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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on : 01.02.2019
Pronounced on : 25.02.2019

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W.P.(C)No.8886/2018

AFILIAS INDIA PVT. LTD. Petitioner
Through: Ms. Chinmayee Chandra, Adv.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Ravi Kishore, Mr. Niraj Singh, Mr.
Deepak Jaiswal and Ms. Atipra Aick,
Advs. for R-2.
Mr. Rakesh Munjal, Sr. Adv. with Ms.
Yashita Munjal and Mr. Yogesh Mittal,
Advs. for R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.

1. The petitioner is aggrieved by the decision of the second respondent, the National Internet Exchange of India (hereafter "NIXI"), a not-for-profit organization incorporated under Section 25 of the Companies Act rejecting its tender/bid for Selection of Technical Service Provider for .IN Registry (hereafter "the service").

2. The Domain Name System ("DNS") acts as a phone book for the Internet by translating human-friendly names into internet addresses, i.e. it maps a web address keyed in by a user to the appropriate webpage by routing it through the correct path. It is a naming system for computers, services, or other resources connected to the Internet or a private network. A domain name consists of one or more parts, technically called 'labels'

separated by dots, (such as 'idea.com'). The rightmost label conveys the top-level domain ("TLD"), i.e. the domain name 'www.example.com' belongs to the top-level domain 'com'.

3. The Internet Corporation for Assigned Names and Numbers ("ICANN") is the global regulatory body for the Internet's Domain Name System and Top-Level Domains; it develops policies for internationalization of the DNS system, introduction of new generic TLDs, etc. The standards applicable to the DNS are contained in a set of documents known as 'Request for Comments' or 'RFC Documents' published by the Internet Engineering Task Force (Internet standards). ICANN delegates the right to use a domain name to domain name registers, which are accredited by it. Every top-level domain (TLD) is maintained and serviced technically by an administrative organization, operating a registry (in India's case, the .IN Registry operated by NIXI). A registry is responsible for operating the database of names within its allocated zone. A registrant is one who seeks a domain registration. ICANN publishes the complete list of TLDs, TLD registries, and domain name registrars.

4. Text in computers, telecommunications equipment etc. are represented by the character encoding standard for electronic communication, i.e. the American Standard Code for Information Interchange ("ASCII"). ASCII was originally based on the English alphabet; it now encodes 128 specified characters into seven-bit integers. Ninety-five encoded characters are printable: these include the digits 0 to 9, lowercase letters a to z, uppercase letters A to Z, and punctuation symbols. In addition, the original ASCII specification included 33 non-printing control codes which originated with Teletype machines; most of these are now obsolete. The limited set of ASCII characters permitted in the DNS prevented the representation of names and words of many languages in their

native alphabets or scripts. To facilitate this, ICANN approved the Internationalizing Domain Names in Applications ("IDNA") system, by which user applications, web browsers, map Unicode strings into the valid DNS character set. In 2009 ICANN approved the installation of internationalized domain name country code top-level domains ("ccTLDs") and many registries of the existing top-level domain names have adopted the IDNA system.

5. The ".IN" is the top-level domain ("TLD") of India at the highest level in the hierarchical Domain Name System of the Internet. Being a country code TLD ("ccTLD"), .IN domain is an India specific unique symbol. The .IN domain initially started with 6,500 registrations before it was re-launched in the January 2005 by Department of Information Technology ('DIT') now Ministry of Electronics & Information Technology (MITY the first Respondent). NIXI is authorized to operate and manage the .IN Registry. The primary objective of the re-launch was to establish a strong technical foundation and project .IN domain as a reliable and stable ccTLD. The .IN domain was well received in the market and in the first 90 days, registrations crossed the 100,000 mark. From its initially modest beginning, the .IN registrations have now crossed the 2.2+million registration mark firmly establishing it as a leading TLD globally with its registrants in over 150 countries.

