

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

Decided on: 15.01.2018

+ **W.P.(C) 1315/2017, C.M. APPL.5990/2017**

**VARIAN MEDICAL SYSTEMS INTERNATIONAL INDIA PVT.
LTD. AND ANR. Appellants**

Through : Sh. Darpan Wadhwa, Sr. Advocate with
Sh. Ajay Bhargava, Sh. Aseem Chaturvedi, Ms.
Chandni Anand and Sh. Adite Mohan, Advocates.

versus

UNION OF INDIA AND ORS. Respondents

Through : Sh. Kirtiman Singh with Sh. Waize Ali
Noor, Sh. Prateek and Sh. Saeed Qadri, Advocates,
for Respondent No.1.

Sh. Ratan. K. Singh with Sh. Aishwary Kumar
Tiwari and Sh. Gaurav, Advocates, for Respondent
No.2.

Sh. Nikhil Swami and Ms. Kruthika Shankar,
Advocates, for Respondent Nos. 3 and 4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The writ petitioner in these proceedings, under Article 226 of the Constitution of India, is aggrieved by the rejection of its bid for 6 Dual Energy Linac with Dosimetry (hereafter "Hela") by the first respondent (hereafter "the Union") and the cancellation of the procurement process in regard to 6 Low Energy Linac ("Lela"). These actions are termed arbitrary, in the petition.

2. The petitioner was a bid participant, who had submitted its tender for Hela and Lela, pursuant to the Notice inviting Tenders (NIT) issued by the second respondent, HLL Lifecare Ltd (hereafter “HLL”) on behalf of the Union. Both equipments were needed for the six All India Institute of Medical Sciences (AIIMS). Five (5) other types of equipments were advertised, in the NIT on global tender basis; again, like the two equipments that are the subject matter in these proceedings, they too were needed for the six AIIMS. According to the petitioner, initially, the specifications in the NIT were not vendor neutral, but tended to tilt the bid consideration unduly in favour of certain manufacturers. It is stated that this led to no less than 13 objections (by the petitioner) and several other vendors. Ultimately, the tender was subjected to 28 amendments. On 17/18 March, 2015, the petitioner lodged its bid for the two equipments in question; they were subsequently opened.

3. It is stated that after bid opening, HLL made certain queries to the petitioner, which were replied to satisfactorily. The petitioner, by its letter dated 24.03.2015, pointed out that the third respondent (another bidder) had not addressed certain technical requirements in respect of the Hela equipment it had bid for; likewise, the third and fourth respondents’ non-compliance and omission to address the issue relating to Dose rate of 100-600 U/min steps and Portal imaging was highlighted. On the other hand, the petitioner relies on a letter dated 02.04.2015 by HLL with respect to dosimetry, immobilization accessories etc. After completion of technical evaluation, the petitioner’s bid was rejected on 08.02.2016 by the Union. It is stated that the information gathered by the petitioner was that its equipment was not acceptable, because they were not from PTW and Orfit Belgium.

The rejection is attacked on two grounds, i.e. that the ostensible reason was not specified as an essential condition, but woven in as a factor to favour the third respondent and that the technology it furnished was in fact a tested and acceptable one; the petitioner cites Apollo and Tata Memorial Hospitals as using the Sun Nuclear's Arc Check products in the field. The petitioner protested the bid rejection, through its letter of 12.02.2016.

4. As far as the Lela equipment offered by the petitioner to the Union is concerned, it is alleged that the petitioner was appraised that its offer was acceptable, on 08.02.2016. However, after much deliberation and consultation, it was informed on 06.05.2016 through a letter from HLL – in an unreasoned communication, that the price quoted by it (i.e. the petitioner) was considered to be “on the higher side by the department”. The petitioner alleges that this letter disregarded the tender process and that its bid had in fact been accepted by HLL earlier. It is stated that the petitioner replied to the letter and, offered discounts by letter of 16.05.2016. Till the petitioner approached the Court, it was not informed about the final decision of the respondents. The petitioner then refers to its representations and letters of 14.09.2016; 29.09.2016 and 19.10.2016. These letters – and e-mails- spoke against the wrong rejection of its bid for Hela equipment on the one hand, and the undue delay in the finalization of award of contract, for the Lela equipment. It is submitted that HLL after much delay, responded to its counsel's notice (dated 19.10.2016) on 09.12.2016 returning its bank guarantees and earnest money deposits (EMDs).

