

\$~ 2

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Judgment reserved on: 02.08.2021**

**Judgment delivered on: 10.09.2021**

%

+ W.P.(C) 4413/2021 and C.M. No. 13502/2021

SHREE PACETRONIX ..... Petitioner

Through: Ms. Preena Salgia, Adv.

versus

DR. RAM MANOHAR LOHIA HOSPITAL

& ANR.

..... Respondent

Through: Mr. Gaurang Kanth, CGSC and  
Ms. Biji Rajesh, Mr. Shresh  
Chadha, Advs. along with Dr. B.B.  
Pandit

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

**HON'BLE MR. JUSTICE JASMEET SINGH**

**J U D G M E N T**

: **JASMEET SINGH, J**

1) Being aggrieved by the rejection of its technical bid in respect of the 15 items for which the Petitioner had submitted its tender, the present petition has been filed by the Petitioner seeking substantially the following prayers:

- a) *“issue a writ of certiorari or any other appropriate writ, order or direction thereby quashing the minutes of meeting dated 20.02.2020, 22.07.2020 and 20.08.2020 of Respondent No. 1 and any actions taken pursuant thereto;*
- b) *issue a writ of mandamus or any other appropriate writ, order or direction thereby directing Respondent No.1 to approve the technical bid of the Petitioner and to consider the financial bid of the Petitioner;*

*c) issue a writ of certiorari or any other appropriate writ, order or direction thereby quashing any letter of intent or award of contract issued by Respondent No.1 to a successful bidder in the Tender, if any; ”*

- 2) Briefly stated the facts giving rise to filing of the present petition are as under.
- 3) The Petitioner is a company incorporated under the Companies Act, 1956 having its office at Plot No.15, Sector- 2, Pithampur, Dist. Dhar (Madhya Pradesh) - 454775. The Petitioner is stated to be a 30-year-old company engaged in the manufacture, supply and distribution of implantable medical devices, such as pacemakers. The Petitioner is further stated to be the only manufacturer of Pacemakers in India, and supplies its products to various government and non-government hospitals and organisations.
- 4) The Respondent No.1 is Dr. Ram Manohar Lohia Hospital, a Central Government Hospital (hereinafter called RML). Respondent No. 2 is the Department of Health and Family Welfare, Government of India. Respondent No.1, functions under the control and supervision of Respondent No.2.
- 5) It is stated that the Petitioner has been supplying pacemakers to the Respondent No.1 hospital for their cardiac patients since the last ten years under various tender processes.
- 6) Sometime in February/March 2019, Respondent No.1 issued a Notice Inviting Tender (NIT), bearing Tender Code No.9-9/2019 - LH (Part D), for the Supply of Permanent Pacemaker and Devices to Respondent No.1 i.e. Dr. Ram Manohar Lohia Hospital, as well as Safdarjung Hospital in New Delhi for a period of two years,

- 7) The Petitioner participated in the said tender, by depositing its bid with the necessary documents and Earnest Money Deposit, in sealed covers at the tender box at RML. The said box was opened on 15.07.2019, wherein a total of five bids were received.
- 8) The Petitioner had submitted its bid for 15 items namely, item Nos.1, 2, 3, 4, 5, 6, 10, 11, 12, 63, 64, 65, 66, 67 & 68 described as under .

| Sr.No | Specification                                                                                                                                                                                                                                                                                                                               |
|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.    | Digital multi-programmable pacemaker with lifetime warranty. Mode: single chamber: VVI/IAAI.<br>a) With 7F compatible passive-fixation tined lead or screw-in lead & lead introducer.<br>b) Pulse generator only.                                                                                                                           |
| 2.    | Digital multi-programmable pacemaker with lifetime warranty,<br>1.5 Tesla MRI compatible.<br>Mode: single chamber: VVI/IAAI..<br>a) With 7F compatible passive-fixation tined lead or screw in lead & lead introducer.<br>b) Pulse generator only.                                                                                          |
| 3.    | Digital multi-programmable pacemaker with lifetime warranty, full body 3 Tesla MRI compatible.<br>Mode: single chamber: VVI/IAAI.<br>a) With 7F compatible passive-fixation tined lead or screw in lead & lead introducer.<br>b) Pulse generator only.                                                                                      |
| 4.    | Digital multi-programmable pacemaker with lifetime warranty. Mode: single chamber: VVI/IAAI. With dynamic adjustment of pacing output and proven longevity of >10 years with 100% pacing of RA/RV. Digital high sampling rate of P/R wave and automated ventricular rate stabilization during AF.<br>a) With 7F compatible passive-fixation |

