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

Date of Decision: 17th January, 2020

+ W.P.(C) 5322/2018 and CM APPL.20642/2018

KARL STORZ ENDOSCOPY INDIA PVT LIMITED..... Petitioner

Through: Mr. Gopal Jain, Senior Advocate with
Ms. Taru Gupta, Mr. Ramnesh Jerath,
Ms. Prashanti & Mr. Vikas Nanda,
Advocates

versus

UNION OF INDIA & ORS.

.... Respondents

Through: Mr. Rakesh Kumar, CGSC with
Mr. Raghav Nagar, Advocate for
R-1/UOI.
Mr. Ratan K. Singh, Advocate with
Ms. Priyanka Solanki, Advocate for
R-2.
Mr. V.S. R. Krishna, Advocate for
AIIMS.
Mr. R. Jawahar Lal, Advocate with
Mr. Siddharth Bawa & Mr. Shyamal
Anand, Advocate for R-3.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

1. The pleadings in the matter are complete.
2. The writ petition is set down for final hearing and disposal at the admission stage itself.

3. A tender bearing No.HITES/PCD/NCI-AIIMS/01/17-18 was invited for state-of-the-art medical facilities at the National Cancer Institute (NCI), Jhajjar Campus, All India Institute of Medical Sciences (hereinafter referred to as, 'AIIMS') through respondent No.2 with updated specifications. Four bidders participated in the tender. However, the tender was cancelled by respondent No.2 on the ground that the bidders did not meet the specific and crucial technical specifications.

4. Thereafter on 11.12.2017, respondent No.2, HLL Infra Tech Services Limited (HITES), a fully owned subsidiary of HLL Lifecare Limited (HLL), a GoI Enterprise issued a Global Tender bearing No.HITES/PCD/NCI-AIIMS/08/17-18 on behalf of respondent No.3, i.e. Director, AIIMS, New Delhi, inviting e-tenders in a two-bid system (technical and price bid) for supply of various equipments including for Integration and Data Management System for Modular OT with OT Light.

5. As per the petitioner, it was specifically provided in the tender document that bidders shall ensure that their tenders are complete in all respects and are submitted online through the e-portal only. It is highlighted before us that the tender document mentioned that "no deviation was acceptable" ; and resultantly, the tender conditions were sacrosanct, especially due to the fact that the goods and services under the tender were required to meet with specific technical parameters essential for the super speciality services to be rendered for the NCI being set-up. In particular, clauses 11.3, 18.1, 25.3, 27.3, 27.4 and 30

have been relied upon, to argue that if the bid did not meet the specific requirements, the bid was to be treated as non-responsive. The clauses cited are reproduced as under :

"Clause 11.3 *A bid, which does not fulfill any of the above requirements and/or gives evasive information/reply against any such requirement, shall be liable to be ignored and rejected.*

Clause 18.1 *The bidder shall provide in its bid the required as well as the relevant documents like technical data, literature, drawings etc. to establish that the goods and services offered in the bid fully conform to the goods and services specified by the purchaser in the Bidding Documents. For this purpose the bidder shall also provide a clause-by-clause commentary on the technical specifications and other technical details incorporated by the purchaser in the Bidding Documents to establish technical responsiveness of the goods and services offered in its bid.*

Clause 25.3 *Two Bid System as mentioned in Para 21.6 above will be as follows. The "Techno-Commercial Bids" are to be opened in the first instance, at the prescribed time and date as indicated in NIB. These Bids shall be scrutinized and evaluated by the competent committee/authority with reference to parameters prescribed in the Bidding Document. During the Techno-Commercial Bid opening, the bid opening official(s) will read the salient features of the bids like brief description of the goods offered, Bid Security and any other special features of the bids, as deemed fit by the bid opening official(s). Thereafter, in the second stage, the Price Bids*

of only the Techno-Commercially acceptable offers (as decided in the first stage) shall be opened for further scrutiny and evaluation on a date notified after the evaluation of the Techno-Commercial Bid. The prices, special discount if any of the goods offered etc., as deemed fit by bid opening official(s) will be read out.