6. The petitioner states that despite significant growth of the Internet user base still only about 22 percent of the Indian market is penetrated. Internet penetration in the country is one of the key factors that contribute to the growth of the domain names for a ccTLD. At present, unlimited registrations are available in the following zones, where registration is available freely to all parties worldwide, and there are no nexus or other qualifications:(a) .in (b) co.in; (c).net.in; (d) org.in; (e) firm.in; (f) gen.in

(general) and (g) ind.in (individuals). It is submitted that zones reserved for use by qualified organizations in India are (a) ac.in. (Academic); (b) res.in (Indian research institutes); (c) edu.in (Indian colleges and universities); (d) gov.in (Indian government); (e) mil.in (Indian military).

7. In 2004, NIXI planned the necessity of a Technical Service Provider with international experience and the expertise of operating and managing the .IN domain Registry. Therefore, a global tender was issued in November 2004 and through a competitive and transparent bidding process, the Petitioner was selected as TSP to operate and maintain .IN domain Registry for the period of 2007 to 2012 and 2013 to 2017 respectively, which was to expire on 31.12.2017. It is stated that the role of the TSP is very important as it provides critical infrastructure, technology and services to NIXI for smooth and efficient management of .IN domain Registry.

8. It is stated that Indian scripts are different from Latin based scripts as they are written in different alphabets / characters of the respective regional languages and use 'matras', half-characters, special language specific characters such as 'halant' and there are numerous variants within individual languages and scripts. It is claimed that over the years, the Petitioner has undertaken huge efforts and developed Indian language-based applications. For this, the Petitioner had to write significant amount of specialized code to render these languages correctly such that users are directed to the correct address. The Petitioner successfully worked with NIXI to enable registration of the “भारत” (.bharat) ccTLD with ICANN after complying with stringent RFC standards. Consequently, the registry has commenced accepting Internationalized Domain Names ("IDNs") in regional languages and has been developing applications to permit registrations in all Indian languages in internationalized script. It is also contended that the भारत

(.bharat) domain name in Devanagari script was successfully launched on 27.08.2014. In the next phase, availability of IDN in Gujarati, Bengali, Manipuri in Bengali script, Punjabi, Tamil, Telugu and Urdu language started from 03.08.2015. At present, the petitioner claims that the commonly used IDN domain name zones are (a) **भारत** (.bharat) (b) **कंपनीभारत** (.company.bharat) (c) **वाद्याभारत** (vidya.bharat) (Exclusive registrar: ERNET) (d) **सरकारभारत** (.sarkar.bharat) (Exclusive Registrar: NIC). Furthermore, the petitioner claims to be presently working towards development of domain names for nine Indian scripts namely Devanagari, Bengali, Gujarati, Gurmukhi, Kannada, Malayalam, Oriya, Tamil and Telugu. It is stated that ICANN approved delegation of the 7 TLDs representing India on 25.01.2011, pursuant to which IANA entered “**भारत**” (.bharat) in the 7 languages in the Petitioner's name servers. In the meanwhile, the Petitioner had also begun discussions with NIXI regarding the launch process, scope, of work and requirements for launching an IDN ccTLD.

9. On 04.06.2012, NIXI issued another RFP for selection of a Technical Service Provider for the period 2013 to 2017. The Petitioner submitted its bid on 06.07.2012, which was selected and the contract was awarded to the Petitioner on 08.12.2012. In 2014, the NIXI introduced Internationalized Domain Names ("IDNs") to enable users to access web sites in their own language. The “**भारत**” (.bharat) domain name in Devanagari script was launched on 27.08.2014. Availability of IDNs in Gujarati, Bengali, Manipuri in Bengali script, Punjabi, Tamil, Telugu and Urdu language started from 03.08.2015.

The present tender and disputes relating to it

10. The dispute which arises for consideration arises out of a tender (RFP) issued by NIXI on 30.01.2018, for Selection of Technical Service Provider for .IN Registry. The RFP specified: the “Scope of Work” of the Technical Service Provider thus *per* Clause 7.5.2:

"for "Providing technical Services to Operate and Maintain .IN Registry " through which the Purchaser intends to perform all .IN Registry Operations. The TSP is required to provide such services, support and infrastructure as the Purchaser may deem proper and necessary, during the term of the Contract, and includes all such processes and activities which are consistent with the proposals set forth in the Bid, the RFP and this Contract and are deemed necessary by the Purchaser, in order to meet its business requirements (hereinafter 'scope of work')." Performance of all .IN Registry operations, which includes management of domain names in regional languages, requires experience with Indian language addresses."

