

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2019

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.1193 of 2019
and W.M.P.Nos.1349, 2094 and 2322 of 2019

Elekta Limited,
A Company duly registered under the laws of
United Kingdom, Having its address at
Linac House, Fleming Way,
Crawley, West Sussex,
RH10 9 RR, United Kingdom,

Represented by its authorised representative
Mr.Chandrashekhar, aged about 47 years,
S/o.Mr.M.Krishnamurthy,
Office at 12th Floor,
Vatika Professional Point, Section 66,
Golf Course Extension Road,
Gurgaon, Haryana 122 001

... Petitioner

Vs.

1. The Government of Tamil Nadu,
Department of Health and Family Welfare,
Secretariat,
Chennai 600 009.
Represented by its Principal Secretary.
2. Tamil Nadu Medical Services Corporation Limited,
A Government of Tamil Nadu Undertaking,
with its registered Office at
417, Pantheon Road, Egmore,
Chennai 600 008.
Represented by its Managing Director.
3. Varian Medical Systems Intl.AG,
A company duly incorporated under the laws of
Switzerland, Hinterbergstrasse 14 CH 6330
Cham, Switzerland.
4. Varian Medical Systems International (India)
Private Limited,
A Company incorporated under the Companies Act,1956,
Kalpaturu Square, Unit No.33,
2nd Floor (Level 3),Off Andheri Kurla Road,

Andheri (East), Mumbai 400 059,
Represented by its Managing Director.

5. Elekta Medical Systems India Private Limited,
A Company incorporated under the
Companies Act, 2013. Having its registered Office at
6/41, Sunder Kiran Building,
209, WEA Karol Bagh,
New Delhi 110 005.

.. Respondents

* * *

Prayer : Writ petition filed under Article 226 of the
Constitution of India praying for a Writ of Mandamus forbearing
the respondent No.2 from proceeding under any order or contract
awarded to or placed on the respondent No.3 or Respondent No.4
under tender No.246/LINAC/TNMSC/ENGG/2017 dated 12.12.2017
including the Lettter of Awards said to have been placed on
27.11.2018 and 30.11.2018 and the order said to have been placed
on 05.12.2018.

For Petitioner : Mr.Sathish Parasaran, SC
for
Mr.R.Bharadwajaramasubramaniam.

For Respondents-1: Mr.Vijay Narayan, AG
Assisted by
Mr.V.Shanmugasundar,
Special Govt.Pleader

For Respondent 2: Mr.V.M.Shivakumar
for M/s.Shivakumar and Suresh

For Respondent -3 : Mr.A.L.Somayaji, SC
for Mr.Abishek Jenasen

For Respondent-4 : Mr.P.S.Raman, SC
for Mr.Abishek Jenasen

For Respondent-5 : Ms.Kruthika Shankar

ORDER

The Writ Petitioner is an organisation engaged in the
business of manufacturing and supplying high quality "linear
accelerators", which is used for radiation therapy in connection
with treatment for cancer throughout the world.

2. The third respondent is also one another primary
manufacturer of "linear accelerators". The second respondent is
a Corporation incorporated by the State of Tamil Nadu with the
primary objective of ensuring availability of drugs and

medicines and allied equipments and services in the Government Medical Institutions throughout the State of Tamil Nadu.

3. The present Writ Petition is filed challenging the proceedings of the second respondent in connection with the tender for fixing rate contract for supply and installation of linear accelerators to medical institutions in the State of Tamil Nadu floated in bid Reference No.246/LINAC/TNMSC/ENGG/2017, dated 12.12.2017. [hereinafter referred to as "tender document"].

4. The said tender initially envisaged the procurement of six linear accelerators having different technical specifications. A subsequent corrigenda was issued by the second respondent clearly and separately detailing the technical specifications for each of the following categories of linear accelerators.

(i) Dual Energy Linear Accelerator with optional items as per specifications ("Schedule 1 Equipment").