Clause 27.3 *The Bids will be scrutinized to determine whether they are complete and meet the essential and important requirements, conditions etc. as prescribed in the Bidding Documents. The bids, which do not meet the basic requirements, are liable to be treated as non-responsive and will be rejected.*

Clause 27.4 *The following are some of the important aspects, for which a bid shall be declared non-responsive during the evaluation and will be ignored;*

- (i) Bid form as per Section IX (signed & stamped) not enclosed.*
- (ii) Bid is unsigned.*
- (iii) Bid validity is shorter than the required period.*
- (iv) Required Bid Security (Amount, validity etc.)/Exemption documents have not been provided.*
- (v) Bidder has quoted for goods manufactured by other manufacturer(s) without the required Manufacturer's Authorization Form as per Section XIII.*
- (vi) Bidder has not agreed to give the required Performance Security of required amount in an acceptable form in terms of GCC clause 5, read with*

modification, if any, in Section-V- "Special Conditions of Contract", for due performance of the contract.

(vii) Bidder has not agreed to other essential condition (s) specially incorporated in the bidding document like terms of payment, liquidated damages clause, warranty clause, dispute resolution mechanism, and applicable law.

(viii) Poor/unsatisfactory past performance.

(ix) Bidders who stand de-registered/banned/blacklisted by any Central Govt. Ministries/ Departments/ Hospitals/Institutes.

(x) Bidder is not eligible as per Clauses 5, 6 & 17 of GIB.

(xi) Bidder has not quoted for the entire quantity as specified in the List of Requirements in the quoted schedule.

(xii) Bidder has not agreed for the delivery terms and delivery schedule.

Clause 30. Qualification Criteria

30.1 Bids of the bidder, who do not meet the required Qualification Criteria prescribed in Section VIII, will be treated as non-responsive and will not be considered further."

6. A pre-bid meeting was held on 21.12.2017 with the interested parties, at which various queries were raised by the interested parties and answered by the respondents. It is submitted that the petitioner filed its techno-commercial bid and the price bid strictly in adherence

of the tender terms and conditions and amended conditions. Accordingly, it is argued that the petitioner legitimately expected that since no deviations were acceptable, this condition would not be violated; and if any bid was submitted with deviations, the same would be treated as non-responsive and would be rejected.

7. Technical bids were opened on 26.02.2018 in the presence of the representatives of the petitioner. It is claimed that during the opening of the technical bid, the representatives of the petitioner, who were present, noted that there were material deviations in the technical bids submitted by respondent No.4 but the same were overlooked and ignored. In fact, after the financial bid was opened, the tender was awarded to respondent No.4.

8. At the outset, the learned counsel for the respondents pointed-out that the present writ petition had been rendered infructuous for the reason that, not only had supplies under the contract awarded been made during the pendency of this writ petition but even Acceptance Certificate had been issued on 02.12.2019 ; Installation Certificate had been issued on 05.11.2019; the system had been installed and made operational on 05.12.2019; and in fact surgeries had also been performed thereafter.

9. Mr. Gopal Jain, learned senior counsel appearing for the petitioner strongly urged before us that since the deviations in case of respondent No.4 go to the root of the matter, the deviations are such, as could not have been ignored nor could respondent No.4 have been allowed to provide the goods and services subsequent to the

submission of the technical bid. Thus, irrespective of the fact that the supplies may have been made ; Acceptance and Installation Certificates issued ; and the system made operational, that would have no bearing to the merits of this matter ; and further that in any case, the order passed in this writ petition on 18.05.2018 said that the award of tender would be subject to the final outcome of the present proceedings.

10. The first objection of Mr. Jain, learned senior counsel for the petitioner is that as per Clause 3(k) of the tender conditions, a suitable "HD camera" was to be provided whereas respondent No.4 had admittedly quoted the price for an "SD camera". However, the evaluation committee allowed respondent No.4 to replace the product with an HD camera, whereby replacement was allowed under the garb of clarification ; and a level playing field was therefore not available, since such change ought not to have been allowed. Resultantly, it is argued, that this would be a case of procedural irregularities since two inconsistent yardsticks were adopted, which clearly smacks of bias on the part of the respondents.

11. In response to the first objection, learned counsel appearing for the respondents submits that the objection raised by Mr. Jain is baseless and unfounded, for the reason that a clarification was rendered by respondent No. 4 before the committee prior to the opening of the financial bid, to the effect that though price had been quoted for an HD camera, by mistake an SD camera was mentioned in the bid document; and that respondent No. 4 would in fact provide an

HD camera and this explanation was accepted by the committee. Moreover, it has been clarified that the deviation was considered minor, since three types of cameras were to be supplied being (i) OT Camera; (ii) Video-Conferencing Camera; and (iii) Room View Camera ; and the discrepancy pointed-out was in relation to the Room-View Camera, which could do even without HD resolution.