11. It is alleged that the Scope of Work requires the TSP to have experience and expertise in Indian language domain names and Indian scripts.

12. Clause 9 of the RFP which sets out, in detail, the Scope of Work and clause 9.9 to the relevant extent, are extracted below:

“Scope of Work

9.1 Shared Registry System

9.1.1 The Extensible Provisioning Protocol (EPP) - based .IN Registry platform provides a stable, DNSSEC and IPv6- enabled Shared Registry System (SRS) that is scalable, state-of-the-art, and secure. The SRS is capable of registering domain names managed by multiple registrars.

9.1.2 The TSP shall ensure that technical and operational specifications for the SRS consists of the following parts:

[.....]

f. Comply with the multi-Unusual requirement of NIXI]

[.....]

9.9 Implementation of IDNs

9.9.1. Implementation and Support of IDNs in multiple Indian languages which are approved and to be approved

9.9.2. Support of IDNs with variant characters and normalisation routines specific to Indian languages

9.9.3. Compliance with the Internationalizing Domain Names in Applications ('IDNA) standards, including involvement in the IDN community, development, and standards groups

9.9.4. Formulate and publish IDN tables and policies in coordination with language authorities

9.9.5: Provide a variant generator and a puny code converter for use of registrants and registrars

9.9.6: Support of IDN TLDs in all twenty two scheduled Indian languages and Indian scripts

9.9.7. Support for EAs. at IDN.IDN in all twenty two Indian scheduled languages and enable complete localisation of all email address into local Indian languages and shall support the <India.IN> email plan.

Emphasis supplied] ”

13. The petitioner alleges that the clear condition in the RFP was that bidders must possess the requisite experience and capability to provide the services and meet the requirements described in the RFP. This was a pre-qualification criterion (contained in Clause 8.1.3), which reads as follows:

"the bidder must possess the requisite experience, strength and capabilities in providing the services necessary to meet the requirements, as described in the RFP. The bids must be complete in all respects and should cover the entire Scope of Work as stipulated in the RFP."

14. It is also alleged and contended that the RFP clearly stated that technical bids shall first be reviewed for determining compliance with RFP terms and conditions, minimum /mandatory technical requirements and the scope of work. Clause 8.2 of the RFP is relevant which inter alia stipulates the following:

'8.2 Evaluation of Technical Bids

8.2.4 The technical bid shall first be reviewed for determining the Compliance of the Technical bids with the RFP terms and conditions. Minimum/ mandatory Technical requirements and the scope of work as defined in this RFP.

8.2.5 Any bid found to be non-compliant to the mandatory Technical Requirements, RFP terms and conditions and the scope of work shall be rejected and shall not be considered for further evaluation. Bids that are technically compliant would only be taken up for commercial evaluation."

15. Learned senior counsel, Mr. Gopal Jain argued that in view of these clear conditions in the RFP, bidders should have *inter alia* had experience of supporting IDN TLDs in 22 Indian languages and scripts. This is a material and fundamental term of the RFP, which cannot be ignored or diluted. It is a vital and critical condition as such experience is necessary for any TSP that is to manage and support the .IN Registry which has IDN TLDs in Indian languages and is developing ccTLDs in all 22 Indian languages.

16. It is submitted that both the petitioner and the third respondent – the successful bidder participated in the bidding process. The NIXI's evaluation committee adjudged both bidders as technically qualified in terms of the RFP, and the commercial bids were opened on 11.07.2018. As the third respondent quoted a price of USD \$ 0.71 per domain while the petitioner quoted a price of \$ USD 1.10 per domain, NIXI declared the third respondent as the LI.