5. The petitioner submits that the rejection of its bid for Hela, on the one hand, and decision of the first two respondents, not to go ahead for procurement of Lela (made known for the first time by HLL's counter

affidavit) is arbitrary. It is submitted that the respondents carried out no less than 28 amendments to the NIT (tender conditions). None of those expressly spelt out any condition that the petitioner failed to comply. Therefore, by harping on lack of a technology, which was in reality vendor specific, and not accepting equipment that was equivalent to such specifications (and indeed answered the tender conditions) the respondents acted unfairly and in an arbitrary manner.

6. Mr. Darpan Wadhwa, learned senior counsel for the petitioner, besides emphasizing on the arbitrariness writ large in the rejection of the petitioner's bid, also argued that the Union was under an obligation to say why the procurement in respect of Lela was virtually abandoned. He highlighted that HLL, in its affidavit had enclosed and relied upon certain minutes of meeting. An overall reading of these would show that initially, the Procurement Committee's concerns with respect to cost of equipment were duly addressed. However, the minutes of meeting dated 20.07.2016 showed that the petitioner's Lela equipment passed all the parameters: technical as well as financial. Yet, the Committee, which had to finalize the issue, arbitrarily stated that the equipment was not needed at that stage and the question of its procurement could be seen later.

7. It is argued that the HLL's counter affidavit and submissions to the Court suggest that the prices quoted by the petitioner were high, resulting in cancellation of the bid. Yet, the materials on the record do not bear out that plea. In fact, submitted Mr. Wadhwa, the Committee belatedly found that the equipment tendered for could be procured later. There is as a matter of fact, no reasoning in support of such a conclusion. On the other hand, all the minutes of meeting relied upon and produced in the Court stated that the

equipment was necessary; the Committee and HLL had through communications, asked the petitioner to give greater discounts. The petitioner did that; yet its bid was found not acceptable.

8. Learned counsel relied on *Star Enterprises v City and Industrial Development Corporation of Maharashtra Ltd* 1990 (3) SCC 280 to say that every decision of the government or executive agency should be a reasoned one, failing which relief through judicial review is available. It was submitted that absence of any reasoning the executive agency's decision has to be held to be arbitrary and unreasonable.

9. HLL, in its counter affidavit, states that a series of meetings were held with the petitioner and other bidders; their suggestions and objections led to amendments in tender conditions. It was submitted that the petitioner's Hela bid was found to be non-responsive and it was rejected on 08.02.2016. It is further stated that the bid of the third and fourth respondent for HELA was accepted and the order was placed, on 19.08.2016, letter of credit (L/C) was opened on December 2016 & January 2017 for the respective consignees the delivery was in advanced stage. Copy of Purchase Order dated 19.08.2016 is placed on the record.

10. It is stated that the respondents determined on 20.07.2016 not to accept the bid for Lela and cancel the tender in that regard. It is stated that under clause 38 of General Instructions to Tenderer (GIT) of the NIT of the above tender, the purchaser/Union had all rights to reject any tender at any time prior to award of the contract, without assigning any reason and without incurring any liability whatsoever against the affected tenderer. In view of the above, as tender for Lela was dropped prior to award of the contract and

by letter dated 09.12.2016 bank guarantee of the petitioner for Lela was returned.

11. In its counter affidavit, HLL mentions that it was appointed by the Union to act as consultant for the procurement and that the specifications; the appointment of an Expert Committee (the Rath committee) which recommended the specifications and technical tender conditions, etc. The counter affidavit also talks of pre-bid meetings between HLL, the tenderers and the decision of the respondents to give a chance to the bidders to comply with the tender technical conditions. HLL says that on 22.06.2015 a letter to the Union informed about recommendations of the Expert Committee and sought approval to go ahead with the commercial evaluation as proposed by the Technical Evaluation Committee. After receiving approval from the first respondent, the bid of third and fourth respondents was opened on 08.02.2016 whereas bid of the petitioner was returned by letter of the same date to representative of petitioner present in the office of the second respondent, in view of its rejection as non-responsive. Later, during commercial evaluation and price evaluation, Integrated Purchase Committee Meetings under Chairmanship of Union Health Secretary were held wherein the following were recommended, viz for High Energy LINAC (HELA) Competent Authority of Respondents on 16.03.2016, decided that order on the third and fourth respondents could be placed subject to acceptance of the counter offer rates that the third and fourth Respondents vide letter dated 17.05.2016 accepted. The order was placed on 19.08.2016 in respect of HELA.