(ii) Dual Energy Linear Accelerator as per specification ("Schedule 2 Equipment").

(iii) Single Energy Linear Accelerator as per specification with aSi based detector ("Schedule 3(i) Equipment").

(iv) Single Energy Linear Accelerator as per specification with Scintillator based detector ("Schedule 3 (ii), Equipment") and

(v) Advanced Dual Energy Linear Accelerator as per specification ("Schedule 4 Equipment").

5. As stated earlier, there are only two suppliers in the above said field in the entire world. Hence, the petitioner and the third respondent were the only bidders under the relevant tender. The technical bids under the relevant tender were opened by the second respondent on 06.05.2018. After evaluation of the technical bids received under the relevant tender, the result was uploaded in the website of the second respondent on 20.07.2018. As per the evaluation results, the second respondent found both the bids of the petitioner as well as the third respondent to be in compliance with their requirements in relation to Schedule 1 equipment and Schedule 4 equipment. From the evaluation report, it can be seen that the second respondent had evaluated each category of the schedule equipment separately, based on the model offered by the bidders as part of the respective bids for the relevant schedule equipment.

6. Insofar as schedule-1 is concerned, the model "Trilogy" quoted by the third respondent and the model "Synergy" quoted by the petitioner were found responsive. Therefore, the second respondent can procure one of these models of the petitioner and the third respondent subject to the other factors, namely,

financial bid etc.,

7. On 24.07.2018, the second respondent opened the financial bids submitted by the bidders for the above models and found the third respondent as the lowest (L1) bidder in relation to its bid for model "Trilogy" in Schedule-1 equipment and the petitioner as L1 bidder in relation to Schedule-4 equipment. The second respondent negotiated with the petitioner in relation to Schedule 4 equipment and informed the petitioner on 20.09.2018 that the third respondent had offered the model "True Beam" in Schedule -4 equipment at the price specified by them for schedule-1 equipment and also enquired if the petitioner would be able to provide their Schedule 4 equipment at the price specified for Schedule-1 equipment. The e-mail, however, does not disclose any possibility of price negotiation with the third respondent for Schedule 4 equipment and the petitioner, presuming the negotiation to be bona-fide, responded to the enquiry and provided a discounted price bid on 09.10.2018 in relation to Schedule-4 equipment. Thereafter, the petitioner also had submitted a revised price bid for Schedule 4 equipment for Versa HD, since in any case, the petitioner was the L1 for schedule 4 equipment, which was also further clarified through their letter dated 10.10.2018. Subsequent exchange of e-mails between the petitioner and the second respondent also happened on various dates including 11.10.2018, 12.10.2018, 17.10.2018, 22.10.2018 and 23.10.2018. The petitioner also provided a special bulk price for 8 units of Versa HD with accessories in Schedule 4 equipment. The revision was submitted with the hope that the same was a price negotiation with the second respondent permissible under law and the relevant tender and the purchase order in respect of Schedule 4 equipment, would be placed on the petitioner being L1 in respect of the tender therefor.

8. While so, on 12.12.2018 the second respondent informed the petitioner that the competent authority had approved the rate contract for model True Beam under Schedule-1 equipment and Letter of Acceptance dated 27.11.2018 and 30.11.2018 had been placed on the third respondent for the model "True Beam" in schedule 1 equipment. Further, an order dated 05.12.2018 had been placed on the second respondent for 8 nos of True Beam and 1 No. Unique performance and finally, the competent authority had approved dropping of schedule 4 equipment, since the model True Beam quoted by the third respondent in schedule 4 equipment could be procured in schedule 1 equipment itself.

9. The petitioner had raised its objections to the decision taken by the second respondent through their letters dated 12.12.2018 and 21.12.2018. The petitioner sent a communication on 19.12.2018 expressing their surprise that the competent authority had approved the rate contract of the third respondent for the model "True Beam" with accessories under

schedule 1, which was never part of schedule 1 as per the technical bid and price bid. The same was reiterated by the petitioner again on 02.01.2019 in its letter to the second respondent.

