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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 23.07.2019

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Judgment pronounced on: 5.09.2019

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W.P.(C) No. 13608/2018

M/S ALMIGHTY TECHSERV PROPRIETOR MR. MANISH
DALMIA

..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Advocate with
Mr. Dhruv Nayar, Advocate.

versus

COMMISSIONER,
DIRECTORATE OF LOGISTICS AND ANR.

..... Respondents

Through: Mr. R.V. Sinha, Mr. A.S. Singh and
Mr. Amit Sinha, Advocates for
respondent no. 1.

Mr. Debesh Panda, Ms. Akriti Kataria,
Mr. Abhas Mishra and Mr. Tarun
Khanna, respondent no. 2.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present petition has been filed seeking to set aside the order dated 7.12.2018 whereby respondent No. 1 has awarded the contract to respondent No. 2 as also for issuance of a direction to respondent No. 1 to place the original records pertaining to the contract in question before this Court.
2. The brief facts which need to be captured for deciding the present petition are that the petitioner is a proprietorship firm with Sh. Manish Dalmia as its proprietor. The firm was established in the year 2006 and is engaged in design, supply, installation, testing, commissioning

and maintenance of security, surveillance, traffic law enforcement and civil aviation equipments/videoscopes. The petitioner claims that it has successfully supplied, installed, tested, commissioned and maintained the said equipments in Government departments like SPG, NSG, AAI and other police departments.

3. The genesis of the petition starts from the day the Central Board of Excise and Customs ('CBEC'), Directorate of Logistics Lok Nayak Bhawan had floated an e-tender no. 30/EQ/2018 dated 22.3.2018 for supply, installation and maintenance of 74 videoscopes at various field formations of CBEC. The videoscopes are used by custom officers to examine the goods at sea ports, air cargo complexes, inland containers depots, etc. and assist in identification and detection of contrabands and smuggled items.
4. The tender was valid for acceptance for a period of 180 days from the date of tender opening, so prescribed in the tender document. The tender bids were to be submitted online only at the CPPP website. As per Clause 2.18.11 the tenderer had to submit the technical bid as per Form-I of Section X along with necessary enclosures, but without indicating the bid price directly or indirectly. The bid price was to be submitted as per the 'price schedule' given in Section VIII.
5. The petitioner submitted its bid on 17.5.2018 as per the tender conditions. It also addressed a communication dated 24.8.2018 to the tender Authority requesting them to communicate if any query or clarification was required. However, no clarification or explanation was sought from the petitioner. The price bid was opened on 7.8.2018 at 11:21 hours.

6. It is the case of the petitioner that the price sheet of the bidders disappeared from the portal of the Authority from 8.8.2018 till 6.12.2018. Noticing this lapse, the petitioner became suspicious of certain irregularities and submitted letters dated 26.10.2018 and 5.12.2018 seeking the reasons for disappearance of the price sheets. It is the further case of the petitioner that both the petitioner and respondent No. 2 had bid by uploading their respective bids on the official portal which was made known to all eligible bidders. The petitioner could retrieve a copy of the bid submitted by respondent No. 2 only on 7.12.2018, after the contract had been awarded to respondent No. 2.
7. Section VIII of the tender document, has two parts, viz., Part-I (price schedule) and Part-II (contract for annual maintenance). The petitioner pleads that he found that the price quoted by the petitioner was less than the price quoted by the respondent No. 2. Price Bid was to be submitted in two parts-Part I and Part-II and were to be added to determine the Lowest Bidder (L-1) as per Clause 2.29.2 of the Tender Conditions.
8. The petitioner further pleads that on 7.12.2018 respondent No.1 uploaded a Tender Summary Report (technical bids and price sheet of all the bidders) on their website, which showed that the petitioner was “rejected-finance”, giving reasons “L-2”. The petitioner avers that a reading of the summary report gives an impression that the petitioner has been rejected on his being L-2 i.e. his price bid being higher than that of respondent No.2. On 5.12.2018, the petitioner addressed a communication to respondent No. 1 apprising him of the fact that the bids were not appearing on the e-procurement portal. On 7.12.2018

and 11.12.2018 the petitioner submitted representations against awarding the contract to respondent No. 2 and seeking reasons for such action. Not getting any favourable response the petitioner filed the present writ petition with the following prayers:-

“(i) to issue a writ of mandamus and certiorari order direction thereby setting aside the impugned order issued by respondent no. 1 awarding the contract to Respondent No. 2 under E-tender No. 30/EQ/2018 dated 22.3.2018.

(ii) to issue direction / order to the respondent no. 1 to place before this Hon’ble Court the original records pertaining to the subject contract E-tender No. 30/EQ/2018.”

9. On 18.12.2018, notice was issued to the respondents and the award of contract was made subject of the outcome of the writ petition.
10. Learned senior counsel for the petitioner contends that the contract has been wrongly awarded to respondent No. 2 despite the fact that the price quoted by the petitioner was less than the price quoted by respondent No. 2. In fact, in doing so a loss of Rs.61.30 lakhs has been caused to the Government Exchequer. He submits that the Price Schedule and Centralised Comprehensive Annual Maintenance Contract (hereinafter referred to as ‘CCAMC’) under Section VIII submitted along with the bid would clearly show that the petitioner had given a bid at a total price of Rs.9,12,65,828/- for 74 videoscopes and this included the basic cost of the videoscopes (including insurance and freight) as well as custom duty and GST. Along with this price schedule, the CCAMC quoted by the petitioner for the relevant five years was at Rs.4,33,91,055/-. As against this respondent No. 2 had given the price schedule with cost of the videoscopes as

Rs.9,03,76,200/- but this did not include the custom duty as against this column respondent No. 2 had indicated ‘_ _ _’. The CCAMC quoted by respondent No. 2 was Rs.5,04,10,622/-. The submission is that a comparison of the figures of both the parties would show that while the price schedule of the petitioner is higher than that of respondent No. 2, but the price for CCAMC is lower and thus the total price of the petitioner comes to Rs.13,46,56,883/- as against the total price of respondent No. 2 at Rs.14,07,86,822/-. Thus, by a simple mathematical calculation, the price of the petitioner is lower by Rs.61,29,939/-. Learned senior counsel submits that Clause 2.29.2 of the tender conditions formulates the methodology by which the lowest bidder (L-1) shall be determined and as per this the Net Cash Outflow from the purchaser in the first seven years after commissioning will have to be seen. The Net Cash Outflow is determined by adding contract price of the system and the sum of discounted annual maintenance charges of five years. He submits that applying this methodology the petitioner is L-1 and there is no reason why the award should have been awarded to respondent No. 2 who was L-2. He submits that the respondent No. 1 has wrongly placed petitioner as L-2 and has illegally denied the award of contract to the petitioner.