12. Mr. Ratan K. Singh, learned counsel for respondent No.2 explains that the most important of the three cameras is the OT Camera ; the second important camera is the Video-Conferencing Camera which would have a lesser significance ; and the camera in question is only the Room-View Camera, which has the least significance since it has nothing to do with the performance of surgeries. It is also argued that evaluation and scrutiny of the bids happens across a three-tier committee system comprising senior doctors. The first committee is a Departmental Committee which comprises three members ; the second committee is the Technical Specification and Evaluation Committee (TSE) comprising 13 members ; and the third committee is the Store-Purchase Committee comprising 11 members, being HoDs of different departments and also doctors who are specialists in hospital management or hospital administration.

13. Upon a query being put, we are informed that although the tender document may not have specifically prescribed a committee but these committees were put in place in compliance of the AIIMS Purchase Manual itself, the purpose of the committees being to ensure

procurement of the best hospital equipment at a large scale and close scrutiny at the time of purchase. Reliance in this regard is placed on three reports of the said three committees. The learned counsel for the respondents have also highlighted that admittedly, there were similar deviations in the case of all three bidders, including the petitioner ; and since the nature of deviations was minor, all three bidders qualified in the technical bid ; and that therefore there was a level playing field.

14. The second objection raised by Mr. Jain is that respondent No. 4 provided non-conforming products which were accepted by the respondents ; which would have far-reaching consequences. It is contended that tender condition 2(b) required supply of 'medical grade' color monitors, which respondent No.4 had not offered to provide.

15. In response Mr. Ratan K. Singh has clarified that respondent No.4 had all along offered medical grade monitors ; however in their bid document, the word 'medical grade' monitor was not mentioned, although the monitor offered was in fact a medical grade monitor ; and thus, this objection of the petitioner accordingly is also without any force. Mr. Singh clarifies that the tender document mentions 'DICOM', which is abbreviation for Digital Imaging and Communications in Medicine, which refers to an industrial standard and is used for equipment that is fit to be applied for medical purposes ; and that therefore the monitor offered, which is compatible with DICOM standard, is by definition a 'medical grade' monitor.

16. The third objection raised by the petitioner is with regard to non-furnishing of Manufacturer's Authorization Form (MAF) by respondent No. 4. In reply to this, counsel for respondent No. 4 submits that as per the tender document, the MAF was to be supplied for three components being Audio-Video Communication System, Control System-cum-Digital Documentation System for MOT and OT Light with Camera. It is submitted that the objection raised pertains to the Audio-Video Communication System, for which the MAF was to be provided by the successful bidder ; but since respondent No.4 is itself the manufacturer of most parts of the equipment, for some parts that were procured from third parties, only a general warranty was furnished and not an MAF. The guarantee for the Audio-Video Communication System was however given by respondent No.4/Stryker itself; and thus it cannot be treated as a deviation, much less a material deviation. Moreover, it is submitted, that the entire system has been provided and installed successfully.

17. The next objection raised by Mr. Jain, learned senior counsel for the petitioner is that as per the tender document, respondent No.4 had initially quoted for supplying a 'Polycom' Video-Conferencing System, but subsequently changed that to a 'Cisco-Polycom' system under the garb of a clarification. It is contended that in fact, the brochure provided by respondent No.4 was for 'Polycom' and not of 'Cisco'. A copy of the brochure filed by respondent No.4 along with its bid, which has been filed alongwith the reply, has been relied upon to contend that the word 'Cisco' has been used/added subsequently. In

response, the respondents have clarified that 'Polycom' is a generic term for the equipment in question ; and 'Cisco' is the name or brand of the manufacturer. Thus to say that by adding 'Cisco' to 'Polycom', the product offered has been replaced, is incorrect.

18. To support his contentions, Mr. Jain has relied upon two decisions of this court reported as ***Richa Industries Limited vs. Delhi Metro Rail Corporation & Anr.*** 2017 IV AD (DELHI) 398, the relevant paras of which are reproduced below:-

"19. When specific instructions have been given in the tender documents regarding pricing/cost as also the mode of evaluation for testing whether a particular bid is compliant of the terms and conditions of the tender, the same should be strictly enforced or else the sanctity and purity of the entire process of tender would be at peril. The bidders as well as the employer inviting the tender are bound by the requirements of the tender document. In the absence of adherence to the requirements set forth by the employer/agencies inviting tender, there would be a much greater risk of discrimination and perhaps even favouritism which is necessarily an anathema to the concept of fairness, rule of law and the principle of treating everybody equally.