10. According to the petitioner, the tender conditions had been modified, subsequent to the opening of the bid. Hence, this Writ Petition is filed seeking to restrain the second respondent from proceeding in any order or contract, awarded to or placed on the third respondent or fourth respondent under the tender document dated 12.12.2017 including Letter of Acceptances said to have been placed on 27.11.2019 and 30.11.2018.

11. The Writ Petition is resisted by the second respondent, inter alia, contending that it is the Nodal Agency for procurement and distribution of Drugs, Surgical and Suture items for about 11000 Government Medical institutions all over Tamil Nadu. Considering the fact that treatment for cancer is very expensive and to avail the facilities to be reached to the poor people, the Government decided to have provision of these facilities in the medical institutions to offer the same at free of cost. Admittedly, there are two suppliers namely, the petitioner and the third and fourth respondents. According to the second respondent, due to the fact that there are only two manufacturers for the said supply of the equipments, the tender conditions are driven by the manufacturers rather than the purchasers. The second respondent has been trying to purchase the equipments from 2014 by floating several tenders, however, due to the fact that the payment was insisted to be made only in foreign currency through Letter of Credit and its payment in INR through RTGS was not agreed, it could not get through. It is stated that schedules are framed in such a way that it is possible for all the prospective bidders to display their available models under the relevant schedules in a single tender against a single bid security. It is further stated that this methodology created not only a conducive atmosphere for all the prospective bidders but also with competitive prices. Therefore, in order to create a natural healthy competition among the prospective bidders for quoting their available models, a condition stating that the second respondent reserves its rights to procure any number of the equipment to any of the listed hospital in any of the listed schedules based on the 0price differential and case loads and the relative advantage of prices with respect to higher specification and the decision of this respondent in this aspect shall be final. In other words, it gives an opportunity to the second respondent to select the most apt and high end equipment for a relatively lesser price among the models quoted across various schedules of the tender. In fact, it is stated that the above methodology adopted by the second respondent was proved successful in procuring the high end models in the previous years for different equipments which

also had only limited suppliers. Hence, the second respondent adopted the same methodology for procurement of Linear Accelerators also.

12. The third and fourth respondents resisted the writ petition on various grounds. The petition was primarily objected on the ground of delay and laches on the part of the petitioner. According to the respondents, the petitioner had intentionally delayed the filing of the Writ Petition only to put a spoke in the second respondent's wheel in giving effect to the purchase order in favour of the respondents 3 and 4 and also inasmuch as it delays the benefits to be taken to the poor and needy. The petition itself is filed as the petitioner could not secure the bid for schedule 4. It is submitted that the tender process and acceptance of the revised offer of the third and fourth respondents, both technical and financial bids for its model "True Beam" under schedule 1 was not only entirely lawful but also in accordance with the Tamil Nadu Transparency in Tenders Act, 1988. Though the tender is floated by the State, it is essentially a commercial transaction. It is only on the request of the second respondent to respond on the final price for the schedule 3 (2) and 4 equipments by providing revised rate with substantial discount, the third and fourth respondents sent the letter on 20.09.2018. Since the third respondent was declared as L1 under Schedules 1, 2 and 3(1), the respondents 2 and 3, as permitted under the tender and the law being in force, entered into negotiations. As a result, the third respondent sent a letter to the second respondent giving the revised offer. Thereafter, the second respondent issued a short Letter of Acceptance (LOA) to the petitioner for schedule 3 (1) equipment and on 30.11.2018, LOA for schedules 1,2 and 3(1) was also issued. It is further contended that the second respondent had reserved its rights to procure their linear accelerators from any schedule based on the relative advantage of the prices with respect to the higher specifications and the price difference. The petitioner and the respondents 3 and 4 were well aware of this clause? attached to the tender and submitted the bid subject to the same. The petitioner, after having submitted its bid, cannot deny the right of the second respondent. The respondents 3 and 4 being L1 for schedule 1 equipment, the respondents rightly negotiated with them and during negotiations, they chose to offer their advanced model "True Beam" instead of "Trilogy" against the price of "Trilogy" in Schedule-I equipment. [As the petitioner also had approached this Court belatedly, the respondents 3 and 4 prayed for dismissal of the Writ Petition]. As there is no discrepancy, as alleged by the petitioner and the second respondent had adhered to the tender process, the petitioner has filed this Writ Petition with an ulterior motive, which cannot be sustained and the same has to be dismissed.

