the enclosed proforma 'B'.*

04. *Notwithstanding anything state above, the purchaser reserves the right to assess the bidder's capability and capacity to perform the contract satisfactorily before deciding on award of contract should circumstances warrant such an assessment in the overall interest of the purchaser.*

The bidder on whose behalf the bid is being made, must be the manufacturer of the product itself and must be in business of similar and/or identical goods for at least last three years and must have manufactured and supplied to the extent of at least 25% of the quantity for the specific product indicated in

Section-V Schedule of Requirements in any one year during the last three years prior to the date of Bid opening.”
[Emphasis supplied]

53. The performance statement occurring in Section VIII (Proforma-Sample Forms) reads as follows:

PERFORMANCE STATEMENT

[Proforma for Performance Statement (for a period of last three years)]

Name of item offered _____ Date of Opening
_____ Time _____ Hours _____

Name of the Firm

Order placed by (full name and address of purchaser)	Order No. and date	Description and quantity of ordered stores	Value of order	Date of completion of delivery		Remarks indicating reasons for late delivery, if any	Has the stores been satisfactorily supplied?	Attach a certificate from the Purchaser / Consignee)*
				As per contract	Actual			
1	2	3	4	5		6	7	8

Signature and seal of the bidder

**** The certificate must incorporate a cross-reference of Order No., date and value of the total order confirming supply and acceptance of stores by the purchaser/ consignee to their entire satisfaction ”. [emphasis added]***

54. We have referred to the various documents forming part of the tender document to appreciate whether there was any ambiguity in the tender process or when the documents, read as a whole, clear the basic factum of requirement. As is evident, the bidder was required to furnish documents to establish its qualification. The 'documentary evidence', as is manifest from Clause 7.2 occurring in Section II, clearly stipulates that the documentary evidence must have the potentiality to establish the purchaser's satisfaction if the bid is accepted. The purchaser is required to evaluate and compare the bids on the basis of the techno-commercial and technical evaluations followed by the price bid evaluation. Logically and sequentially put, a bidder has to first qualify in the techno-commercial / technical evaluation bid and thereafter its price bid would come within the domain of evaluation or for that matter comparative assessment. The purchaser is also required to take into consideration the bidder's financial, technical and production capabilities which would be based on bidder's qualification. That apart, the said satisfaction would also depend upon such other information as the purchaser would deem necessary and appropriate. Clause 7.3 occurring in Section II clearly provides that techno-commercial bid incomplete in any respect will be rejected without further reference to the bidder. The Schedule of Requirement (SOR) in Section V provides that the stores should be suitable for storage and use in Delhi. There is also a provision in Clause 2 of Section VI (Technical Specifications) that the product should be stable when stored at ambient temperature (not exceeding 42.5° C). The

Qualification Criteria, as referred in Sections IV, VII and VIII, specifically refers to Clause 7.2 of ITB and in categorical terms lays down a postulate that the bidder must be in business of similar and/or identical goods for at least three years and must have manufactured and supplied to the extent of at least 25% of the quantity for the specific product indicated in Section V (Schedule of Requirements) in any one year during the last three years prior to the date of bid opening. In addition to that, the performance statement also requires a bidder to incorporate, in an indubitable manner, a cross-reference of Order No., date and value of the total order confirming supply and acceptance of the stores by the purchaser/consignee to their entire satisfaction.

55. In this backdrop, it is to be seen whether the petitioner had satisfied the techno-commercial bid. The performance statement furnished by the petitioner relates to April, 2006 to March, 2007, April, 2007 to March, 2008 and April, 2009 to March, 2010. The same has been brought on record as Annexure-Q to the writ petition. On a scrutiny of the same, it is perceptible that the performance statement has been provided by way of a chart as required. Column No.7 of the said chart requires the bidder to state “has the stores been satisfactory supply” and column No.8 requires the purchaser to “attach certificate from the purchaser/consignee”. The said chart has been made according to performance statement provided in the tender document. The note appended, as has been highlighted earlier, requires incorporation of

cross-reference of Order No., date and value of the total order confirming supply and acceptance of stores by the purchaser/consignee to their entire satisfaction. A bare glance at column No.8 of the chart furnished by the petitioner for the year 2006-07 would show that 5 certificates were attached whereas 17 orders were attached. In respect of 2007-08, 16 orders and 7 certificates were enclosed. For the year 2009-10, 17 orders and 15 certificates were enclosed.