|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     | <p>tined lead or screw in lead &amp; lead introducer.</p> <p>b) Pulse generator only.</p>                                                                                                                                                                                                                                                                                                                                                                                                  |
| 5.  | <p>Digital multi-programmable pacemaker with lifetime warranty,<br/>1.5 Tesla MRI compatible.<br/>Mode: single chamber: VVI/IAAI. With dynamic adjustment of pacing output and proven longevity of &gt;10 years with 100% pacing of RA/RV. Digital high sampling rate of P/R wave and automated ventricular rate stabilization during AF.</p> <p>a) With 7F compatible passive-fixation tined lead or screw in lead &amp; lead introducer.</p> <p>b) Pulse generator only</p>              |
| 6.  | <p>Digital multi-programmable pacemaker with lifetime warranty, full body 3 Tesla MRI compatible.<br/>Mode: Single Chamber: VVIR/AAIR. With dynamic adjustment of pacing output and proven longevity of &gt;10 years with 100% pacing of RA/RV. Digital high sampling rate of P/R wave and automated ventricular rate stabilization during AF.</p> <p>a) With 7F compatible passive-fixation tined lead or screw in lead &amp; lead introducer.</p> <p>b) Pulse generator only</p>         |
| 10. | <p>Digital multi-programmable pacemaker with lifetime warranty. Mode: Dual chamber: DDD. With dynamic adjustment of pacing output and proven longevity of &gt;10 years with 100% pacing of RA &amp; RV. With advanced features like (i) automatic AV search (ii) AV delay extendable upto 400 ms (iii) Rate hysteresis etc. to minimize RV pacing.</p> <p>a) With 7F compatible passive-fixation tined leads or screw in leads &amp; lead introducers.</p> <p>b) Pulse generator only.</p> |
| 11. | <p>Digital multi-programmable pacemaker with lifetime warranty.<br/>1.5 Tesla MRI</p>                                                                                                                                                                                                                                                                                                                                                                                                      |

|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     | <p>compatible.<br/> Mode: Dual chamber: DDD. With dynamic adjustment of pacing output and proven longevity of &gt;10 years with 100% pacing of RA &amp; RV. With advanced features like (i) automatic AV search (ii) AV delay extendable upto 400 ms (iii) Rate hysteresis etc. to minimize RV pacing.<br/> a) With 7F compatible passive-fixation tined leads or screw in leads &amp; lead introducers.<br/> b) Pulse generator only.</p>                                                                                    |
| 12. | <p>Digital multi-programmable pacemaker with lifetime warranty, full body 3 Tesla MRI compatible.<br/> Mode: Dual chamber: DDD. With dynamic adjustment of pacing output and proven longevity of &gt;10 years with 100% pacing of RA &amp; RV. With advanced features like (i) automatic AV search (ii) AV delay extendable upto 400 ms (iii) Rate hysteresis etc. to minimize RV pacing.<br/> a) With 7F compatible passive-fixation tined leads or screw in leads &amp; lead introducers.<br/> b) Pulse generator only.</p> |
| 63. | <p>Permanent pacing lead (ventricular/atrial endocardial bipolar, passive fixation with tines), steroid eluting, IS-1 header with the introducer sheath.</p>                                                                                                                                                                                                                                                                                                                                                                  |
| 64. | <p>1.5 Tesla MRI compatible permanent (ventricular/atrial endocardial bipolar, passive fixation with tines), steroid eluting, IS-1 header with the introducer sheath.</p>                                                                                                                                                                                                                                                                                                                                                     |
| 65. | <p>3 Tesla full body MRI compatible permanent pacing lead (ventricular/atrial endocardial bipolar, passive fixation with tines), steroid eluting, IS-1 header with the introducer sheath.</p>                                                                                                                                                                                                                                                                                                                                 |
| 66. | <p>Permanent pacing lead (ventricular/atrial endocardial bipolar, active fixation steroid eluting screw in lead) with IS-1 header with the introducer sheath.</p>                                                                                                                                                                                                                                                                                                                                                             |

|     |                                                                                                                                                                                               |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 67. | 1.5 Tesla MRI compatible permanent pacing lead<br>(ventricular/atrial endocardial bipolar, active fixation steroid eluting screw in lead) with IS-1 header with the introducer sheath.        |
| 68. | 3 Tesla full body MRI compatible permanent pacing lead<br>(ventricular/atrial endocardial bipolar, active fixation steroid eluting screw in lead) with IS-1 header with the introducer sheath |

- 9) On 03.01.2020, the Petitioner after becoming aware that the technical bid had been opened, wrote a letter to Respondent No.1 inquiring about the reasons as to why the Petitioner had not been notified about opening of the financial bid due on 09.01.2020. The Petitioner further requested Respondent No. 1 that, in any event, it be allowed to participate in the financial bid. The communication of 03.01.2020 was followed by another reminder on 04.01.2020. On 27.02.2020, the Petitioner received a letter from Respondent No. 1 qua the petitioner's bid in respect of some items. The operative portion of the letter reads as under :-

- a) *"furnish satisfactory working certificate of quoted products in the tender from five government hospitals (mandatorily include AIIMS. Delhi) where the company has  $\geq$ 50 implantations done in the last one year (Jan. 2019-Dec.2019)."*
- b) *"Since your representative has claimed that some changes have been made in latest services of products, you are also requested to submit the new brochure highlighting the changes made in the products."*

- 10) As per the Petitioner, though the said requirement was beyond the tender condition, nevertheless, the Petitioner proceeded to compile the documents and provided the same to Respondent No. 1, on

07.03.2020.