13. Heard both sides.

14. From the above facts, the following aspects arise for consideration:

(i) Whether there was a modification in the technical bid after opening of the financial bid?

(ii) Whether the second respondent had maintained the transparency in negotiating with the petitioner?

(iii) Whether there was any alternative remedy available to the petitioner?

15. The main objection of the learned Senior Counsel appearing for the petitioner is that very tender is price-agnostic, inasmuch as the determinant of procurement under the relevant tender is only the highest compliance with the specification stipulations for each equipment under the tender schedule and not over-all price. According to the learned senior counsel appearing for the petitioner, the Model "True Beam" was offered by the second and third respondents only in relation to Schedule 4 and Model "Trilogy" was offered by the respondents 2 and 3 in relation to schedule-1 equipment. Therefore, under the guise of price negotiation in relation to schedule-1 equipment, the second respondent cannot permit the third respondent to modify the technical bid and offer a completely different equipment under a different schedule with an ulterior motive to exclude the petitioner from schedule 4 equipment especially when the petitioner was the L1 bidder.

16. In this regard, Section 10(3) of the Tamil Nadu Transparency in Tenders Act, 1988 was referred, which permits price negotiation with L1 bidder for reduction of the prices quoted by the L1 bidder. However, in this case, the second respondent-Corporation permitted the third respondent to modify its entire technical bid and also the price bid, which is higher than the original price quoted by the third respondent in relation to Schedule 1 equipment. Even with respect to the price bid, the original price quoted by the third respondent for the model "Trilogy" was Rs.18.52 crore per equipment and the total cost of 8 numbers of "True Beam" as per the revised offer of the third respondent was Rs.153.16 crores. Hence, it is contended that even as per the revised rates proposed by the third respondent, there is an increase in the offer for schedule 1 equipment by Rs.5 crores and this cannot be considered as reduction of price as envisaged under Section 10(3) of the Transparency Act. In this regard, an useful reference may be made to the schedule-wise comparative chart furnished by the second respondent, which was not disputed by the petitioner, as hereunder :