17. It is submitted that on 13.07.2018, the Petitioner learnt of the third respondent's incredibly low price quoted and wrote to NIXI drawing its attention to Clause 8.3.7 of the RFP which states that "*Bidders quoting incredibly low or unrealistic high cost of items leading to unrealistic commercial bid with a view to subverting the tender process shall be*

rejected straight away and EMD of such vendor shall be forfeited. Any bid found to be unsatisfactory in terms of any of the evaluated parameters as mentioned may be rejected and shall not be considered for further evaluation." It was argued that the price of LI is unrealistic and unsustainable and that such low financials will pose a danger to the stability of a critical national infrastructure like the .IN registry. Counsel also pointed out that Respondent No.3 had just lost the .AU registry (Australia) in a competitive bidding where it was charging USD 6.00 per domain, that it is similarly charging USD \$ 5.00 per domain for the .biz TLD, and that these rates are nowhere close to the USD 0.71 per domain quoted by Respondent No.3 for the .IN registry.

18. Reliance is placed on two letters to the NIXI, dated 16th and 18th July, 2018 objecting to the award of the contract to the second respondent; further the petitioner also states that on 19.07.2018, it again wrote to the RFP Committee of NIXI pointing out critical technical gaps in the bid of the third respondent and consequent risks to the stability of .IN registry.

19. Mr. Jain argued that the third respondent lacks experience in supporting Hindi or any other Indian language in the marketplace with respect to second-level Hindi, Tamil or other Indian language IDN registrations; and top-level Hindi, Tamil or other Indian language operations. It is also submitted, further that attempts to register Hindi language names in major TLDs supported by the third respondent results in a response which reads 'invalid' or *'the domain name contains invalid characters'*. Counsel argued that on the other hand, the Petitioner has custom built the IDN program which is now operating successfully for .IN, which is the result of a complex and sophisticated initiative never undertaken by any other registry operator in the world. Further, for an operator with no existing capabilities in Hindi / Indian languages, to.

replicate such a program introduces extreme risk into the stability of .IN and jeopardizes the security and accessibility of every name in use.

20. It is submitted that the utter lack of experience and expertise to develop and maintain .IN programs threatens the third respondent's credibility in performance of core and basic tasks in NIXI's stated objective of intending to perform all .IN Registry Operations. Therefore, the third respondent was ineligible in terms of the RFP and NIXI could not have accepted its bid. Counsel submitted that the acceptance of the third respondent's bid and rejection of the petitioner's bid is arbitrary and contrary to Article 14 of the Constitution of India.

21. It is argued on behalf of NIXI that it is authorized by the Government of India as the sole authority for the purpose of running the ccTLD (country code top level domain) - .IN domain and .bharat the IDNs (Internationalized domain names) in various Indian official languages. NIXI is also the neutral meeting point of the ISPs in India. Its main commitment is to facilitate exchange of domestic Internet traffic between the peering ISP members. This enables more efficient use of international bandwidth, saving foreign exchange. It also improves the quality of services for the customers of member ISPs, by avoiding multiple international hops and thus reducing latency.

22. It is pointed out that the "RFP" categorically mentioned that before opening and evaluation of the technical proposals, bidders are expected to meet all the conditions of the RFP and the pre-qualification criteria. Bidders failing to meet these criteria or not submitting requisite supporting documents/ documentary evidence for fulfilling the pre-qualification criteria are liable to be rejected. The RFP also mentioned that the bidder must possess the requisite experience, strength and capabilities in providing the services specified. In response, two bids were received by NIXI.

23. NIXI urges that the bids submitted by bidders were evaluated by an evaluation committee with the help of an independent consultancy organization, to ascertain whether they complied with the criteria prescribed by the RFP and also whether the bidders were technically qualified in terms of the RFP. NIXI stated that on evaluation the bids submitted by the Petitioner and the third respondent were found to be technically qualified and consequently the commercial bids were opened on 11.07.2018 only for these two bidders as they were the only two technically qualified bidders. This was categorically mentioned in the RFP that the Commercial bids submitted by only those bidders shall be eligible for further evaluation, who has qualified both the requalification and the Technical evaluation.