11) In the said letter, the Petitioner stated and provided as under:-

*a) "Six certificates from government hospitals where the petitioner had done more than 50 implants of its products between January 2019 and December 2019.*

*b) Specifications of the newly developed accessory to the pacemaker i.e. a 'screw-in lead'.*

12) The Petitioner informed Respondent No.1 that it had not supplied pacemakers to AIIMS, Delhi between January 2019 and December 2019. The Petitioner added that, however, it had supplied products in the aforesaid period to AIIMS, Bhopal, for which the purchase order was provided.

13) Thereafter, the Petitioner did not hear anything from the Respondents, but continued to supply pacemakers to Respondent No.1. The last purchase order was received by the Petitioner from the Respondent No.1 on 24.09.2020, and the Petitioner supplied 30 pacemakers to RML Hospital on 01.10.2020.

14) Since no response was received from the Respondent, the Petitioner filed an RTI application on 03.02.2021, seeking information as to whether the technical bid of the Petitioner had been rejected. In addition, in the RTI application, the Petitioner also asked for the minutes of the meeting, where the decision for rejecting the Petitioner's bid was taken. Since no response was received to the RTI application, the petitioner filed an RTI Appeal on 22.03.2021, whereupon the Petitioner received documents from Respondent No.1 on 26.03.2021. Upon perusing the documents, the Petitioner states

that it was shocked to note, that the Petitioner's bid had been rejected.

The bid evaluation committee on 20.02.2020 had recorded that :

*"It is a matter of common knowledge among cardiologists that the products of the particular firm were rejected recently at AIIMS, Delhi, citing serious safety and efficacy issues." On this basis, it was decided that the Petitioner "should submit the satisfactory working certificate of their products quoted in the tender from five government hospitals (mandatorily include AIIMS, Delhi), where the company has >50 implantations done in the last one year (Jan 2019-Dec 2019).*

*Since the company representative has claimed that some changes have been made in latest series of products, the company should submit the new brochure highlighting the changes made in the products"*

- 15) On 22.07.2020, in its meeting the bid evaluation committee, after considering the reply submitted by the Petitioner on 07.03.2020, held that the bid of the Petitioner be rejected for the following reasons.

*"The company could not provide the supply order of AllMS New Delhl. The new lead they have developed is 8F compatible whereas tender specification is 7F compatible lead hence it is a deviation of tender specification. In view of these deficiencies, Shree Pacetronix Ltd. is not approved for Part D of cardiology tender (Item Nos.-1 and 4) of Tender No. 9-9/2019-LH (S) 15.07.2019."*

- 16) During the course of hearing on 27.07.2021, the Counsel for the Petitioner did not press the petition in relation to rejection of its bid for item Nos. 2,3,10 and 63 to 68.
- 17) As regards the rejection of the Petitioner's bids for item Nos. 5,6,11

and 12, the reason for rejection is contained in the Minutes of the Meeting dated 19.12.2019. The reason for rejection as noted in the minutes are as under :

| Item No | Reasons for Rejection      |
|---------|----------------------------|
| 5       | Rejected, No lit of MRI    |
| 6       | Rejected, No lit of 3T MRI |
| 11      | Rejected, No lit of MRI    |
| 12      | Rejected, No 3T MRI lit    |

- 18) During the course of arguments, it was put to the Learned Counsel for Respondents, that '*no lit*' ('lit' connotes literature) was a very vague term, as the Petitioner had claimed that the literature had been supplied with its bid. On 13.07.2021, we directed both parties to place on record the complete bid documents, with the forwarding letter.
- 19) In response, the Respondent filed an additional affidavit on 20.07.2021. The respondent stated as under, in respect of the above said 4 items:

*"It was an essential specification for Item 5 that the quoted product should be '1.5 Tesla MRI compatible'. In the supporting documents provided by the Petitioner for the product- 'Pinnacle R 297 PRO MRI', there is no mention whether or not the product is 1.5 Tesla MRI compatible. Due to the absence of any literature/brochure to that regard, the Respondent No.1 could not ascertain whether or not the product quoted by the Petitioner is in compliance with the tender specification. Thus, the bid of the Petitioner for Item 5 was rejected due to the absence of adequate literature to depict compliance with the tender specifications.*