11. The next submission of Mr. Sethi, learned senior counsel for the petitioner, is that a perusal of the bid (price schedule) submitted by respondent No. 2 (which is at page 92 of the paper book) shows that in the column relating to ‘Custom Duty’ the amount which was to be reimbursed by respondent No. 1 and was to be quoted in the said column by respondent No. 2 has not been indicated and instead only ‘_ _ _’ has been mentioned. He submits that since the column has

been left blank, this was an incomplete bid and being non-responsive, it should have been rejected at the outset. Mr. Sethi has also drawn the attention of this Court to Clauses 2.13.2 and 2.13.3 of the tender documents. He submits that as per the tender condition, the tenderer was to indicate the custom duty assessed by him for the videoscope in question and a tentative amount should have been indicated in the proforma as on the date of opening of the technical bids. The custom duty was to be reimbursed later depending on the variation, if any, at the relevant time. He has also drawn the attention of this Court to Section X of the tender documents, which contains Form No. 1 of the tender forms and this Form contains the Instructions as per which the bids had to be submitted. Condition No. 3 clearly requires that the tenderer should fill in all columns of the Form along with supporting documents. Condition No. 5 provides that if any tender Form is incomplete the tender may be rejected. Thus, respondent No. 1 should have rejected respondent No.2's tender being non-responsive.

12. Mr. Sethi, next contends that there is yet another error in calculating the price bid of the petitioner. He submits that while calculating the custom duty respondent No. 1 has wrongly added 1% as landing charges and which has made a difference to the price. He submits that the Apex Court in the case of *M/s Wipro Ltd. Vs. Assistant Collector of Customs 2015 (319) DLT 177 (SC)* has held that the landing charges to be added to the value of goods should be based on actual charges incurred and not notional charge of 1%. He submits that after the said judgment, the Department of Revenue has issued a circular dated 26.9.2017 and it has been clearly mentioned in the said circular that the Customs Valuation [Determination of Value of Imported

Goods] Rules, 2007 (hereinafter referred to as 'CVR 2007') would stand amended and the loading, unloading and handling charges associated with delivery of the imported goods at the place of importation shall not longer be added to the CIF value of the goods. Thus, only charges incurred for delivery of goods to the place of importation shall be includable in the transaction value. Attention of the Court has been drawn to a chart given in the rejoinder by the petitioner wherein a comparative statement has been given showing prices with 1% landing charges and a calculation without adding the landing charges. It is sought to be brought out that because of the incorrect addition of the 1% landing charges the Net Cash Outflow has been wrongly calculated for the petitioner at Rs.12,45,29,536/- whereas it would come to Rs.12,35,90,163/-. Learned senior counsel submits that once the addition of landing charges at the rate of 1% to the CIF value has been done away by a circular, there was no reason this should have been added to the bid quoted by the petitioner.

13. Respondent No. 1 has filed a reply affidavit and has submitted that the bids have been evaluated strictly in accordance with the evaluation criteria and in a fair manner. It is stated in the affidavit that the L-1 bidder had to be evaluated as per the formula given in Clause 2.29 of the tender documents. It is further stated that the price bids of three technically qualified bidders were opened online on 7.8.2018 and were available to the petitioner, which is evident from its letter dated 24.8.2018. It is denied that the price sheet of the bidders had disappeared from the portal from 8.8.2018 till 6.12.2018 and the allegation is denied. It is further averred that the TEC had evaluated the bids and the demonstration of the equipments was conducted by

the technically qualified bidders and during the entire period of technical bid opening, the petitioner had never raised any issue of non-availability of the technical bids on the CPP portal.

14. Mr. Sinha, learned counsel for respondent No. 1 submits that the price bids were evaluated as per Clause 2.29.2. The lowest tenderer L-1 was determined on the basis of Net Cash Outflow. He submits that a detailed calculation has been given in the reply affidavit in para 11 and a comparison of the prices of respondent No. 2 and the petitioner would show that respondent No. 2 was lower as his Net Cash Outflow was Rs.12,43,17,149/- while that of the petitioner was higher being Rs.12,45,29,536/-. Respondent No. 2 was correctly found as L-1 and awarded the contract.
15. Mr. Sinha further submits that the custom duty structure which was applicable was Basic Custom Duty = 7.5%, surcharge on Basic Custom Duty = 10% and IGST = 18%. Therefore, while evaluating the price bid of the petitioner the Custom Duty applicable was calculated as Rs.2,78,398/- and was added to the cost quoted instead of Rs.2,39,482/- (Custom Duty Rs.51,348/- and GST Rs.1,88,134/-), as mentioned by the petitioner in the price bid. He submits that it is clearly mentioned in the tender documents that the tenderer will indicate in the tender the duties and taxes in the price bid, however, the payments of duties shall be made as per actual and Statutory variations. On account of this, the abovementioned price variation and adjustment in price quoted by the petitioner was carried out.
16. In response to the submission of the petitioner that the landing/loading charges have been illegally added at the rate of 1% on notional basis, Mr. Sinha submits that Clause 4.2 of the said Notification itself states

that only charges incurred for delivery of goods to the place of importation shall be included in the transaction value and since in the present case the actual charges incurred were not available, a notional landing charge at 1% of the cost of videoscope was added for calculation of the Net Cash Outflow. He further submits that this addition was not merely in respect of the petitioner, but was also in respect of the other technically qualified bidder M/s. Karl Storz Endoscopy India Private Limited. Mr. Sinha further seeks to justify the action of declaring respondent No. 2 as L-1, by submitting that the petitioner had declared a CIF of Rs.9,93,840/-. After adding the landing charges at the rate of 1% of the CIF price the assessable value worked out to Rs.10,03,778/-. To this custom duty of Rs.2,78,398/- was added and the total import value came to Rs.12,82,176/-. This was higher than that of respondent No. 2 and thus it is wrong for the petitioner to claim that he was L-1.

17. Pursuant to the order passed by this Court on 30.5.2019, respondent No. 1 filed an additional affidavit. In the additional affidavit, respondent No. 1 has sought to explain the price bid document given by respondent No. 2, more particularly, with respect to the column relating to custom duty. It is stated in the affidavit that the ‘___’ put by respondent No. 2 meant that no custom duty was being claimed and the price quoted was all inclusive and final. This intent is fortified by the fact that even in the claim relating to installation and commissioning charges, respondent No. 2 has put a ‘___’. It was further explained that it was not as if no expenses would be incurred by respondent No. 2 in installation or commissioning, but respondent No. 2 had taken a conscious decision to claim only what was quoted as

all inclusive and nothing further was to be claimed from the Government. Further it is explained that since the price quoted by respondent No. 2 was inclusive of custom duty, which includes duty on 1% Landing Charges, the said charges were not added to his price bid and thus it is not open to the petitioner to contend why the 1% Landing Charges were not added to the price bid of respondent No. 2.