"20. In West Bengal State Electricity vs. Patel Engineering Company and Ors.: 2001 2 SCC 451, the Supreme Court has very succinctly held that "The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State

agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided."

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"23. Now, the other important question is whether the departure from the tender condition viz. not including the service tax component in the cost and not indicating it separately, can be said to be such a deviation which can render respondent no.2 disqualified. Minor deviations are permitted if it does not put other competitors in any disadvantageous position and can be permitted if it is at the instance of an employer. But such permission has to be afforded to all and not only to one of the participants.

"24. Much has, by now, been said about the essential or substantial conditions of the bid document which cannot be departed from or waived. In the present case, the tender document itself spells out that a bidder would quote prices as per tender conditions and would separately indicate the amount of service tax which is included in the bid price. Therefore, it cannot be said that the aforesaid requirement in the tender document is not an essential condition of contract and that it could be lightly dealt with. The wordings of the various clauses of the tender papers quoted above re-enforce the perception that the pricing offered by the tenderers was to be compliant with specific conditions and the evaluation of the employer inviting the tender, would also be based on a consideration of the fact whether the tender offered conforms to all the terms, conditions and specifications of the tender document. The limits of the material deviation has also been defined in the tender document."

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"26. The financial bid of respondent no.2 was apparently not compliant with the terms and conditions of the tender documents and this fact was pointed out by the petitioner

but to no avail. This conduct of respondent no.1 therefore smacks of a casual and cavalier approach with regard to the enforcement of condition of its own document. One could have understood if the complaint of the petitioner would have been dealt with in a different way or respondent no.1 would have taken a decision that it was not an essential condition of the tender requirement to include the service tax. Completely ignoring the aforesaid aspect and holding the petitioner, for having raised objections, to be in violation of the certain provisions of the tender document regarding its conduct, rendering its bid liable to be rejected, discloses an unfair approach.

"27. In our opinion, the format of quoting price stipulated in the tender document in the present case is an essential condition and cannot be permitted to be given a go-by as if such requirement were redundant or superfluous. The approach of respondent no.1 in dealing with the aforesaid deviation prima facie appears to be discriminatory and unfair to other participants.

"28. The respondent no.2 may have been declared as the lowest bidder perhaps because of it not including the service tax component in the price offered; thus rendering the petitioner as a participant exposed in an uneven playing field. As a rule of law, it may not be necessary to award contract to the lowest bidder. Times without number, it has been reconfirmed that the principle of awarding a contract to a lowest tenderer is applicable when other things are equal. A non-compliant bid even, if lowest, is liable to be rejected."

Mr. Jain has also relied upon the decision of this court reported as ***M/s Almighty Techser V Proprietor Mr. Manish Dalmia vs. Commissioner, Directorate of Logistics & Anr.*** in W.P.(C) No.13608/2018 decided on 05.09.2019 :-

"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 the 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."

19. On the other hand, counsel for respondent No. 4 has relied upon ***Municipal Corporation, Ujjain & Anr. vs. BVG India Limited & Ors.*** reported as (2018) 5 SCC 462, in support of his contention that the court does not have the expertise to correct administrative decisions, more particularly when they pertain to technical issues such as in the present case. Relevant paras 8,10,16,17 and 20(iv), are reproduced below:-

"8. The questions involved in these appeals are:

8.1.(a) Whether under the scope of judicial review, the High Court could ordinarily question the judgment of the expert consultant on the issue of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

8.2.(b) Whether a bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture can rely upon the technical qualifications of any third party for its qualification;

8.3.(c) Whether the High Court is justified in independently evaluating the technical bids and financial

bids of the parties, as an appellate authority, for coming to the conclusion?"

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"10. 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, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or a quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by mala fides. (See the judgment in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.(2005) 6 SCC 138)."

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"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. (2000) 2 SCC 617)."

"17. In 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.”

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20. In Karnataka SIIDC Ltd. v. Cavalet India Ltd. (2005) 4 SCC 456, this court after taking into consideration various questions on various subjects laid down the following legal principles viz: (SCC pp.465-66, para 19)

“(iv) Unless the action of the Financial Corporation 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 Financial 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."

