IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5491 OF 2021

M/s. Molecular Pathlabs LLP through Partner
Dr. Dishita Budhalani ... Petitioner
Vs.
State of Maharashtra ... Respondent

Dr. Uday Warunjikar a/w. Mr. Ayush Pasbola and Mr. Aditya Kharkar for the Petitioner.
Mr. Ravi Kadam, AGP for Respondent-State.

CORAM : UJJAL BHUYAN &
MADHAV J. JAMDAR, JJ.

DATE : SEPTEMBER 22, 2021

<u>ORAL ORDER</u> (*Per Ujjal Bhuyan, J.)* :-

Heard Dr. Ujay Warunjikar, learned counsel for the petitioner and Mr. Ravi Kadam, learned AGP for the respondent-State.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has challenged legality and validity of the terms and conditions 2.3 to 2.6 of the tender notice dated 26.08.2021 issued by the Commissionerate of Health Services, Government of Maharashtra, Mumbai for purchase of RTPCR test equipments.

3. By the said tender notice, Joint Director of Health Services (Procurement Cell), Mumbai on behalf of Government of Maharashtra's Commissionerate of Health Services invited tenders in two envelope systems for the purchase of RTPCR test instruments and equipments, approximate quantity being 10,00,000.

4. The impugned terms and conditions bearing 2.3 to 2.6 are as under :-

> "2.3 The minimum annual turnover of the bidder shall be as indicated below for the period of past three years i.e. 2018-19,

2019-20 & 2020-21 to qualify per year. This is applicable for Schedule as a whole.

Sr. No.	**Description**	**Turnover (in Rs.)**
1.	RT PCR Test	29,90,00,000/-

2.4 Tenderer shall produce Certificate from Chartered Accountant for annual turnover of last 3 years of 2018-19, 2019-20 & 2020-21 in the format given in Annexure-3.

2.5 Tenderer shall produce Audited Balance Sheet and Profit and Loss Accounts for last three years i.e. 2018-19, 2019-20 & 2020-21 certified by the Chartered Accountant.

2.6 The eligible bidder must submit particulars of quantity of the past supplies made as per the performance statement format provided in the tender document without any alteration, during the last three calendar years, out of this at least 25% quantity for same or similar Test as specified in the Technical Specification and in the Schedule of Requirements & must have been supplied in any one of the last 3 (three) calendar years i.e. 2018-19, 2019-20 & 2020-21."

5. Before adverting to the grounds of challenge, it may be mentioned that as per the tender schedule, last date for sale of tender documents was 23.08.2021 upto 14:00 hours.

6. In the hearing held on 16.09.2021, Mr. S. S. Panchpor, learned AGP made a statement that the last date for submission of bid was extended upto 23.09.2021 till 14:00 hours.

7. Petitioner, which is a limited liability partnership company, is an ICMR approved laboratory for Covid-19 RTPCR and Antigen testing. It also has facilities and equipments to carry out various other diagnostic and molecular tests.

8. Challenge to the impugned terms and conditions is on the ground that the requirement of annual turnover of Rs.29.90 crores is absurd. No bidder in India can possibly have a turnover of Rs.29.90 crores for conducting RTPCR tests. Besides, there can be no experience of any

laboratory conducting RTPCR tests for last three years because the first Covid-19 case in India was detected some time in the month of February, 2020. According to the petitioner, respondent has put the condition that the turnover should be Rs.29.90 crores for the past three years i.e., 2018-2019, 2019-2020 and 2020-2021 in respect of RTPCR tests. In the circumstances, insistence upon such terms and conditions is not only unreasonable but is manifestly arbitrary as well.