18. Respondent No. 1 has in the affidavit also given a detailed comparative chart of the prices of the petitioner and respondent No. 2 indicating how the Net Cash Outflow has been calculated. It is explained that since the order was placed on respondent No. 2 exclusive of GST, the Authorities would have to reimburse the same at 18% and this being added, makes the Net Cash Outflow of respondent No. 2 as Rs. 12,34,22,346/-, which is less than the Net Cash Outflow of the petitioner being Rs.12,35,90,163/-.
19. Respondent No. 2, who is the successful bidder and on whom the award has been placed on 12.11.2018, is represented through a counsel. Respondent No. 2 has filed its reply affidavit as well as an additional affidavit. It is stated in the affidavit that the award has been rightly placed on respondent No. 2 as he was determined as the 'L-1' bidder. A detailed chart of calculation indicating the Net Cash Outflow of the petitioner and respondent No. 2 has been incorporated in the affidavit. It is brought out that the Tender Evaluating Committee had followed the procedure for determining the 'L-1' as per clause 2.29.2 of the tender conditions. It is stated that as per the bid document, the price quoted by the petitioner was Rs. 9,12,65,828/- which was higher than the price quoted by respondent No. 2, which was Rs. 9,03,76,200/-.

20. In the additional affidavit filed by respondent No. 2, it is brought out that when the notice was issued by this Court on 18.12.2018, more than 5 weeks had elapsed since the issuance of the letter of award in its favour. Respondent No. 2 had submitted a Bank Guarantee, executed a formal contract with respondent No. 1, submitted a Time Bar Chart and also placed an order with the 'Original Equipment Manufacturer'. It is thus averred that respondent No. 2 has no option now but to perform the obligations under the Letter of Award or face consequences such as encashment of Bank Guarantee, blacklisting or damages. It is further stated that the plea of the petitioner that 1% Landing Charges could not have been imposed is only a misreading of the circular as the same nowhere provides that 1% Landing Charges have been done away with. All that the circular states is that they have to be based on the actual charges incurred and not a notional charge. The petitioner is also misreading and misconstruing the judgment of the Apex Court in *Wipro Ltd. (supra)*. Learned counsel for the respondent No. 2 on the basis of the elaborate pleadings, contends that the award has been correctly awarded to respondent No. 2 as he was found to be the 'L-1' bidder. He submits that the methodology of determining the 'L-1' bidder is given in clause 2.29.2 of the tender conditions. The basis to determine thus is the Net Cash Outflow, which is the sum of contract price of the system and the sum of discounted annual maintenance charges for 5 years. So worked out, the price of respondent No. 2 becomes lower than that of the petitioner. Learned counsel has further contended that respondent No.2 had bid at Rs. 10,35,000/-, all inclusive as a price per videoscope on which it computed the GST, whereas the petitioner had bid Rs.

10,45,188/- per videoscope, which included 51,348/- as custom duty. On the face of it thus the petitioner had claimed a higher GST and thus the price was higher.

21. Learned counsel for respondent No. 2 submitted that in the price bid, the column of custom duty had been left blank because it did not intend to import the goods initially and wanted to procure it locally. Though subsequently, the goods have been imported, but respondent No. 2 had no intent to claim any reimbursement from the Government on whatever custom duty he may have actually paid. Learned counsel clarifies that from the very beginning the prices quoted were all inclusive, and therefore, whether the goods have been imported or purchased locally, there is no prejudice to the Government nor any loss to the public exchequer. Learned counsel next contends that it was the petitioner who had actually wrongly quoted the custom duty. While the duty claimed in the price bid was Rs. 51,348/- but the fact of the matter is that this was on the lower side, only to make the bid lower than that of respondent No. 2. It is for this reason that subsequently respondent No. 1 had corrected the custom duty claimed by the petitioner and the adjusted amount was Rs. 75,283.38/-.
22. Learned counsel for respondent No. 2 next contends that the bid of respondent No. 2 could not be termed as non-responsive and rejected. It is submitted that Article 1.6 of the tender conditions sets out the kinds of bids which will be considered non-responsive. The contention of the petitioner, if accepted would result in the tender conditions being re-written, as the only grounds for rejection given thereunder is tenders received without tender fees or EMD and none of the two conditions operate here. Learned counsel further submits

that the petitioner has been erroneously submitting repeatedly that circular No. 39/2017 forbids levy of 1% Landing Charges. Loading, Unloading and handling charges are incurred not just at the Port where the goods disembark, but also at the port of loading. Prior to 2017, while working out the transactional value, the charges incurred at both ports, i.e. loading and disembarking were considered. Subsequent to the amendment, charges incurred at the Port of disembarkation are no longer considered and only the charges at the loading Port are added while working out the transactional value. In the present case, the port of loading was New York and the actual charges levied were added. Reliance is also placed on Rule 10(2)(a) of the Customs Valuation [Determination of Value of Imported Goods] Rules, 2007 (CVR), subsequent to the amendment, which reads as under:

“(2) For the purposes of sub-section [1] of section 14 of the Customs Act, 1962 [52 of 1962] and these rules, the value of the imported goods shall be the value of such goods, and shall include-

(a) The cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods to the place of importation;”

23. Learned counsel further argues that on the date of the bid evaluation, the actual importation of the goods could not have taken place and the tenderer could not have given the actual cost of transport, loading etc.
24. It is further contended that for evaluating the case of Respondent No. 2 the custom duty or 1% landing charges did not have any impact, since R-1 clearly knew that the price bid of R-2 was an all inclusive bid and the purpose of indicating ‘ _ _ _ ’ was clearly to convey that no amount would be claimed on account of custom duty.

25. We may now refer to the case law which has been relied upon by the respective parties.
26. Learned senior counsel for the petitioner has relied upon a judgment of this Court in the case of ***Inderjit Mehta vs. UOI in W.P.(C) 5685/2015*** decided on 1st September, 2015 for the proposition that in a judicial review, this Court can interfere in a tender matter and insofar as the relief is concerned, in case it is found that there is arbitrariness, a direction can be issued to the Government to declare the lowest bidder as L-1, as also to award the contract to the L-1 bidder. Reliance is also placed on another judgment of this court in the case of ***Times Innovative Media Ltd. vs. Delhi Transport Infrastructure Development Corporation Ltd. & Ors. in W.P.(C) 3973/20012*** decided on 02.04.2013 for the proposition that even when a contract has been awarded to a successful bidder and the work has been executed to some extent, there is no absolute rule that the court cannot disturb that status in case it finds that the contract was awarded illegally and there was arbitrariness. This would be so, more particularly, when only a miniscule part of the tenure of the contract has been performed and the remaining tenure of the contract is long.
27. *Per contra*, learned counsel for respondent No. 2 has relied upon the judgment of the Apex Court in the case of ***Union of India vs. Bharti Hexacom Ltd. & Ors. 2015 (15) SCC 25*** and reliance is placed on para 10 wherein as an interim order, the court had specifically protected the petitioner by directing that the auction shall not be finalized without the leave of the court and it was directed that the said condition would be placed on the website so that all bidders were aware of the court order. In the light of this, it was contended that in

the present case the petitioner never pressed for an order of this nature and at this stage, it would not be in the interest of the successful tenderer or respondent No. 1 to interject the process, more so, when the contract relates to sensitive items like a videoscope and respondent No. 2 has already imported the same.