24. It is further argued that in terms of the RFP and on scrutiny/evaluation of the Commercial Bids it was stated that the bidder who had quoted the lowest amount per Financial Transaction Annual Service Price shall be awarded the Contract. In view of this, the third respondent was awarded the contract; it had quoted the lower price per domain transaction as against the price quoted by the petitioner.

25. It is further argued that with regard to the appointment of the third respondent as TSP, the Petitioner wrote various emails to the NIXI, to the Secretary of the Union Government, who is also the Chairman NIXI alleging the appointment of third respondent was unrealistic and unsustainable and that low financials will pose a danger to the stability of a critical national infrastructure like the .IN registry. It further wrote that the third respondent has violated Clause 8.3.7 of the RFP and that their quote is irrational and predatory. The NIXI, denied those allegations. It is contended that a definitive Technical Service Provider (TSP) Agreement was entered between the third respondent and NIXI on 3.10.2018 in terms of the RFP.

26. The petitioner's contentions that the third respondent is ineligible in supporting and managing domain names in Indian languages and scripts and it is also further denied that their bid is liable are denied as baseless; it is stated that on the contrary the third respondent has all the relevant qualifications and expertise to support and manage the .IN registry as per the terms of the RFP.

27. NIXI stated that the third respondent had submitted in the bid document that it possessed the relevant qualification and experience to support the International Domain Names (IDNs) in Indian languages and scripts. In its technical bid response the third respondent stated as under:-

"IDN Support

The Neustar Registry supports over 20 IDN language tables which includes Hindi. Based on the given language table, Neustar not only complies with the IDN2008 rules, complies language specific context rules and variants are supported as well to provide a meaningful implementation of a language for the target registrants and public users.

Context rules include, but not limited to:

- Positional requirements in context to the use or presence of other characters;*
- Combination and/or patterns of characters allowed in label; and*
- Classification of a subset(s) of character determining they use with one another in a single label."*

28. NIXI states that the third respondent, therefore has the capabilities to manage and support IDNs in Indian languages. It further states that:

"The allegation of the Petitioner is baseless as it has not provided any documentary evidence to support its contention. In the contrary the Respondent No.3 in its bid had specifically submitted that it supports over 20 IDNs languages which includes Hindi. The Respondent No.3 has confirmed that it has

extensive experience with in-country registry development which comply with NIXI's requirements. The Respondent No.3 have develop registry software in UAE, Qatar and Oman. The Respondent No.3 has extensive experience providing back end registry services and has done so far over 17 years."

29. NIXI denied the allegation that the third respondent's bid was with an intention to subvert the tender process and submitted that it is a well settled principle that in a commercial tender, quoting a price is left to the bidder and the lowest price so quoted needs to be accepted if the bidder meets all other criteria of the RFP. It also denies that the third Respondent tried to influence the tender process by extraneous considerations like a proposed meeting to be held at its corporate headquarter. NIXI denies that any such proposed meeting took place and that *"In the past also such meeting had taken place in overseas offices of the Petitioner, who was the earlier Service Provider also wherein the cost of the travel was borne by the Respondent No. 2."* (i.e NIXI).

30. The evaluation process, states NIXI was conducted by an internationally reputed consultancy organization in a transparent manner after which the contract was awarded to the third respondent. NIXI further stated as follows:

"50. The averments in the Para 50 (a) to (d) are false and hence denied. It is reiterated that the Respondent No.3 in its bid had submitted that it had full knowledge, expertise and experience to act as the TSP in terms of the RFP. Further, the bid was evaluated by an internationally reputed consultancy organization. It is worthwhile to mention that the Respondent No.3 expertise in supporting in Hindi. On the contrary the Respondent No.3 in its bid had specifically submitted that it supports over 20 IDNs languages which includes Hindi. The Respondent No.3 has confirmed that it has extensive experience with in-country registry development which comply with NIXI's requirements. The Respondent No.3 have developed registry

software in UAE, Quarter and Oman. The Respondent No.3 has extensive experience providing back end registry services and has done so far over 17 years.