56. As per the requirement of the tender stipulations, the petitioner was required to produce goods acceptance certificate for 68,750 litres quantity from the purchaser/consignee whereas the petitioner could only produce documents in respect of 38,900 litres. It is not disputed by Mr. Sibal, learned counsel for the petitioner, that the petitioner had not filed the certificates though there were work orders and supply was made. It is urged by him that it was incumbent on the part of the petitioner to determine whether it is a responsive or non-responsive bid. As has been indicated earlier, the techno-commercial bid and price bid were required to be complete in all respects without any ambiguity and if the techno-commercial bid is incomplete in any respect, the same was liable to be rejected. To build the edifice of the said submission, it is canvassed by Mr. Sibal, learned counsel for the petitioner, that when there was a postulate for determination a discrimination was inherent in the tender document to afford an opportunity to be satisfied.

57. The term ‘determination’ has to be understood in the context it is used. To elaborate: when the techno-commercial bid as well as the price bid/financial bid are found to be in order, the purchaser has the responsibility under the tender documents to determine regard being had to various aspects. But such a situation did not emerge in the case at hand. The petitioner on its own showing did not file the requisite performance certificate. What is structured by Mr. Sibal is that the petitioner was required to show the supply from 27.11.2009 as per the communication dated 21.5.2010. The said proponent on a first blush appears to be quite attractive but on a studied scrutiny, it melts into insignificance because the respondent No.2 wanted the same as an additional information which is in tune/accord with the conditions of the contract. Quite apart from the above, what is more important is that the 2nd respondent wanted the product to be stored at a particular temperature. The product of the petitioner did not have the potentiality to be stored at the said temperature. What is urged by Mr. Sibal is that the product did not change and that has been clarified by the documents issued by the authorities. The same, as we understand, is in a different realm altogether. The performance statement clearly postulated confirmation of supply and acceptance of stores by the purchaser/consignee to their entire satisfaction. Read cumulatively, the filing of certificate in its ambit and sweep engulfs ‘the satisfaction’. It is the warrant. The same was not adhered to. Thus, the essential condition was not satisfied. The pronouncements in the field can go a long way to highlight that when there is infirmity in the decision making process which relates to ignoring the

procedures that are basic in nature and further the action of the purchaser is not in consonance with essential condition of the NIT and a deviation has been made then there can be interference by the Court. As is evincible, the essential condition that has been postulated in the NIT has not been satisfied. The same is imperative in character and is not relaxable as it has a purpose. The purpose was to procure adequate quantity to eradicate the epidemics spread of the disease of malaria and dengue which have been geometric leap in the rainy season. It was incumbent on the part of the authorities to take efficient, responsible, expeditious and scientific precautionary measures to annihilate the spread so that the people do not suffer from the disease or eventually succumb to it. The age old saying 'prevention is better than cure' comes into full play. That serves a public interest in the completest sense. It safeguards the health of the citizens. It makes a genuine effort to destroys the fear in the heart of a citizen in respect of such dangerous diseases.

58. Another aspect, as we find, cannot be lost sight of. The agreement has not been entered into with the respondent No.7 for one year. Initially it has been entered into for three months reserving the right to place the order for full tendered quantity keeping in view the requirement. Thus, the conception of satisfied supply gains further acceptance.

59. Another aspect which has been highlighted by Mr. Sibal is that the petitioner was not given equal opportunity than that was afforded to the respondent No.7. It has been brought to our notice that the respondent No.7

was asked to clarify with regard to the certificates. It is undisputed that the respondent No.7 had supplied the product earlier to the MCD. The respondent No.2 has been appointed as the agent to finalise the tender on behalf of the respondent No.3, the Municipal Corporation of Delhi, which is the user and, in fact has the more responsibility to see that the diseases do not spread and eventually are eradicated. The certificates from MCD were filed. Hence, it had a different contour altogether. Judged from both the spectrums, it is clear as noon day that the petitioner did not satisfy the requisite/essential conditions and the element of public interest, in certitude, tilts in favour of the decision making process of respondent No.2.

60. *Ex consequenti*, the writ petition, being sans substratum, stands dismissed without any order as to costs.

CHIEF JUSTICE

MANMOHAN, J.

JULY 26, 2010
pk