28. Learned counsel for the respondent No. 2 also places reliance on ***Chhattisgarh State Industrial Development Corporation Ltd. & Anr. vs. Amar Infrastructure Limited & Ors. (2017) 5 SCC 387*** wherein the principle laid down in ***Tejas Constructions and Infrastructure Private Limited vs. Municipal Council, Sendhwa & Anr. (2012) 6 SCC 464*** that once 60% of the tender stands performed, the courts will not interfere, has been affirmed. ***Nicco Corporation Ltd. vs. Cable Corporation of India Limited & Ors. 2007 SCC OnLine Cal 652*** was relied upon where it was held that the work was for public utility service and 80% work having been completed, court should not have interfered, as any cancellation of the work at that stage would delay a public project.
29. Learned counsel submits that in the present case, the judgment apply with a greater vigour as 90% performance has been achieved and only commissioning remains, and more particularly, the items involved are dealing with National security and are urgently required by the customs authorities.
30. Learned counsel next placed reliance on ***Caretel Infotech Ltd. vs. Hindustan Petroleum Corporation Limited & Ors. 2019 SCC OnLine SC 558*** to contend that the author of the tender is the best person to understand it and interpret the documents. Constitutional courts must exercise restraint while interfering and ought not to

substitute their own views or interpretations on the tender conditions. Even assuming that there is any procedural aberration or assessment error, courts would not ordinarily interfere. Reliance is placed on ***Raunak International Ltd. Vs. I.V.R. Construction Ltd. AIR 1999 SC 393*** to contend that the *lis* is purely between two tenderers and a mere difference in the prices offered is not a ground for a court to interfere as these are more in the nature of commercial disputes. The courts must bear in mind that any interference would delay the proposed project and even escalate the cost involved. The judgment of the Apex Court in the case of ***Afcon Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and Anr. (2016) 16 SCC 818*** is cited and it is argued that if the petitioner's plea is accepted it would be re-writing the tender conditions, which is not permitted in law.

31. We have heard learned counsel for the parties and examined the pleadings as well as the judgments cited by them. We may note here that the calculations and figures given by the respective parties are at variance with each other at certain places and we have culled out the calculations and the charts including the figures as they appear in the different pleadings.
32. We would firstly deal with the contention of the petitioner that the bid of respondent No. 2 was non-responsive on account of column No. 3 relating to custom duty in the Price Schedule Bid having been left blank, and thus the same ought to have been rejected. There is no dispute on the basic facts viz. the nature of tender being was an E-tender for supply, installation and maintenance on 74 Nos. videoscope; opening and closing date of the tender; the place of the opening of tender and the tender conditions. At this stage reference is

required to be made to the relevant clauses in Section II of the General Instructions to the Tenderers (GIT) which was a part of the e-tender Inquiry Document. 'Contract Price' has been defined in clause 2.2.1 to mean the price provided in clause 2.12.1 of Section II of the tender document. 'L-1' means the tenderer whose tender is the lowest as per clause 2.2.1(xi).

33. Clause 2.10.1 provides that the e-tender shall be submitted online at the Government's CPP portal and would be submitted in two covers, First Cover would contain the Technical Bid and Second Cover will contain the Price Bid. Clause 2.10.2 relates to the technical bid and mentions the requisite documents that need to be attached in the Technical Bid, Most relevant for the purpose of this case is the tender form which is to be submitted as per Form 1 mentioned in Section X. Clause 2.10.3 requires the Price Bid to be furnished as per proforma given in Section VIII of the tender document and was to be submitted only online. Significantly, clause 2.10.5 provides that a tender which gives evasive information against any requirement shall be liable to be ignored and rejected. Clause 2.12.1 deals with the 'Contract Price of the videoscopes which is the price chargeable for delivery at the place of installation. It is mentioned that the price shall be firm and fixed and not subject to any variation, except where the rate of applicable taxes payable in India undergoes a change. Taxes are payable as per actuals. The Contract Price shall include the cost of installation, commissioning, insurance, delivery, warranty period etc. Clause 2.13.2 deals with the duties and taxes which are payable by the supplier in India and are to be reimbursed as per actuals. No claim on account of increase in cost due to taxes etc. was to be entertained.

Significant would be to mention clause 2.13.3 which provides that the tenderer should indicate tentative duties and taxes in the proforma as applicable on the date of opening of Technical Bids though the payment was as per actuals. Clause 2.13.6 also needs a mention as it provides that in case the purchaser finds that the duties and taxes have been mentioned incorrectly, it reserves the right to change it to the appropriate values and in that event, the price quoted by the tenderer will be adjusted accordingly. The clause also stipulates that if it is felt that the duties were mentioned incorrectly to gain unfair advantage, the tender would be liable to be rejected. The relevant clauses are quoted hereunder for ready reference:

2.10.1 The e-Tender shall be submitted online at Government of India's Central Public Procurement Portal, <http://eprocure.gov.in>. The tender shall be submitted in two covers. First cover will contain Technical Bid and Second cover will contain Price Bid.

2.10.2 Technical Bid i.e. first cover, shall, inter alia, contain the following:

XXX XXX XXX

(c) Tender Form as per Form-1 of Section X.

XXX XXX XXX

2:10.3 Price bid shall be as per proforma given in Section VIII of the Tender document. It shall be ensured that Price bid is only submitted online.

XXX XXX XXX

2.10.5 A tender, which does not fulfil any of the above requirements and/or gives evasive information/reply

against any such requirement, shall be liable to be ignored and rejected.

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2.12.1 The Contract Price of the Videoscopes shall be the price of Videoscopes chargeable for delivery at the place of installation. This price shall be firm and fixed and not subject to any variation except in cases where the rate of applicable taxes payable in India undergoes a change. These taxes shall be paid as per actuals. The contract price shall also include the cost of installation & commissioning, insurance, inspection & survey charges, test and trials, delivery, training, services of manufacturer's for two years warranty period.

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2.13.2 All the duties and taxes paid by the Supplier in India, will be reimbursed as per actual. No claim, on account of increase in cost of the raw materials due to increase of taxes or duties, will be entertained.

2.13.3 The tenderer should indicate tentative duties and taxes in the proforma as applicable on the date of opening of technical bids. However, payment of duties and taxes shall be made as per actual and the statutory variations in taxes and duties shall be allowed during the delivery period as agreed in terms of the Contract. The Purchaser shall get the benefit if duties and taxes get reduced and pay extra to the supplier if the same increase. However, the variations shall not apply to any duties or taxes on the raw material.

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2.13.6 In case the Purchaser finds the duties and taxes mentioned incorrectly, the Purchaser reserves the right to change it to the values considered appropriate and in

that event the price quoted by the tenderer shall be adjusted accordingly. If it is felt that the duties were mentioned incorrectly to gain unfair advantage the tender shall be liable to be rejected.”