*It was an essential specification for Item 6 that the quoted product should be '3 Tesla MRI compatible'. In the supporting*

*documents provided by the Petitioner for the product- 'Pinnacle R 297 PRO MRI', there is no mention of whether or not the product is 3 Tesla MRI compatible. Due to the absence of any literature/brochure to that regard, the Respondent No.1 could not ascertain whether or not the product quoted by the Petitioner is in compliance with the tender specification. Thus, the bid of the Petitioner for Item 6 was rejected due to the absence of adequate literature to depict compliance with the tender specifications.*

*It was an essential specification for Item 11 that the quoted product should be '1.5 Tesla MRI compatible'. In the supporting documents provided by the Petitioner for the product- 'Charak 747 PRO MRI', there is no mention of whether or not the product is 1.5 Tesla MRI compatible. Due to the absence of any literature/brochure to that regard, the Respondent No.1 could not ascertain whether or not the product quoted by the Petitioner is in compliance with the tender specification. Thus, the bid of the Petitioner for Item 11 was rejected due to the absence of adequate literature to depict compliance with the tender specifications.*

*It was an essential specification for Item 12 that the quoted product should be '3 Tesla MRI compatible'. In the supporting documents provided by the Petitioner for the product- 'Charak 747 PRO MRI', there is no mention of whether or not the product is 3Tesla MRI compatible. Due to the absence of any literature/brochure to that regard, the Respondent No.1 could not ascertain whether or not the product quoted by the Petitioner is in compliance with the tender specification. Thus, the bid of the Petitioner for Item 12 was rejected due to the absence of adequate literature to depict compliance with the tender specifications.”*

- 20) On 27.07.2021, during the course of the arguments we recorded that the Petitioner’s brochure merely stated that their product is ‘MRI safe’, whereas the Learned Counsel for the Respondent stated that all other bidders who were technically qualified have clearly stated in their brochures that their products were Tesla 1.5 and 3 compatible.

- 21) Noting the above contentions, we had asked the Respondents to file a short affidavit enclosing only relevant extracts from the bids made by the other technically qualified bidders in relation to item Nos. 5,6,11 and 12.
- 22) As per our directions, Learned Counsel for the Respondents filed the documents before us and in the hearing of 02.08.2021, took us through those documents. The documents for item No. 5 & 6 pertain to M/s St. Jude Medical India Pvt. Ltd (successful bidder).
- 23) A bare perusal of the brochure of the other bidders demonstrated that they had clearly stated that the products were Tesla 1.5 or Tesla 3 compatible. Similarly, for items 11 and 12, the bid documents of M/s Biotronik Medical Devices India Pvt. Ltd. were filed. Their brochure, again, clearly showed the products to be 1.5 Tesla/3 Tesla compatible. This position, the Petitioner has not been able to controvert.
- 24) As regards to item No. 1 and 4. The Respondents in their additional affidavit stated that it was the Petitioner who, vide their letter dated 03.01.2020, requested the Respondent to re-consider the issue and permit the Petitioner to participate in the commercial bid.
- 25) The Respondent tried to help the Petitioner as they were an Indian MSME and, hence, vide letter dated 27.02.2020, gave them another opportunity, subject to the Petitioner submitting satisfactory working certificates from 5 Government hospitals (mandatorily including AIIMS, Delhi), and a brochure of the latest series of products highlighting the changes made in them.
- 26) As per the Respondent, since the Petitioner could not produce the certificate from All India Institute of Medical Sciences, Delhi for item

No.1 the bid was rejected. With regard to item No. 4, their own brochure showed that the screw in lead was only 8F compatible, thus the bid of the Petitioner was not approved in the minutes of the meeting of 22.07.2020.

- 27) The Respondents have further argued that the bid of the Petitioner had already been rejected in the minutes of the meeting of 19.12.2019, but only on sympathetic grounds, the Respondents had a relook with regard to item No. 1 and 4. The Respondent has stated that it was common knowledge that the pacemaker supplied by the Petitioner was troublesome and it received numerous complaints as under:

| SR. NO. | NAME/AGE/SEX | DATE OF REIMPLANTATION | CR. NO. | DIAGNOSIS AT THE TIME OF REIMPLANTATION                            | DATE OF IMPLANTATION | REASON FOR REIMPLANTATION                                      | NEW PPI             |
|---------|--------------|------------------------|---------|--------------------------------------------------------------------|----------------------|----------------------------------------------------------------|---------------------|
| 1.      | 55/F         | 15/2/2019              | 10675   | PSVT/POST RFA/CHB/EF 60%                                           | 14/2/2019            | LOSS OF CAPTURE ON 15/2/2019 LEAD PARAMETER OK, PG NOT WORKING | VVIR ST JUDE        |
| 2.      | 54/F         | 15/2/2019              | 11806   | COPD/AFIB WITH SIGNIFICANT PAUSES[7.6SEC] VVI(MAY 2017)/EF 60%/EOL | MAY 2017             | EARLY EOL PG NOT PACING LEAD PARAMETER OK                      | PGR NEW PG OLD LEAD |