I. Schedule wise Comparative chart					
Schedule	3(ii)	3(i)	2	1	4
Category	Low end	Low end	Mid end	Mid end	High end
Type	Single energy with material detector	Single energy with Scint (later material detector (technically superior material))	Dual energy	Dual energy	Advanced Dual Energy
Model Quoted by Elekta	Compact	Not quoted	Synergy platform	Synergy	VERSA HD
Evaluated life cycle price during opening of price bid	10.23 Crores	Not applicable	16.94 Crores	19.09 Crores	20.86 Crores
Position	L1 (Sole responsive bid)	Not applicable	L2	L2	L1
Model Quoted by Varian	Radiation	Unique Power	Clinac IX	Trilogy	True Beam
Evaluated life cycle price during opening of price bid (Rs.)	Not applicable	12.54 crores	16.09 Crores	18.52 Crores	21.86 Crores
Position	---	L1 (Sole bid)	L1	L1	L2
Negotiations held for with	Elekta	Varian	Varian	Varian	Elekta
Revised offer by L1 bidder	With discount	With discount and better model: Unique Performance	Model Trilogy instead of Clinac IX	Model True Beam instead of Trilogy	Reduction in price
Pricewise revised offer was with	Only discount	Unique Performance at Unique Power price With discount	Trilogy at Clinac IX price	True Beam at Trilogy price with additional items (6 DOF couch) at free of cost	Only discount
For operation of True Beam and VERSA HD certain additional items from schedule (1) and (4) and also from optional accessories are required as recommended by the specialist in technical evaluation report which were considered and communicated to both the bidders for their revised price including those items and for the same combination of items. Since both the bidders were interested to know the probable order quantity in high and machine initially it was indicated as 5 to 8 nos. However both the bidder chose to give their revised price for a package of 8 nos. of True Beam / VERSA HD. Accordingly the comparison was made for a total package price of 8 nos. of True Beam / Versa HD.					
Total life cycle cost for the same combination of equipment plus additional accessories from schedule (1) and (4) as recommended by specialist in technical evaluation report and also the value of 3 nos. 6 DOF couch offered at free of cost by Varian for an order quantity of 8 nos. of True Beam, the revised total life cycle price for 8 nos. at Rs. 71 per US\$ was at (Rs.)				153.37 crores for package of 8 nos.	165.89 crores for package of 8 nos.
Difference between the revised price offered by Elekta and Varian as on 23.11.2018, the date of acceptance by the Board and 30.11.2018 the date of issue of Letter of acceptance				12.52 crores excluding Customs Duty and GST (Working sheet at page 325 & 326 of typed set)	
Difference between the belated final price offered by Elekta on 06.12.2018, and the price of Varian accepted by the Board on 23.11.2018.				7.98 Crores excluding Customs Duty and GST (Working sheet at page 325 & 326 of typed set)	
Final Position	Selected for empanelment in Rate contract for possible orders in the next three years based on future requirement	Selected for empanelment for possible orders in the next 3 years based on future requirement and 1 no. for the present requirement	Selected for empanelment for possible orders based on future requirements.	Selected for empanelment for possible orders based on future requirements and 8 nos. with free items for the present requirement.	Could be empanelled if they offer the same price of Varian

17. The learned Advocate General, who appeared on behalf of the first and second respondents, contended that the petitioner had violated the terms, for which, the third respondent had objected vide letter dated 24.07.2018. It is also further stated in determining the lowest evaluated price of an imported item the customs duty shall be included in addition to GST and hence, in the absence of specific values of Customs Duty and GST indicated in the price bid, evaluation and comparison of the prices cannot be done. Therefore, it is further stated that the value indicated by the petitioner "as the applicable customs duty" and for the GST "as applicable" is taken into account the petitioner did not qualify as L1 even for schedule 4. It is also stated that during negotiation, the third respondent chose to offer their advanced model "True Beam" which meets the specifications of schedule 4 including CAMC prices. The petitioner had responded vide their letter 03.10.2018 giving the revised offer. Therefore, it is evident that the petitioner is not willing to give a similar offer of supplying his product Versa HD at the rate quoted by them in any other schedule. There was another revised belated offer given by the petitioner on 05.12.2018. It is stated by the second respondent that this was after the orders were placed with the third respondent and it could not be entertained as the same is violative of Rule 23 of the Tender Rules and Clause 19.3 of the tender conditions.

18. It is further submitted by the learned Advocate General on behalf of the second respondent that there has been no modification of bid subsequent to submission of bids. The offer of the third respondent was only an equipment with higher specification comparable with the model of schedule 4 of the petitioner at the price of schedule 1 which has relative advantage of prices for higher specification as permitted by the terms of the tender. Hence, the petitioner cannot be permitted to take advantage of his own mistake and seek a mandamus.