51. The contents of Para 51 of the Petition are false and denied. It is submitted that the Respondent No.3 was declared a successful bidder on the basis of global tender in a transparent manner and after evaluation of the bid by an internationally reputed consultancy organization. The evaluation was strictly as per the terms and conditions of the RFP. The allegations made by the Petitioner are frivolous and baseless and the same have been made with the sole intention of scuttling the process.”

31. The third respondent, denies the allegations that it lacks the experience and states that the petitioner’s allegations are unfounded; it claims to have earned the reputation of being among the most reliable and trusted domain name registry service providers in the world and further that the technology provided by it supports the global community with the infrastructure throughout America, Europe, Africa, Asia, and Middle East and further that it manages over 13 million domain names across approximately 250 TLDs. These span country codes, generic, city and brand TLDs. Its operational models are flexible to support customer needs including fully licensed solutions like those deployed for .ae, .om’ and .qa, revenue share models, or software-as-a service engagements that are in place with many other TLDs.

32. The third respondent claims that it was one of the first registry service organizations to successfully implement an IDN (IDN Registry Service System) using the IDNA 2008 Protocol. Its implementation provided fully configurable support for. Further, it played an integral role in the introduction of IDNs through participation in the-Internet Engineering Task Force. It is stated that the said respondent has deep experience in complex languages including but not restricted to Chinese, Arabic and

Hindi. The allegations about its lack of experience are therefore, denied Allegation no.2 That the petitioner has alleged that the Respondent No. It also denies that it has no knowledge or expertise in Hindi language or that the global authority repository does not recognize the third respondent as an entity having experience in Hindi language names.

33. The third respondent submits that :

“in this regard it is submitted that the allegations as leveled by the petitioner are unfounded as Neustar Data InfoTech (India) Private Limited (Respondent No. 3) is a wholly owned subsidiary of Neustar, Inc. The foundation of the Respondent No.3 is of technical excellence in delivery of domain name registration services. It also goes far beyond that which also supports the objectives of Respondent No.2. The Respondent No. 3 has earned the reputation of being among the most reliable and trusted domain name registry services providers in the world. The technology supports a global community with infrastructure throughout America, Europe, Africa, Asia, and Middle East. As described above. Respondent No. 3 has successfully passed the PDT(Pre-delegation testing) process conducted by IIS (Internetstiftelsen Sverige) with the Hindi Language Table. That the table based on the Hindi language can be found at https://registry.in/Internationalized_Domain_Names_IDNs. That as far as IANA is concerned, it is stated that this is related to the relevant registry operator's timeline as to when it wishes to publish or update, so IANA's website cannot be taken as the sole criterion nor was that the condition leveled in the RFP. In addition, IANA has its own timeline as to its own wishes as to when it decides to upload or update the Hindi Language Table on its website. The Respondent No. 3 is not responsible for the same. The answering respondent is not required to upload its experience on IANA's website. As explained above, the Respondent No. 3 has the experience and technical capability to manage, support IDNs in Indian languages and has also shown proofs regarding the same. Therefore, the present allegation is totally unfounded, baseless and is without any merit attached to it. Thus, the present petition is devoid of merits and is liable to be dismissed.

34. The petitioner's challenge to the award of contract therefore, to the third respondent is on the basis that the latter has no experience in developing and maintaining a domain name service in Indian languages. The petitioner relies on clause 8.2.4 and 8.2.5 to say that the bid should comply with the requisite standards needed for the scope of work. In this regard, to spell out what the scope of work is, the petitioner relies on the following RFP stipulations:

*"9.1.2 The TSP shall ensure that technical and operational specifications for the SRS consists of the following parts:
[.....]"*