12. It is submitted that HLL had earlier recommended negotiation of price with the petitioner and requested a discount of 25 %. However, this was

refused by the Petitioner and as a counter-offer 7% discount was offered by them along with some add-ons. The price quoted by Petitioner was much more than the estimated price in terms of the Tender Document. This counter-offer was placed before the Integrated Purchase Committee (IPC). However, after detailed discussions and deliberations on 20.07.2016, IPC decided to drop the item based on the opinion of the Technical experts from AIIMS New Delhi, PGI Chandigarh and TMH Mumbai, that for starting the operation of the department the equipment may not be a necessity at this stage and may be procured at a later stage.

13. It is submitted that in view of the above facts and circumstances, it is evident that HLL acting as PSA of the Union, acted in terms of the tender inquiry and instructions of the Union based on recommendations of the Expert Committee. As the Petitioner was found technically non responsive for HELA and the third and fourth respondents were found technically responsive for HELA, contract for HELA was rightly awarded to Respondent No 3 and 4. Thus, the petitioner's objection to awarding of contract of HELA to M/s Elekta and not to petitioner, is totally unfounded and without any merit. As regards Lela, it urged that the Union decided to drop the procurement of that item, exercising its right under clause 38 of Section II-General Instructions to Tenderers and there cannot be any objection to this action.

14. While exercising judicial review jurisdiction, a Court, under Article 226 of the Constitution reviews the decision making process, its legality and procedural regularity and not the merits of the decision of the executive agency. The administrative or public agency is the principal decision maker. That Court or the concerned Judge might view tender conditions- or a

particular stipulation differently (from the public agency) is insufficient reason for interference. *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr* 2016 SCC Online SC 940 is an authority on this aspect; it instructs that Courts are to defer to executive decisions, largely unless manifest *mala fides* or procedural irregularity or illegality is established. Similarly, the Supreme Court, in *Montecarlo Ltd v National Thermal Power Corporation Ltd* 2016 (15) SCC 272 stated that:

“Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

15. Again, in *JSW Infrastructure Ltd v Kakinada Seaports Ltd* 2017 (4) SCC 170 and *Central Coalfields Ltd v SLL-SML (JV Consortium)* 2016 (8) SCC 622, it was held that tender documents and stipulations are to be construed in the context of their background and that no condition is to be treated as redundant or superfluous.

16. In the present case, undoubtedly, the tender conditions underwent a large number of amendments, pursuant to extensive consultations. At one stage, the expert committee was of the opinion that the petitioner’s bid ought

to be rejected, because it was not compliant with technical specifications. However, the petitioner and other bidders were asked to comply. The petitioner's bid for Hela was rejected in February, 2016; it was aware of this fact. Yet it did not approach this Court for over a year. Delay defeats the right to seek relief in Court in such cases. Concededly, the petitioners' competitors were awarded the contract (for Hela); they have even supplied a major portion of the purchase order. Therefore, the petition is barred, as regards the claim. As far as its argument that the equipment offered by it is sound and technically feasible goes, here the Court is of opinion that the specifications were known to all; the petitioner cannot now say that what it offered matched with what the respondents wanted to procure and say that this is because other organizations are procuring or purchasing it.

17. With respect to the cancellation of the tender (as regards Lela) the petitioners' grievance is that the respondents did not furnish any reason. Here, the Court notices that the order of cancellation (of tender) does not operate to anyone's prejudice, *per se*. Rather, it is a decision not to procure the item. The *rationale* recorded by the respondents is that the Integrated Purchase committee (which comprised of several experts) felt, after considering all aspects, including the petitioner's offer, that for the time being there was no necessity to purchase the equipment. Given that the AIIMS are not yet fully functional in all the departments, this is not an arbitrary decision; nor can these be called no reasons. In a rapidly changing technological age, with fresh innovations breaking ground with increasing rapidity, the assumption that it would be better to wait and see what the requirements would be later, cannot be called arbitrary. In any case, these are areas that can be hardly reviewed on application of public law principles.

18. For the foregoing reasons, it is held that the writ petition is unmerited; it is therefore, dismissed without any order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JANUARY 15, 2018