19. The learned Senior Counsels appearing for the third and fourth respondents also contended that the petitioner was informed about the offer made by the respondents 3 and 4 by e-mail dated 29.09.2018 and was also given adequate opportunity to reduce the price of its Schedule 4 equipment, namely, Versa HD. It is contended that the price quoted by the third respondent under schedule 1, based on which, they were declared as L1 was not altered in any form or manner. The tendered rates of the machinery was maintained at the same rate as originally offered by the third respondent in the price bid. It is also specifically pointed out that CAMC price quoted by the third respondent for Schedule IV were lesser than the CAMC price quoted by the third respondent for Trilogy along with other options offered under Schedule-I. Thereafter, it was clarified that the CMAC price quoted for True Beam will apply to the

revised offer made under Schedule-1. In this regard, despite several opportunities being given to the petitioner to reduce the price, the revised offer of the petitioner only tendered higher price.

20. It is the complaint of the petitioner that the exact price and package offered by the third respondent was not disclosed in the e-mail dated 20.09.2018. Therefore, the petitioner could not reliably believe that the second respondent permitted the third respondent to change its technical bid in relation to schedule 4 equipment and accommodate the procurement of the equipment offered by the third respondent to be considered as schedule 4 equipment under Schedule 1 equipment. It is the consistent stand of the petitioner that the revised offer of the third respondent was never provided to the petitioner enabling them to match the said price.

21. In any tender, the procurement is determined only by the highest compliance with the specifications for each equipment under the tender schedule and then only the price. According to the petitioner, Versa HD quoted by them in Schedule 4 is the high end equipment complying with the technical specifications for the same. It is also claimed that the said model has been procured by several prestigious hospitals and institutions like All India Institute of Medical Sciences etc., The equipment is a unique 4D technique which uses on-line registration and the said technology is not available in the model "True Beam" which is based on 2D tracking. The learned Senior Counsel appearing for the petitioner also explained that the model Versa HD is accurately modeled and the same is not available in the model "True Beam" manufactured by the third respondent. Therefore, in terms of the model of the equipment also, the petitioner has complied with and provided better technical specifications.

22. The learned Senior Counsel appearing for the petitioner alleged that a clarification had escalated into a situation where a wholesale change in not only in number, but also the machine, which has resulted in lack of transparency in the second respondent's negotiation with the petitioner. As mentioned earlier, the details of the exact price and package offered by the third respondent was not disclosed in the mail dated 20.09.2018 and the petitioner did not have a reason to believe that the third respondent was permitted to change its technical bid in relation to schedule 4 equipment and to accommodate the procurement of the equipment offered by the third respondent to be considered as schedule 4 equipment under Schedule-1 equipment.

23. The petitioner was kept in dark about the negotiations, the second respondent had with the third respondent and did not disclose the details of the revised offer provided by the third respondent. Hence, it is alleged that there is a total lack of transparency in the negotiations that the second respondent had with the petitioner.

24. The learned Advocate General appearing for the second respondent replied that the comparison of the package prices offered by the third respondent for their model "True Beam" with accessories and with 3 numbers of 6 DOF couch at free of cost for an order of 8 numbers with that of the corresponding package prices offered by the petitioner would go to show that the offers of the former were found cheaper. The difference in price for the said packages is without including the value of retro fitting for the CT Stimulator. The procurement being for the State, the guiding factors, apart from public interest, were the price difference and the relative advantage of the prices with respect to the higher specifications, which had been clearly mentioned in the tender conditions. As the extended validity of the bids of both the bidders was only upto 30.11.2018, the second respondent had placed the proposal before the Tender committee of the Board for consideration of approval of their rates, which was subsequently approved by the Board of Directors. The second respondent further stated that the offer of the petitioner in respect of the revised package price was a belated one for 8 numbers of their model Versa HD with accessories but without retro fitting and without any free offer similar to the one offered by the third respondent.