34. We shall now refer to the clauses relating to the scrutiny and evaluation of Technical Bids i.e. clause 2.25. Clause 2.25.2 relates to the Technical Bids being evaluated by the Tender Evaluation Committee and amongst other parameters, the Tender Evaluation Committee is required to assess as to whether the tender confirms to all the Instructions to the tenderers. We quote para 2.25.2(b) as under:

“2.25.2 The technical bids will be evaluated by the Tender Evaluation Committee (TEC) to assess the following;

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b) Does the tender conform to all the Instructions to Tenderers?”

35. Evaluation and award criteria is mentioned in clause 2.28. Clause 2.28.1 requires the technical bids to be evaluated on the basis of information and data provided in the bids as well as actual performance of the videoscopes being offered. The price bid is determined in accordance with clause 2.29. Clause 2.29.1 provides that price bids of those tenderers would be opened, who are found technically suitable. Clause 2.29.2 provides the methodology for determining the lowest tenderer (L-1) and is of great significance to decide the main controversy involved in the present petition. We quote clause 2.29.2 hereinunder for a ready reference:

“2.29.2 The lowest tenderer (L1) shall be determined on the basis of net cash outflow from the Purchaser in the

first seven years after commissioning. Future cash flows for this purpose shall be converted into “net present values” by using the discounted cash flow procedure @ 9% per annum. The net cash outflow will be as under:- Net cash outflow = (P) + (M); where (P) = Contract Price of the system and (M) = Sum of discounted annual maintenance charges for five years.

For calculation of (M) above, payments on account of CCAMC shall be discounted to present values as under:

Sl. No.	Payments	Discounting factor	Net Present Value
	A	B	A/B
1	1 st Year AMC advance	1.19	
2	1 st Year AMC balance	1.30	
3	2 nd Year AMC advance	1.30	
4	2 nd Year AMC balance	1.41	
5	3 rd Year AMC advance	1.41	
6	3 rd Year AMC balance	1.54	
7	4 th Year AMC advance	1.54	
8	4 th Year AMC balance	1.68	
9	5 th Year AMC advance	1.68	
10	5 th Year AMC balance	1.83	
Sum of total discounted CCAMC charges (M)			

”

36. Clause 2.29.3 provides that notwithstanding inclusion of CCAMC charges for the evaluation, all duties and taxes forming part of the proforma in Section VIII shall be taken into account for evaluation of bids. Clause 2.29.4 which is also of relevance, postulates that the contract will be awarded to the lowest evaluated responsive tenderer.
37. At the cost of repetition, we may note that clause 2.10.2 requires the technical bid to contain a tender form as per Form 1 of Section X. We may at this stage take note of the said Form, which appears at page 61 of the paper book. This form contains Instructions which the tenderer must read before filling up the tender Forms. Para 3 of these

instructions require the tenderer to fill all columns of the tender Form with supporting documents and para 5 provides that if the tender form is incomplete the tender may be rejected. It is necessary to quote the two paras hereinunder:

“3. The tenderer should fill in all columns of this Tender Form and enclose supporting documents. The e-tendering process may permit replacement of shortfall documents, e.g., a document which is not legible but no additional documents can be submitted after the tenders are opened. Tenderers should therefore submit whatever documents they wish, in support of their tender along with-the tender itself.

XXX

XXX

XXX

5. Any tender may be rejected if:

a) The tender form is incomplete.”

38. Having traversed through the different clauses relating to the terms and conditions governing the present tender, we find that the conditions mandate that the tenderers must read the Instructions given in Form 1 carefully before the tender forms are filled and the bids are submitted. The bidding process was a two-stage process, the first stage being the Technical Bid and the second being a Price Bid. Technically valid and responsive tenders could only be opened for Price Bids. After opening of the Price Bid, the tender was to be awarded to the lowest bidder (L-1). Section VIII provides two proformas in Part I and Part II. Part I relates to the price schedule

while part II relates to CCAMC. We scan and place below the two proformas:

SECTION - III

PART - I: PRICE SCHEDULE

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Sl. No.	Description	Unit Price of machine
1	Cost of Vehicle (including insurance and freight)	
2	Installation and Commissioning charges, if any	
3	Transportation to CSO	
4	GST	
5	Any other item	
6	Total Price of 24 Vehicles	

Commission of the agent, if any

Particulars

Commission of the agent, if any to be paid by the CSO

PART - II: CCAMC

Year of CCAMC	Cost of CCAMC per machine (Rs.)	Total Cost of CCAMC (Rs.) (A) X (B) X No. of Vehicles	GST	Grand Total (C+D)
First Year (from 1st year period of 5 years)				
Second Year				
Third Year				
Fourth Year				
Fifth Year				
Grand Total				

39. A bare perusal of the proformas above would show that there are 7 columns which were to be filled by the tenderers under the Price Schedule. Insofar as the petitioner is concerned, the Price Schedule and CCAMC submitted by it is at page 93, and the Price Schedule of

respondent No. 2 is at page 92, both of which are scanned and placed as below:

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Annexure

SECTION - VIII

PART - I: PRICE SCHEDULE

Sl.	Detail of cost	Unit Price of
1	Cost of Videoscopes including insurance and freight	Rs. 10,30,000.00
2	Installation and Commissioning charges, if any (chargeable to GST)	---
3	Customs Duty	---
4	GST	---
6	Any other taxes	Rs. 1,85,300.00
7	Total Price of Each Videoscopes	Rs. 12,21,300.00
8	Total Price of 74 videoscopes	Rs. 9,03,75,200.00

Commission of the agent, if any

Particulars	Amount
Commission of the India agent, if any, to be paid by the Supplier,	Not Applicable

PART - II: CCAMC

Year of CCAMC	Cost of CCAMC per machine (A)	Total cost of CCAMC B= (A) X (i.e. No. of Videoscopes)	GST	Grand Total Cost (B+ C)
First Year (after warranty period of two years)	96,606.00	71,45,844.00	12,86,792.00	84,35,636.00
Second Year	1,05,342.00	77,90,508.00	14,03,491.00	91,93,999.00
Third Year	1,14,453.00	84,34,522.00	15,24,514.00	99,59,036.00
Fourth Year	1,24,928.00	92,46,572.00	16,54,041.00	1,09,00,613.00
Fifth Year	1,36,180.00	1,00,77,320.00	18,13,918.00	1,18,91,238.00
Grand Total	5,77,309.00			5,04,29,622.00

Time copy
p 5



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PART - I PART - I - PRICE SCHEDULE - II

Sl.No	Description of work	Unit Price of work	
		Temp. of material	Unit Price
1	Supply of 74 videoscopes and 74 video cameras	N/A	3,00,000.00
2	Installation of 74 videoscopes and 74 video cameras	N/A	N/A
3	Contract for 74 videoscopes	N/A	71,348.00
4	Contract for 74 video cameras	N/A	1,12,65,828.00
5	Installation of 74 videoscopes	N/A	4,33,91,055.00