|     |              |            |       |                                                         |                          |                                                                                                                             |                                                |
|-----|--------------|------------|-------|---------------------------------------------------------|--------------------------|-----------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|
| 3.  | 75/M         | 4/2/2019   | 8366  | CVA/CHB/VVI/<br>EF 60%                                  | 2/3/2016                 | LOSS OF<br>CAPTURE?<br>LEAD<br>FRACTURE(<br>NOT<br>APPERENT<br>ON REDO<br>5X) PG<br>GOOD,<br>LEAD<br>PARAMETE<br>RES NOT OK | REIMPLANTA<br>TION WITH<br>NEW LEAD<br>SAME PG |
| 4.  | 60/M         | 1/2/2019   | 6996  | CHB/POST PPI<br>VVI/2010/POST<br>PGR VVI<br>2016/EF 60% | 2010:EOL<br><br>2016:PGR | LOSS OF<br>CAPTURE?<br>EOL<br><br>LEAD<br>PARAMETE<br>RS OK, PG<br>NOT PACING                                               | PGR DONE,<br>SAME OLD<br>LEAD                  |
| 5.  | 53/M         | 16/1/2019  | 2798  | HTN/SYNCOPE/<br>2:1<br>AVBBLOCK/V<br>VI/EF 60%          | 2017                     | ?LOSS OF<br>CAPTURE,<br>LEAD<br>PARAMETE<br>RES OK, PG<br>NOT<br>WORKING                                                    | PGR DONE,<br>SAME OLD<br>LEAD                  |
| 6.  | 60/M         | 4/1/2019   | 3500  | CHB/EF<br>60%/VVIR                                      | JAN 19                   | LEAD OK,<br>PG OK?<br>LEAD<br>DISPLACED                                                                                     | LEAD<br>REPOSITIONI<br>NG DONE                 |
| 7.  | 60/M         | 29/12/2018 | 93459 | PRESYNCOPE/<br>CHB/EF<br>60%/VVI                        | 2017                     | LOSS OF<br>CAPTURE                                                                                                          | LEAD<br>REPLACED<br>SAME PG                    |
| 8.  | 70/F         | 13/12/2018 | 87021 | SYNCOPE/CH<br>B/VVI/EF 60%                              | MARCH 2018               | PACEMAKE<br>R SITE<br>INFECTON                                                                                              | PGR VVI[NEW<br>PG AND<br>LEAD]                 |
| 9.  | FATIMA, 65/F | 8/12/2018  | 87985 | SYNCOPE/CH<br>B/VVI/EF 55%                              | 19/9/2018                | LOSS OF<br>CAPTURE ,<br>LEAD<br>PARAMETE<br>RS NOT OK,<br>PG OK                                                             | NEW LEAD<br>OLD PG                             |
| 10. | 65/F         | 17/11/2018 | 83707 | DM/HTN/CHB/<br>EF 60%/VVI                               | 15/11/18                 | LEAD<br>DISPLACED,<br>LEAD<br>PARAMETE<br>RS OK, PG<br>OK                                                                   | LEAD<br>REPOSITIONI<br>NG                      |
| 11. | 77/F         | 26/11/2018 | 84405 | SIADH/CHB/V<br>VI/PRESYNCO<br>PE                        | 10/9/2018                | LOSS PF<br>CAPTURE,<br>LEAD AND<br>PG<br>PARAMETE                                                                           | LEAD<br>REPOSITIONI<br>NG                      |

|     |      |           |       |                        |      |                                   |                               |
|-----|------|-----------|-------|------------------------|------|-----------------------------------|-------------------------------|
|     |      |           |       |                        |      | RES OK                            |                               |
| 12. | 70/F | 7/12/2018 | 86609 | HTN/CHB/VVI/<br>EF 60% | 2010 | ?EOL, PG<br>NOT PACING<br>LEAD OK | PGR DONE,<br>SAME OLD<br>LEAD |

28) The Respondent has also sought to rely upon a letter of 24.07.2021 written by Dr. Preeti Gupta, Associate Professor Cardiology, Safdarjung Hospital complaining about the pacemaker of the Petitioner, which reads as under :-

*“Respected Sir,*

*With due respect I hereby state*

*1. One single Shree Pacetronix pacemaker was used by me few years back. I had faced multiple problems during the pacemaker implantation like*