25. In response to the same, the learned Senior Counsel appearing for the petitioner contended that in computing the total price of the third respondent's revised offer, the second respondent had reduced the price of three numbers of 6 DOF couch, which the third respondent had offered free. The said items were only optional and adopting such a methodology and reducing the price is clearly flawed, since the offer to provide an optional item does not reduce the consideration payable by the second respondent for the procurement of the equipment. Thus, there was a clear lack of transparency in the negotiations that the second respondent had with the petitioner. The details of the revised offer of the third respondent were provided to the petitioner for the first time in the course of the present proceedings including the details of the accessories added in the package offered by the third respondent.

26. The prayer of the writ petitioner is for a mandamus forbearing the second respondent from proceeding under any order or contract awarded to or placed on the third respondent under tender No.246/LINAC/TNMSC/ENGG/2017 dated 12.12.2017 including the Letter of Awards said to have been placed on 27.11.2018 and

30.11.2018.

27. Section 10(6) of the Tamil Nadu Transparency in Tenders Act, 1998 provides that "if the Tender Accepting Authority proposes to accept the tender as per the provisions of this Section, the said authority shall pass orders accepting the tender together with reasons for such acceptance".

28. Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998 provides for an appeal by a tenderer aggrieved by the order passed by the Tender Accepting Authority to the Government within 10 days from the date of receipt of the order. In the case on hand, the second respondent had placed the letter of acceptance on 27.11.2018 and 30.11.2018 on the third respondent and the said orders have not been provided to the petitioner by the second respondent. Therefore, it is contended that the petitioner had no occasion or opportunity to challenge the said orders. The letters received by the petitioner are not orders, but they are intimation that the orders have been placed. Therefore, the petitioner cannot maintain the Writ Petition, without exhausting the alternative remedy available to them.

29. The learned Advocate General appearing for the first and second respondents also submitted that the Hon'ble Supreme Court has repeatedly held that the decision making process in tender conditions cannot be interfered with. He placed his reliance on the judgment of the Hon'ble Supreme Court in RAUNAQ INTERNATIONAL LTD., Vs. I.V.R.CONSTRUCTION LTD., AND OTHERS reported in (1999) 1 SCC 492, wherein, in paragraphs 13, 14, 15 and 16, it has been held as follows:

"13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes and the court is satisfied on the material before it that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.

15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been

considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.

16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

30. Reliance was also placed on the decision in Tata Cellular - vs- Union of India, reported in 1994 (6) SCC 651, wherein, it has been categorically held that the terms of the invitation to tender cannot be opened to judicial scrutiny because the invitation to the tender is in the realm of contract and that the Government must have freedom of contract.

31. The learned Advocate General pressed into service the order of the Supreme Court in Air India Ltd., Vs. Cochin International Airport Ltd., reported in 2000 (2) SCC 617, in support of his contentions and para 7 of the same reads as follows:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] , Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India [(1981) 1 SCC 568] , CCE v. Dunlop India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75] , Tata Cellular v. Union of India [(1994) 6 SCC 651] , Ramniklal N. Bhutta v. State of Maharashtra [(1997) 1 SCC 134]

and Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492] The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

32. The next case on which reliance was placed on is the case of SHIMNIT UTSCH INDIA (P) LTD. AND ANOTHER Vs. WEST BENGAL TRANSPORT INFRASTRUCTURE DEVELOPMENT CORPORATION LTD., AND OTHERS reported in (2010) 6 SCC 303, wherein it has been held as follows:

45. In Directorate of Education v. Educomp Datamatics Ltd. [(2004) 4 SCC 19] this Court, inter alia, applied the principles enunciated in Tata Cellular [(1994) 6 SCC 651] and Monarch Infrastructure (P) Ltd. [(2000) 5 SCC 287] and held as follows: (Directorate of Education case [(2004) 4 SCC 19] , SCC p. 24, para 12)

"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

46. In *Bannari Amman Sugars Ltd. v. CTO* [(2005) 1 SCC 625] this Court was concerned with the question relating to withdrawal of benefits extended to the appellant therein as subsidy and it was held: (SCC p. 638, para 21)

"21. ... We find no substance in the plea that before a policy decision is taken to amend or alter the promise indicated in any particular notification, the beneficiary was to be granted an opportunity of hearing. Such a plea is clearly unsustainable. While taking policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn."