20. Reliance is also placed by respondent No. 4 on **Monte Carlo Limited vs. NTPC Ltd.** reported as (2016) 15 SCC 272, para 26 of which is relevant and is reproduced below :-

"26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to

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

21. We have heard learned counsel for the parties and have considered their rival contentions. The arguments of Mr. Jain can be summarized as under:-

- (i) that respondents Nos. 1 and 2 have allowed respondent No. 4 to change the specifications of the Room-View Camera offered under the garb of giving a clarification ;
- (ii) that respondents Nos. 1 and 2 have allowed respondent No. 4 to offer an inferior monitor in place of a medical grade monitor ;
- (iii) that respondents Nos. 1 and 2 have allowed respondent No. 4 to get away without furnishing a MAF for the Audio-Video Communication System ;
- (iv) that respondents Nos. 1 and 2 have allowed respondent No. 4 to substitute a video conferencing system with a one that is

different from the one offered i.e. Cisco-Polycom instead of Polycom ;

- (v) that in the above manner, respondents Nos. 1 and 2 have allowed deviation from the tender conditions; have upset the level playing field; and have acted in a manner that is not fair or just ; and
- (vi) that the aforesaid deficiencies and discrepancies amount to irregularity in the tendering process, all of which has been done in order to favour respondent No. 4 ; and
- (vii) that all these are material irregularities and cannot be dismissed as mere minor deviations.

22. The arguments of learned counsel for respondents can be summarized as under:-

- (i) that none of the objections as regards deviations from the tender conditions, raised by the petitioner, are issues of any consequence or importance, since respondent No. 4 had either corrected minor inadvertent errors in its tender document and/or explained the apparent deviations, after which the products supplied are exactly the ones that were required; and there is no material deviation whatsoever from the terms and conditions of the tender or the bid document filed by respondent No.4.

- (ii) that similar deviations were found in the bid documents of all three tenderers, including the petitioner ; all of them were allowed equal opportunity to provide clarifications ; all three qualified in the technical evaluation and the financial bids were opened only once all clarifications were provided ;
- (iii) that the petition has in any case become infructuous, since equipment has been supplied ; Acceptance and Installation Certificates have been issued ; and the equipment have been put to use and surgeries have been performed;
- (iv) that the respondent No.4 was not only L-1 but was a substantial 63% lower than the price quoted by the petitioner.

23. Additionally, counsel for the respondents submit that there is no illegality, infirmity or bias ; and that in fact the entire tendering process has been examined by not one, but three committees, comprising highly eminent members, including senior doctors who specialize in hospital administration.

24. We have heard counsel for the parties at length; and have considered their rival submissions.

25. The law with regard to dealing with the matters pertaining to tender is well settled. It is no longer *res integra* that the courts must show restraint in dealing with the matters pertaining to tenders since courts do not sit in appeal over the decisions of administrative authorities. It has also been repeatedly highlighted by the Supreme

Court that the court would, very often, lack expertise and special knowledge of the commercial world; and should not therefore substitute the court's view in place of that of technical experts. This principle would apply squarely to the present case since, admittedly, the tender pertains to supply of highly sophisticated technical equipment for the use of a specialised cancer hospital.

26. We have also examined the reports of the three committees cited before us. We have carefully examined the explanation which has been rendered by the respondents with regard to each of the alleged deviations, including that the camera in question is only the Room-View Camera which has the least importance in comparison to the cameras required at the time of surgery; and that respondent No.4 did actually provide an HD camera, as offered. Accordingly, we find that the committees were right in accepting the explanation and allowing respondent No.4 to provide HD camera for which they had already quoted in the financial bid. As far as the alleged deviation with regard to 'medical grade' monitors not having been supplied is concerned, we find the explanation of respondent No. 4 also to be completely justified since DICOM support for medical application in fact means Digital Imaging and Communications in Medicine, which refers to equipment which is fit to be used for medical purposes. Therefore the monitor offered, which is compatible with DICOM standards, is by definition a 'medical grade' monitor; and therefore no fault can be found in the supply of monitors by respondent No.4. Similar is the position on the objection raised with regard to Polycom

and Cisco-Polycom, since Polycom is the generic term ; and the brochure provided alongwith the bid document, a copy of which has been filed on page 685, mentions Cisco and Cisco-Polycom. We are also satisfied with the explanation rendered by the respondents with regard to the non-furnishing of Manufacturer Authorization Form (MAF) for the Audio-Video Communication System.

27. Resultantly, we find no merit in the writ petition ; and the same is accordingly dismissed.

28. In this light, the pending applications are also disposed of.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

JANUARY 17, 2020/vk