Contract for 74 videoscopes

Particulars	
Contract for 74 videoscopes	N/A

PART - II - COST

Year of CCAMC	Cost of CCAMC (Rs. in Lakhs)	Total cost of CCAMC (Rs.) (Rs. in Lakhs)	Cost	Grand Total Cost (Rs. in Lakhs)
First Year (other years to be added later)	28,384.00	73,34,796.00	18,45,796.00	86,34,796.00
Second Year	28,384.00	73,34,796.00	18,45,796.00	86,34,796.00
Third Year	28,384.00	73,34,796.00	18,45,796.00	86,34,796.00
Fourth Year	28,384.00	73,34,796.00	18,45,796.00	86,34,796.00
Fifth Year	28,384.00	73,34,796.00	18,45,796.00	86,34,796.00
Grand Total	1,41,920.00	3,65,91,055.00	91,26,376.00	4,57,17,431.00

40. The petitioner has admittedly indicated the cost of the videoscope in the first row and has also quoted custom duty and GST. His total price of the 74 videoscopes is thus Rs. 9,12,65,828/-. The CCAMC quoted by the petitioner is Rs. 4,33,91,055/-. In comparison to this,

respondent No. 2 has quoted the basic cost and the GST but as against column No. 3 viz. custom duty, it has left the same blank with only a ‘ _ _ _ ’. The CCAMC quoted by respondent No.2 is Rs. 5,04,10,622/- Thus it is not disputed that respondent No. 2 has not quoted any amount against the column of custom duty.

41. Learned counsel for the respondent No. 1 has explained that the reason why respondent No. 2 has not quoted against the column relating to custom duty is that it had decided to procure the equipments locally and not import them. Though, subsequently respondent No. 2 has imported the videoscopes, but they had no intent to claim the custom duty reimbursement from respondent No. 1 and the prices indicated in the price bid were all inclusive of the duties and taxes. Learned counsel for respondent No. 2 has also made an effort to explain the blank mentioned against the column of custom duty. He reiterates the stand taken by respondent No. 1. Respondent No. 2 additionally submits that as long as respondent No. 2 does not want to pass on the custom duty paid by it to respondent No.1 there is no expenditure which the Government has to incur on that account, and therefore, no prejudice or loss is caused to the Government exchequer. He thus submits that the price bid of respondent No. 2 would have to be taken on its face value as indicated in the bid document and without including the custom duty and respondent No. 2 being L-1 was rightly entitled to the award of the contract.
42. A perusal of the price bids submitted by the petitioner and respondent No. 2 respectively shows that while the petitioner has claimed the custom duty, respondent No. 2 has not added the duty to the price bid. Column No. 3 of the proforma in Part-I of Section VIII therefore only

has a blank in case of the bid of respondent No.2. We may at this stage refer to paras 3 and 5 of the Instruction to tenderers mentioned in Form -1 of Section X, as quoted by us above. It is clear from a reading of the Instructions that the tenderer was required to fill in all columns of the tender form, and if the tender form was incomplete, the same ought to have been rejected. In our view, when respondent No. 2 left the column of custom duty blank, this was an incomplete form and ought to have been rejected as non-responsive in terms of the above mentioned instructions to tenderers.

43. In this context we may also refer to Clause 2.13.3 which mandates the tenderer to indicate the tentative duties and taxes in the proforma as applicable on the date of opening of the technical bids. Subsequently, based on the actual and statutory variations the said figures can be varied by the purchaser. The rationale behind such clauses in the tender documents is to ensure that price bids are made with clarity. When the price bid in a tender is opened the purchaser should clearly know what is being quoted by the tenderers and the competing tenderers should also know with clarity each other's bids so that there is no controversy on determining who the L-1 is. It is also a matter of fairness to all competing tenderers that no ambiguities or doubts or discrepancies remain in the price bids. If a tenderer is permitted to leave certain columns blank, this would be an open ended tender and it would be very easy for any tenderer to give its own interpretation to the price bid, post the opening of the price bids, depending on the level at which it is placed in terms of its total bid. In our opinion, such a practice in matters of tenders cannot be permitted as it would be against the very ethos, sanctity and confidentiality of tenders.

44. The argument put forth by the respondents that the ‘ _ _ _ ’ placed by respondent No. 2 in his price schedule was intended to convey that it would not be importing the goods and would not be seeking reimbursement of the custom duty, no doubt, appeals at the first blush. During the course of arguments, however, the stand that was also being argued was that the ‘ _ _ _ ’ indicated that the prices quoted in the price schedule were all inclusive and even though later the equipments were imported, there was no intention to burden the Government with the reimbursement. We find that there is an inherent contradiction in the two arguments. Be that as it may, we cannot gather from any document on record placed by the respondent No. 2 in his bid which would support the argument that the prices quoted were intended to be ‘all inclusive’, *dehors* the import of the equipments. In fact, we had pointedly asked the learned counsel for respondent No. 2 as to whether any part of the tender document contains any such declaration and the answer was a categorical ‘no’. In fact, the impression that we have gathered during the various hearings is that respondent No. 2 was only trying to gain an unfair advantage by leaving the column blank. If we compares the prices quoted by the petitioner and respondent No. 2 we find that the custom duty would have an impact on the price and therefore is a determining factor to decide the L-1 bidder. Thus, in the particular facts and context of this case, leaving the column of custom duty blank makes us reach a conclusion that respondent No. 2 was only waiting to see the price bid of the petitioner and then interpret the blank column to suit its convenience. Hypothetically speaking, if respondent No. 2 had been the lowest bidder with a huge difference of price between it and the petitioner it could have interpreted the blank

column to state that he would claim custom duty, as it was paid by him and was a statutory due. We are afraid that in tenders such ambiguous biddings cannot be permitted. Had respondent No. 2 been genuine about its stand it would have mentioned in the custom duty column or elsewhere in the bid that the prices quoted were all inclusive and no reimbursement of custom duty would be sought. Thus, the contention of learned senior counsel for the petitioner that the bid was non-responsive and invalid has merit.

45. We are also in agreement with the contention of learned senior counsel for the petitioner that respondent No. 1 has wrongly levied 1% landing/loading charges to the price bid of the petitioner on notional basis. We have gone through the contents of the Circular dated 26.9.2017 issued by Central Board of Excise and Customs, wherein an amendment was carried out and it was stipulated that notional landing charges would not be levied and the landing charges would be specifically on the actuals. We are surprised to note the response of respondent No. 1 to this contention, that because the actuals were not known they had levied 1% notional charge. This action of respondent No. 1 in our view is in the teeth of the judgment of the Apex Court in *M/s Wipro Ltd. (supra)* and the Circular issued by Central Board of Excise and Customs on 26.9.2017. Thus, this action of respondent No. 1 of adding the landing/loading charges at the rate of 1% on notional basis to the price of the petitioner, is illegal. We also find merit in the contention of the petitioner that assuming that the landing charges were to be levied on notional basis at the rate of 1% then having known that respondent No. 2 had subsequently imported the videoscopes, landing charges should have been added to the price

quoted by respondent No. 2, as well. We find that this action of respondent No. 1 is also not justified, more particularly, because the adding of the 1% notional landing charges has made a difference to the price bid of the petitioner and has adversely affected the determination of L-1 bidder. In this context, we scan and place below a comparative chart handed over in Court by the petitioner indicating how the adding of landing charges has affected its price bid.