47. In *Global Energy Ltd. v. Adani Exports Ltd.* [(2005) 4 SCC 435] this Court reiterated the principles that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

48. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.* [(2005) 6 SCC 138] the legal position highlighted in *Tata Cellular* [(1994) 6 SCC 651] was reiterated in the

following words: (Master Marine case [(2005) 6 SCC 138] , SCC p. 147, para 12)

"12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* [Associated Provincial Picture Houses Ltd. v. *Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

33. The decision of the Hon'ble Supreme Court in *Municipal Corpn., Ujjain v. BVG India Ltd*, reported in (2018) 5 SCC 462, was relied on by the learned Senior Counsel appearing for the third respondent, wherein, in paragraphs 14, 15, 16 and 17, it has been held as follows:

"14. The judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision;

and if the public interest is not affected, there should be no interference under Article 226.

15. It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.

16. The State, its corporations, instrumentalities and agencies have a public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere. (See the judgment in *Air India Ltd. v. Cochin International Airport Ltd.*)

17. In *U.P. Financial Corpn. v. Naini Oxygen & Acetylene Gas Ltd.* [U.P. Financial Corpn. v. Naini Oxygen & Acetylene Gas Ltd., (1995) 2 SCC 754], this Court held that it was not a matter for the courts to decide as to whether the Financial Corporation should invest in the defaulting unit, to revive or to rehabilitate it and whether even after such investment the unit would be viable or whether the Financial Corporation should realise its loan from the sale of the assets of the Company. The Court observed that a Corporation being an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge, it is free to act according to its own right in the discharge of its functions. The

views it forms and the decisions it takes would be on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. In such a situation, more so in commercial matters, the courts should not risk their judgment for the judgments of the bodies to which that task is assigned. The Court further held that: (SCC p. 761, para 21)

"21. ... Unless its action is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable."

34. It is submitted that despite opportunities being given to the petitioner to enable them to match the offer to that of the third respondent, since the petitioner could not offer a matching price, the second respondent had placed the orders on the third respondent. If the petitioner-Company is aggrieved, it should have challenged the same within the period of limitation under Section 11 of the Transparency in Tenders Act. As the time limit for an appeal is over, the petitioner has chosen to file the Writ Petition.

35. The rejection of the offer of the petitioner was made known to them by letters written by the second respondent dated 12.12.2018 and 21.12.2018. Therefore, the challenge should have been made within a period of 10 days. Having failed to do so, the jurisdiction under Article 226 of the Constitution of India, cannot be invoked.

36. The petitioner by their own conduct, failing to file an appeal as contemplated under Section 11 of the Transparency in Tenders Act, waived their rights in respect of the Letter of Acceptance and have acquiesced to the award of contract in favour of the third respondent. Hence, the petitioner is estopped by their conduct from challenging the tender in the manner whatsoever.

37. For the foregoing reasons, the Writ Petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

srn
To

1. The Principal Secretary.
Government of Tamil Nadu,
Department of Health and Family Welfare,
Secretariat,
Chennai 600 009.
 2. The Managing Director.
Tamil Nadu Medical Services Corporation Limited,
A Government of Tamil Nadu Undertaking,
with its registered Office at
417, Pantheon Road, Egmore, Chennai 600 008.
- +1 CC to Mr. Shivakumar, Advocate sr 36994.
+3 Ccs to Mr. Abishek Jenasenani, Advocate sr 36083.
+1 CC to Mr. R. Bharadwajaramasubramaniam, Advocate sr 36744

W.P.No.1193 of 2019
and W.M.P.Nos.1349, 2094 and 2322 of 2019

NMI (CO)
SP(14/05/2019)

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