*a. The pacemaker lead was 8 F and too bulky to use and may cause Subclavian vein perforation.*

*b. There was no console hence programming could not be seen and guided by the implanter/ operator.*

*2. I never used it again due to the problems faced and much better standard alternative options are available.*

*3. As it was done few years back and Cathlab building had been changed as we shifted to SSB, actual records of the proof of implantation are not available.*

*4. However in his WhatsApp conversation sent by Mr. Sumit Chakraborty Director (marketing) Pacetronix (M-9810904175) of Shree Pacetronix Ltd. Dated 14<sup>th</sup> Jan 2020 has been attached which clearly shows that implantation of Pacetronix pacemaker has been done in Safdarjung Hospital although only once and that too few years back.*

*5. Pacetronix pacemaker has not been implanted by anyone in Safdarjung Hospital/ after this unpleasant experience.”*

29) Our conclusion and analysis to the above petition are as under.

30) As regards to the rejection of the Petitioner’s bid with regard to Item

Nos.2,3,10 and 63 to 68 are concerned, the Petitioner has already made a statement on 27.07.2021, that the Petitioner is not pressing its claim in respect of those items.. Hence, the same needs no adjudication.

- 31) As regards to item Nos. 5,6,11 and 12, we have seen from the documents filed by the Respondent and the brochure supplied by the Petitioner, that they were, in fact, not in terms of the tender requirement. The Petitioner has failed to highlight in the brochure whether the products of the Petitioner were '*1.5/3 Tesla compatible*', and, the stand of the respondents that the same tantamounted to deficient disclosure by the Petitioner appears reasonable and plausible. That Tesla compatibility was an essential condition, and not one which was superfluous appears to be a reasonable view. So also the view of the respondent that, merely stating that the product is '*MRI safe*' cannot be assumed to mean both – 1.5 and 3 Tesla compatible, appears to be reasonable and, therefore, does not call for interference.
- 32) A bare reading of the brochure of the petitioner shows that the brochure does not address the issue of Tesla Compatibility with 1.5 and 3 Tesla. As regards items 5, 6, 11 and 12 are concerned, the Petitioner should have clearly mentioned the Tesla compatibility in their brochure, which was a tender requirement and which the other bidders had so done. Thus, their bid for items 5,6,11 and 12 was rejected at the Technical Stage itself, due to the lack of adequate literature.
- 33) **In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.,**

(2016) 16 SCC 818, and paragraphs 14 and 15 in particular it has been reiterated, which state:

*“14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.*

*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 malafide 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.”*

- 34) In this view of the matter, the rejection of the bid for item No.5,6,11, and 12 requires no interference.
- 35) As far as item Nos. 1 and 4 are concerned, we are of the opinion that the rejection of the bid by the Respondent for product Nos. 1 and 4 is arbitrary, unreasonable and does not meet the Test of the Wednesbury Principle of Unreasonableness. Our reasons for saying so are as under:-

- a) That the Respondent has materially altered the terms of the tender by asking the Petitioner to submit certificates from 5 Medical Hospitals including All India Institute of Medical Sciences, Delhi. The said condition was not put to any other bidder.
- b) The same was not a requirement of the tender condition, and could not have been placed upon the Petitioner subsequently. Imposing of such a condition upsets the level playing field. Nevertheless, Petitioner complied with the requirement and gave 6 certificates, but in its response dated 07.03.2020, the Petitioner categorically made a submission that it had made no supply to All India Institute of Medical Sciences and hence there was no question of the Petitioner giving such a certificate. Merely because AIIMS may not have procured any pacemakers from the Petitioner in the years 2019, does not lead to the conclusion that the Petitioner was blacklisted by AIIMS, much less, on account of their product being of inferior quality or on account of unsatisfactory performance.
- c) The said requirement of the Respondent itself was unreasonable.
- 36) It has been held by the Supreme Court in ***Meerut Development Authority and Ors. v. Association of Management Studies and Ors ((2009) 6 SCC 171)***:

*“17. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in*

*the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.*

*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.”*

(emphasis supplied)

- 37) The Supreme Court in ***Reliance Energy Limited and Ors. v. Maharashtra State Road Development Corporation Ltd and Ors*** ((2007) 8 SCC 1) succinctly noted :

*“24. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".*

- 38) It is indeed ironical and difficult to understand that if Petitioner's product was sub-standard and causing trouble with patients, as stated in the counter affidavit, then why would the Respondent place orders in the year 2019, 2020 and 2021 for more than 300 pacemakers as under.