*f. Comply with the multi-Unsual requirement.ofNIXI]
[.....]*

9.9 Implementation of IDNs

9.9.1. Implementation and Support of IDNs in multiple Indian languages which are approved and to be approved

9.9.2. Support of IDNs with variant characters and normalisation routines specific to Indian languages."

35. It is apparent that what the RFP required as essential qualifications were that the bidder should have the technical capability of supporting "IDNs in multiple Indian languages which are approved and to be approved"; that it should "Complywith the multi-Unsualrequirement.ofNIXI" and also that it should be able to "Support of IDNs with variant characters and normalisation routines specific to Indian languages." Conspicuously these conditions *do not spell out previous experience in supporting IDNs in multiple Indian languages or that the previous experience of the bidder should necessarily be in all or some Indian languages*. In turn, this implies that bidders should have sufficient expertise in supporting multiple IDNs in several languages. The petitioner's

emphasis is that the expertise or experience should necessarily be in Indian languages. However, there is no such clear tender condition mandating that all bidders should possess such prior experience. What is needed is ability to support and maintain IDNs with variant characteristics and normalization routines specific to Indian languages and (b) ability to comply with “*multi-Unsualrequirement.of NIXI*”. If the petitioner would have its way, perhaps the NIXI would be left with only one contender: i.e. the petitioner because there might be very few competitors.

36. The correct approach that courts with respect to challenges to the award of contracts by a public agency or the executive government was delineated by the Supreme Court in *Municipal Corporation, Ujjain and Ors. vs. BVG India Limited and Ors.*, (2018) 5 SCC 462 after considering and citing a large number of its previous rulings. The court observed that:

“25. In *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* (2016) 8 SCC 622, it was observed as follows:

“38. In *G.J. Fernandez v. State of Karnataka* (1990) 2 SCC 488] both the principles laid down in *Ramana Dayaram Shetty* (1979) 3 SCC 489 were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) “has the right to punctiliously and rigidly” enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the “changes affected all intending applicants alike and were not objectionable”. Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in *Ramana Dayaram Shetty* sense.

47. *The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber."*

26. *This Court also made an observation on judicial interference in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. and Ors. (2016) 16 SCC 818, as hereunder:*

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

Similar observations were made in the cases of Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517, and Meerut Development Authority v. Assn. of Management Studies (2009) 6 SCC 171.

27. *Thus, only when a decision-making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decisions,*

power of judicial review can be exercised. However, if it is bona fide and in public interest, the Court will not interfere in the exercise of power of judicial review even if there is a procedural lacuna. The principles of equity and natural justice do not operate in the field of commercial transactions. Wherever a decision has been taken appropriately in public interest, the Court ordinarily should exercise judicial restraint. When a decision is taken by the concerned authority upon due consideration of the tender document submitted by all tenderers on their own merits and it is ultimately found that the successful bidder had in fact substantially complied with the purpose and object for which the essential conditions were laid down, the same may not ordinarily be interfered with."

37. The petitioner's claim to arbitrariness and unfairness on the part of NIXI entirely hinges on *its interpretation of the tender conditions*. It emphasizes and underlines that *sans* prior experience in maintaining multiple *Indian* languages, no bidder can be awarded a contract by NIXI. *Ex facie*, this contention appears to be based on an assumption- perhaps misplaced, that it is essential for every bidder to mandatorily possess the experience outlined in the tender conditions *in respect of all Indian languages*. This court holds that the interpretation is incorrect; as long as bidders can succeed in showing previous expertise in multiple languages, including and peculiar language variant characteristics its offer can be evaluated. That indeed happened with the third respondent, which has experience of maintain DNAs and in several languages (in its case, languages such as Arabic and Chinese, which may have specific traits) with 17 years' experience; it has managed the web sites of volumes up to 13 million, worldwide. In these circumstances, its bid could not have been brushed aside as technically not compliant, for lack of experience.

38. If the petitioner's argument were to be considered, going back, it might not have been awarded the contract, for the first time in 2012. At that

time, the petitioner too was an outsider, without experience; yet it was chosen and awarded the contract. Therefore, if a credible competitor emerges with relevant expertise and experience in maintaining several languages, its bid can be considered valid and competent.

39. In view of the above reasons, it is held that the interpretation given to the tender conditions, which pertains purely to technical matters, by NIXI cannot be faulted. Consequently, the writ petition fails; it is therefore dismissed without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATEEK JALAN
(JUDGE)**

FEBRUARY 25, 2019