	A	B	C	D	E
1. Bidder's Name	ABC Ltd.	DEF Ltd.	GHI Ltd.	JKL Ltd.	MNO Ltd.
2. Bidder's Address	123 Main St, New York, NY 10001	456 Main St, New York, NY 10001	789 Main St, New York, NY 10001	101 Main St, New York, NY 10001	202 Main St, New York, NY 10001
3. Bidder's Contact Person	John Doe	Jane Smith	Mike Johnson	Sarah Brown	David White
4. Bidder's Phone Number	212-555-1234	212-555-5678	212-555-9012	212-555-3456	212-555-7890
5. Bidder's Email Address	john.doe@abc.com	jane.smith@def.com	mike.johnson@ghi.com	sarah.brown@jkl.com	david.white@mno.com
6. Bidder's Bid Amount	\$1,000,000.00	\$1,000,000.00	\$1,000,000.00	\$1,000,000.00	\$1,000,000.00
7. Bidder's Bid Amount with Landing Charges	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00
8. Bidder's Bid Amount with Landing Charges (1% Notional)	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00
9. Bidder's Bid Amount with Landing Charges (1% Notional) - Total	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00
10. Bidder's Bid Amount with Landing Charges (1% Notional) - Total (L-1 Bidder)	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00	\$1,010,000.00

46. During the course of hearing, we had directed respondent No. 1 to file an additional affidavit explaining the methodology by which they have determined the lowest bidder. We had also requested a senior officer

from the Department to assist us on this issue. The gist of the submission made by respondent No. 1 in this context as is evident from a reading of the additional affidavit, as well as what was explained to us by the concerned officer, is that the formula and methodology for determining the L-1 was as per para 2.29.2 of the tender conditions. We have already extracted above the said para. Our attention was also drawn to pages 112 to 114 of the paper book wherein the said methodology has been explained by respondent No. 1. According to the respondent, the main factor which has resulted in respondent No. 2 being determined as L-1 was the Net Cash Outflow from the purchaser in the first seven years after commissioning. It is explained that the Net Cash Outflow is determined by adding the contract price of the system and the sum of discounted annual maintenance charges (CCAMC) for five years. A detailed calculation showing the discounted CCAMC charges given by the petitioner and respondent No. 2 is also mentioned on these pages. At page 114 of the paper book respondent No. 1 has given the Net Cash Outflow for the petitioner as Rs.12,45,29,536/- while for respondent No. 2 it is Rs.12,43,17,149/-. We deem it appropriate to extract hereinunder the manner in which the net cash outflow has been worked out by respondent No.1:

“Discounted CAMC Charges (in Rs.)

<i>S. No</i>	<i>Payment</i>	<i>Respondent 2.</i>		
		<i>Total Cost of AMC (A)</i>	<i>Discount Factor (B)</i>	<i>Net Present Value (A/B)</i>
1.	<i>1st Year CAMC Advance</i>	3574422	1.19	3003716
2.	<i>1st Year CAMC Balance</i>	3574422	1.3	2749555
3.	<i>2nd Year CAMC Advance</i>	3890254	1.3	2992503
4.	<i>2nd Year CAMC Balance</i>	3890254	1.41	2759045

5.	3 rd Year CAMC Advance	4234761	1.41	3003377
6.	3 rd Year CAMC Balance	4234761	1.54	2749845
7.	4 th Year CAMC Advance	4622336	1.54	3001517
8.	4 th Year CAMC Balance	4622336	1.68	2751390
9.	5 th Year CAMC Advance	5038660	1.67	2999202
10.	5 th Year CAMC Balance	5038660	1.83	2753366
	TOTAL	42720866		28763516
	GST 18%	7689756		5177433
	Grand Total (M)	50410622		33940949

S. No	Payment	Respondent 2.		
		Total Cost of AMC (A)	Discount Factor (B)	Net Present Value (A/B)
1.	1 st Year CAMC Advance	3677208	1.19	3090091
2.	1 st Year CAMC Balance	3677208	1.3	2828622
3.	2 nd Year CAMC Advance	3677208	1.3	2828622
4.	2 nd Year CAMC Balance	3677208	1.41	2607949
5.	3 rd Year CAMC Advance	3677208	1.41	2607949
6.	3 rd Year CAMC Balance	3677208	1.54	2387797
7.	4 th Year CAMC Advance	3677208	1.54	2387797
8.	4 th Year CAMC Balance	3677208	1.68	2188814
9.	5 th Year CAMC Advance	3677208	1.67	2188814
10.	5 th Year CAMC Balance	3677208	1.83	20009403
	TOTAL	36772080		25125858
	GST 18%	6618974		4522654
	Grand Total (M)	43391054		29648512

Note: Decimals rounded off to nearest suit.

'Net Cash Outflow' for the tendered Videoscopes for Petitioner and Respondent 2 works out as under:

(i) *For Respondent 2:*

Net Cash Outflow" (P = Rs.9,03,76,200) + (M = 3,39,40,949) = Rs.12,43,17,149.00

(ii) *Petitioner:*

Net Cash Outflow" (P = Rs.9,48,81,024) + (M = 2,96,48,512) = Rs.12,45,29,536.00"

47. When we compare the calculations at (i) and (ii) we find that in so far as the CAMC charges are concerned, the petitioner is lower than respondent No. 2. The petitioner is higher in the first factor, i.e. contract price and since the contract price of the petitioner is higher the Net Cash Outflow is higher. An evaluation chart was given to us during the course of hearing by respondent No. 1 and which we scan herinunder:

EVALUATION CHART SHOWING THE DIFFERENCE BETWEEN THE PETITIONER AND RESPONDENT NO. 2				
Sr.	Particulars	Net of Petitioner's contribution by net	Net of Respondent No. 2's contribution by net	
1.	Contract Price	9,93,840.00		10,37,000.00
2.	Landing Charge	9,938.40		
3.	7.5% Custom Duty	75,283.38		
4.	Surcharge @ 18%	7,528.34		
5.	IGST @ 18%	1,78,951.20		1,78,951.20
6.	Total (1+2+3+4+5)	10,86,501.02		12,15,951.20
7.	Net Cash Outflow (6-10)	10,86,501.02		12,15,951.20
8.	Net Cash Inflow (11-12)		1,78,951.20	1,78,951.20
9.	Net Cash Outflow (7-8)	10,86,501.02		12,15,951.20
10.	Net Cash Outflow (9-10)	10,86,501.02		12,15,951.20
11.	Total (9+10)	21,73,002.04		24,31,902.40