*“Year-wise data of the number of implants of Shree Pacetronix Ltd.'s pacemakers in Dr. RML Hospital, Delhi”*

| Year         | No. of Implants |
|--------------|-----------------|
| 2009         | 36              |
| 2010         | 18              |
| 2011         | 57              |
| 2012         | 8               |
| 2013         | 6               |
| 2014         | 6               |
| 2015         | 21              |
| 2016         | 47              |
| 2017         | 68              |
| 2018         | 104             |
| 2019         | <b>182</b>      |
| 2020         | <b>99</b>       |
| 2021         | <b>15</b>       |
| <b>Total</b> | <b>667</b>      |

- 39) The Petitioner continued to supply and the Respondent continued to install the Petitioner's pacemakers in patients. There is not a single letter of show-cause notice, warning, blacklisting from the side of the Respondent to the Petitioner.
- 40) An answer was sought from the Respondent for continuing to install these pacemakers in patients. They stated as follows :-

*“That it is incorrect to say that the Petitioner was not informed of the inadequacies in their products. The Respondent No.1 had written to the Petitioners on several occasions over the years regarding the poor performance of their products. However, due to the fact that the Petitioner is the only Indian manufacturer of single- chamber pacemakers and that the same product was not available with any other manufacturer/distributor, the Respondent No. 1 was constrained to place orders under previous tenders upon the*

*Petitioner, when the successful bidders in those tenders were not able to supply the required product.”*

- 41) The aforesaid stand of the respondents does not inspire our confidence. It is not possible that no substitutes, of pacemakers were available in the market, other than the ones being manufactured by the Petitioner. Further, we do not expect a hospital having the reputation and stature as Respondent No.1, that they, despite having known the defects in the product of the Petitioner continued to install the allegedly defective, faulty and sub-standard pacemakers in innocent, helpless and hapless patients.
- 42) So far as the alleged instances of malfunction of the petitioner's product are concerned, it is not disclosed on what basis this compilation is prepared; by whom it is prepared, and; most importantly, why had the Petitioner not noticed if its implants were malfunctioning, and; why the Respondents continued to source more and more pacemakers from the Petitioner despite the alleged instances of malfunction of the pacemakers supplied by the Petitioner. Even the complaint of Dr. Preeti Gupta, Associate Professor, Cardiology, Safdarjung Hospital dated 24.07.2021 came to be issued much after the tender process was initiated and during pendency of the proceedings. It relates to “few years back” and no particulars or specifics of the patient are disclosed. Once again, the Petitioner was not put to notice of the alleged malfunctioning.
- 43) We have also seen the original Minutes of Meeting of 19.12.19 and the remarks of the Technical Specification Committee of specialists wherein they had originally approved item 1 & 4.

| Item No | Name of the item with Specification                                                                                                                                                                                |
|---------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1       | Digital multi-programmable pacemaker with lifetime warranty.<br>Mode: single chamber: VVI/AAI.<br>a) With 7F compatible passive-fixation tined lead or screw-in lead& lead introducer.<br>b) Pulse generator only. |

| S.No. | Name of the firm           | Brand/Make/Manufacturer                          | Demo/Sample | Remarks                                                    |
|-------|----------------------------|--------------------------------------------------|-------------|------------------------------------------------------------|
| 1.    | M/s. Shree Pacetronix Ltd. | Pinnacle 8820<br>Make/Mfg: Shree Pacetronix Ltd. |             | Rejected in view of poor performance of lead<br>R. K. Bani |

| Item No | Name of the item with Specification                                                                                                                                                                                                                                                                                                                                                                                       |
|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4       | Digital multi-programmable pacemaker with lifetime warranty.<br>Mode: single chamber: VVIR/AAIR. With dynamic adjustment of pacing output and proven longevity of >10 years with 100% pacing of RA/RV. Digital high sampling rate of P/R wave and automated ventricular rate stabilization during AF.<br>a) With 7F compatible passive-fixation tined lead or screw in lead& lead introducer.<br>b) Pulse generator only. |

| S.No. | Name of the firm           | Brand/Make/Manufacturer                           | Demo/Sample | Remarks                                                    |
|-------|----------------------------|---------------------------------------------------|-------------|------------------------------------------------------------|
| 1.    | M/s. Shree Pacetronix Ltd. | Pinnacle R 297<br>Make/Mfg: Shree Pacetronix Ltd. |             | Rejected in view of poor performance of lead<br>R. K. Bani |

- 44) The said approval was then cancelled and written as 'rejected in view of poor performance of lead'.

Explanation for this is as under by the Respondent:-

*"The members of the Respondent No. 1 hospital in the Technical Specification Committee initially wrote 'approved', however, after detailed deliberation of the entire quorum of the Technical Specification Committee (including members of the Safdarjung Hospital) the quoted item was rejected on the same day i.e. 19.12.2019 itself. The reason for rejection was rooted in the dissatisfactory past performance of the quoted item in the past, specifically in 2019."*

- 45) We are at pains to understand the said reasoning. The Technical Specification Committee comprised of Senior Cardiologists and

Eminent Doctors and Specialists in the field, who were designated with the task of evaluating important medical equipment like pacemakers, which could very well be the difference between life and death for an individual. We can neither expect nor believe that such a Committee would approve or reject medical products, so frivolously. This makes us believe that the rejection of the bid of the Petitioner was for reasons other than that on meritorious grounds.

46) Evaluation of a Tender is an austere matter, the process of evaluation of Bids submitted in response to a Public Tender is a serious exercise, which the tender inviting authority must undertake with all seriousness. It cannot be seen to be acting mindlessly, mechanically, and in complete ignorance of, or contrary to the terms of the tender. The manner in which the respondents have dealt with the petitioner's bid, demonstrates utter lack of application of mind by the respondents during the process of its evaluation of the petitioner's bid. Bid evaluation is not a mechanical process. It is undertaken by human beings having, or, at least, expected to have, reasonable intelligence and common sense.

47) In ***Macpower Cnc Machines Limited V. Union of India, Through Development Commissioner Ministry of Micro Small and Medium Enterprises (MSME), W.P. (C) 3942/2020***, decided on 24.12.2020, a Division Bench of this court, while dealing with a challenge to disqualification of the Petitioner in the bidding process, inter alia, observed as follows:

“ 81. The entire process of inviting bids in respect of a public tender is an expensive and time consuming process. The

*whole process, even in the present case, started way back in July, 2019 and the respondents sought to reject, inter alia, the petitioner's bids for Lots 4,5 and 6 in June, 2020. Substantial expenditure would have been incurred not only by the Government in the process of inviting the bids, but also by all the bidders in meeting the terms and conditions of the bid, preparing their bids, and submitting their bids. They had to shell out substantial monies towards earnest money deposit. The respondents cannot treat their bids lightly. They have a right to fair examination of their bids. If the respondents are allowed to conduct themselves in arbitrary and whimsical manner in the matter of examination of the bids, the public bidding process would lose its credibility, which would be detrimental to public interest. The respondents are accountable to the bidders, and merely because they have a right to reject any bid, and the discretion whether, or not, to call for clarification, it does not mean that the said powers can be exercised in an arbitrary and whimsical manner. The exercise of any discretion by a public authority has to be guided by the object and purpose for such powers being vested in the authority in the first place."*

- 48) In this view of the matter, the stand of the Respondent for item no.1, being that the pacemakers of the Petitioner are sub-standard does not inspire our confidence and hence is rejected.
- 49) As regards to Item No. 4, the brochure of the screw in lead clearly shows that it is in fact 8F/7F compatible. For the Respondent to say that it is only 8F compatible is clear misreading of the brochure of the Petitioner. The Counsel for the Respondent further stated, during arguments, that all the 300 pacemakers supplied by the Petitioner earlier were 7F compatible and, hence, it is incomprehensible that the screw in lead were only 8F compatible, and not both 7F/8F compatible, specially when the brochure of the Petitioner clearly shows it to be both 8F/7F compliant. In view of

the abovesaid fact narration, rejection of the bid of the Petitioner for item No.1 & 4 is unreasonable and hit by the Wednesbury Principle of Unreasonableness.

- 50) We may refer to the observation in **Tata Cellular v Union of India (1994) 6 SCC 651** wherein it was observed :-

*“93. The duty of the court is to confine itself to the question of legality. Its concern should be:*

- 1. Whether a decision-making authority exceeded its powers?*
- 2. committed an error of law*
- 3. committed a breach of the rules of natural justice*
- 4. reached a decision which no reasonable tribunal would have reached or*
- 5. abused its powers.*

*94 . Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case, shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:*

*(i) Illegality: This means the decision-maker must understand correctly the*

*law that regulates his decision-making power and must give effect to it.*

*(ii) Irrationality, namely, Wednesbury unreasonableness,*

*(iii) Procedural impropriety.*

- 51) In this view of the matter, we hold that the rejection of the bid of the petitioner for items 1 & 4 is unreasonable; hit by the Wednesbury principle of unreasonableness; is in breach of the principles of natural justice; is founded upon vague and unsubstantiated notions – regarding the quality and performance of the Petitioners products, and; the

Respondents have acted with a prejudice/ bias towards the Petitioner. The rejection of the petitioner's bid for item 1 & 4 is accordingly set aside, and it is directed that the respondents should consider the financial bid of the petitioner for items 1 & 4. The Respondent shall proceed to process the bid of the petitioner in accordance with the prescribed procedure.

**JASMEET SINGH, J**

**VIPIN SANGHI, J**

**SEPTEMBER 10, 2021 / dm**



नित्यमेव जयते