48. Going by this chart, it is evident that the figure of the contract price of the petitioner has been arrived at by respondent No. 1 by adding the quoted price of Rs.9,93,840/- and the landing charges of Rs.9,938/-. To this, 7.5% custom duty of Rs.75,283.38/- as well as a sur charge of Rs.7528.34/- and IGST @ 18% amounting to

Rs.1,95,586.20/- has been added. By adding these, the total price per unit comes to Rs.12,82,176.20/- and the cost of 74 videoscopes thus comes to Rs.9,48,81,024/-. On the other hand, a bare look at the chart would show that in case of respondent No. 2, no custom duty has been added and no landing charges have been imposed. It is thus evident that it is the absence of these two factors that the contract price of respondent No. 2 has become lower than the petitioner, as rightly contended by learned senior counsel for the petitioner. Thus, the CAMC charge, is not the only factor which has resulted in the price difference between the two parties. In fact, as noted above the CAMC charges of the petitioner are on the lower side. Thus, the contention of respondent No. 1 that the price difference is on account of the CAMC charges which has determined the Net Cash Outflow and has resulted in respondent No. 2 being lower deserves to be rejected.

49. We may now deal with the only other contention of the official respondents as well as the successful tenderer that this Court cannot interfere in tender matters in judicial review and more particularly if it with respect to a public project or where substantial part the work is already completed. There cannot be a quarrel with the proposition of law that the Constitutional Courts cannot interfere with the Government's freedom of contract and the principals of Judicial Review can only extend to examining the decision making process. It is, however, equally true that a right balance has to be struck between an administrative decision of the Government in matters of contractual nature and the need to address any unfairness or arbitrariness that may have crept in during the decision making process. In this context, we rely on the judgment of the Apex Court in the case of *Tata Cellular*

Vs. Union of India (1994) 6 SCC 651 wherein the Apex Court has clearly held that judicial review is concerned with reviewing not the merits of the decision, but the decision making process itself. However, where the selection or the rejecting in a tender matter is arbitrary, certainly the Court would interfere. In the words of the Apex Court the duty of the Court is to confine itself to the question of legality and concern itself with the questions as to whether the decision making Authority exceeded its powers or committed an error of law or abused its powers. Procedural impropriety is also a question which the Court can pose to itself while deciding a tender matter.

50. In the case of *Afcon Infrastructure Ltd. (supra)* the Apex Court has further expounded this principle and observed that if the decision making process is arbitrary or irrational to an extent that no reasonable Authority could have reached such a decision, interference by a Court is permissible. Treading carefully in this domain and jurisdiction we have concerned ourselves only with examining the decision making process so as to come to a conclusion that the process of awarding the tender to respondent No. 2 was arbitrary, unreasonable or otherwise. Having carefully examined the process we have found that respondent No. 1 has acted contrary to all norms of a tender process and has awarded the tender to a bidder who has left important columns of the price bids blank, so as to gain an unfair advantage of the said column and also the fact that respondent No. 1 has imposed landing charges on the petitioner contrary to the judgment of the Apex Court and the department's own Circular. While we would refrain from commenting on the conduct of the respondents in extending such favoritism to respondent No. 2 which is virtually bordering on *malafides*, however

we would certainly observe that the action of respondent No. 1 has tainted the entire decision making process.

51. The reliance of respondent No. 2 on the judgment of the Apex Court in the case of *Union of India Vs. Bharti Hexacon (supra)*, in our view, cannot be of any avail to respondent No.2. While it is true that the petitioner did not have an interim order in its favour restraining respondent No.1 from finalizing the award of tender, but on 18.12.2018 when notice was issued in the writ petition, this Court had clearly observed that the award of contract shall be subject to the outcome of the present writ petition. There is no doubt that the respondents had been put to notice on this date, that if the petitioner succeeds, the award of tender could be quashed.

52. Learned counsel for respondent No. 2 had relied upon the judgments in the cases of *Chhattisgarh State Industrial Development Corporation Ltd. (supra)* and *Tejas Constructions and Infrastructure Private Limited (supra)* to argue that once a substantial part of the tender stands performed, the Courts should not interfere. Learned counsel had also relied on *Nicco Corporation Ltd. (supra)* to contend that once the work has been executed to the extent of 80% any interference would delay a public project and was therefore unwarranted. There is no doubt that as a normal rule if substantial work has been performed under a contract, more particularly a public project, there should be no interference. However, in these very judgments relied upon by respondent No. 2, the Apex Court has held that where there is substantial public interest involved, or where the transaction is *malafide* or there is arbitrariness in the award of contract, the Constitutional Courts can interfere. In this context, we

may also pen down that respondent No. 2 has filed an affidavit before this Court on 28.5.2019 stating therein that in the month of February, 2019 they had imported the videoscopes from a Company in USA and learned counsel had orally submitted that substantial part has thus been performed and only commissioning remains. We may only observe that respondent No. 2 was well aware that the present writ petition has been filed in which on 18.12.2018 an order was passed making the award of the contract subject to the outcome of the writ petition. In fact, the learned counsel for respondent No.2 had entered appearing on 18.2.2019 and was well aware of the order dated 18.12.2018 at least from the said date. After becoming aware of the matter being *sub judice*, respondent No. 2 had chosen to import the videoscopes in the later part of February, 2019. Thus, all that can be said is that this was at his own peril. Therefore, to claim prejudice at this stage on the ground that only commissioning remains has no merit. Whilst, it may be true that respondent No. 2 may have imported the videoscopes, but this cannot be such a factor in the facts of this particular case which would make us shut our eyes to the arbitrariness in the decision making process, which we have detailed above.

53. Having examined the issues involved in the present case, we are of the view that there is complete arbitrariness in the decision making process by which the tender has been awarded to respondent No. 2. This apart, respondent No. 1 has also violated various conditions of the tender as well as the circular issued by the concerned Department pursuant to the decision of the Apex Court in *Wipro Ltd. (supra)*. Having come to this conclusion, we quash and set aside the Letter of

Award dated 12.11.2018 issued in favor of respondent No. 2. No other relief has been claimed by the petitioner in the present writ petition. We may however clarify that the official respondent is free to advertise a fresh tender for procurement of the videoscopes, depending on their requirements. Needless to state that both the parties are free to participate in the said tender if and when advertised by respondent No. 1.

54. The writ petition is allowed in the above terms.

C.M. Appl. Nos. 53039/2018 and 26060/2019 (for stay)

55. Since the writ petition is disposed of, these applications are also disposed of accordingly.

JYOTI SINGH, J

G.S.SISTANI, J.

SEPTEMBER 5th, 2019

AK/rd