9. Respondent has filed an affidavit through Dr. Umesh Shirodkar, Joint Director of Health Services, Thane. It is stated that a pre-bid meeting was held with the prospective bidders on 02.09.2021. Several queries were raised by a number of participants including the petitioner which are in the process of being replied to. Because of that the period of submission of tender has been extended till 23.09.2021. In paragraph 4 of the reply affidavit, it is clarified that the annual turnover insisted upon by the tender notice is Rs.29.90 crores which is the over all turnover of the bidder and not confined to RTPCR tests only. In response to queries made in the pre-bid meeting, respondent has decided to call bids for eight health circles in the State of Maharashtra so as to attract more bidders. That apart, the annual turnover requirement has been reduced to approximately Rs.3.74 crores as the estimated value of tender in one circle is approximately Rs.3.74 crores. Respondent has asserted that the condition requiring minimum of three years of experience is a mandatory requirement. Tender has been floated for the purpose of conducting RTPCR tests by laboratories which are accredited to National Accreditation Board for Testing and Calibration Laboratories (NABL). The amount reflected in the tender document as reduced is not relatable to mere RTPCR tests but in respect of entire business of the laboratory conducted during the last three financial years. The closing date for submission of bid has been deferred till 23.09.2021. Finally respondent has stated that the impugned conditions cannot be said to be arbitrary, illegal or against public interest as safety of the public at large is at stake.

10. Petitioner has filed rejoinder affidavit reiterating the contentions made in the writ petition, besides contending that stand taken by the respondent is vague. Petitioner has registration certificate as a Micro, Small and Medium Enterprise (MSME) issued by the Government of India. As per the office memorandum issued by the Central Vigilance Commission on 07.05.2004 pre-qualification criteria in the tender document should neither be very stringent nor very lax to restrict / facilitate entry of bidders.

11. While assailing the impugned terms and conditions of tender as explained by the respondent in the reply affidavit as vague, unreasonable and arbitrary, learned counsel for the petitioner has placed reliance on various decisions of the Supreme Court, copies of which have been submitted in the form of a compilation. He submits that if the tender conditions are vitiated by arbitrariness and unreasonableness and are designed in such a manner as to restrict the number of bidders, the High Court under Article 226 of the Constitution of India can certainly interfere for the ends of justice; on the other hand Mr. Kadam, learned AGP submits that respondent has now clarified the requirement of Rs.29.90 crores annual turnover by splitting the bids into eight health circles in the State of Maharashtra, thereby reducing the requirement of annual turnover to Rs.3.74 crores. He has also placed before us the minutes of the pre-bid meeting held on 02.09.2021.

12. Submissions made by learned counsel for the parties have received the due consideration of the Court.

13. Let us first advert to the impugned terms and conditions. As per condition No.2.3, the minimum annual turnover of the bidder should be Rs.29.90 crores for the last three years i.e., 2018-2019, 2019-2020 and 2020-2021 per year. Condition No.2.4 requires that the tenderer should produce a certificate from a chartered accountant in respect of the annual turnover. In addition, as per condition No.2.5, the tenderer should also

produce audited balance sheet and profit and loss accounts for the aforesaid three years which should be certified by a chartered accountant. Finally as per condition No.2.6, the eligible bidder should submit particulars of supplies made in the past for the last three calendar years.

13.1. On a perusal of the tender documents we find that Annexure 2 is a proforma for past performance statement of the last three years. Bidders are required to enclose copies of supply orders and satisfactory certificates of respective clients in support of such statement. Similarly Annexure 3 is an annual turnover statement for the last three years which must be under the signature of a chartered accountant. Annexure 7 is relevant and deals with experience report. In addition to other particulars, such as, total turnover of last three years from the laboratory services, number of blood tests done in last three years etc. what is relevant is that as per Sr.No.3, the bidder has to furnish the number of RTPCR tests done from April, 2020 to March, 2021. Furnishing of such information has been made mandatory.

14. As already stated above, respondent in its reply affidavit has clarified that the annual turnover of the bidder of Rs.29.90 crores should be the overall annual turnover of the bidder and not confined to RTPCR tests only. Further, it has been decided to split up the bids into eight health circles in the State of Maharashtra so as to attract more bidders. Consequently, the turnover requirement has been reduced to approximately Rs.3.74 crores which as explained above is not necessarily to be generated from RTPCR tests by the bidder.

15. As a matter of fact it is seen from the minutes of the pre-bid meeting held on 02.09.2021 that turnover of the bidder will be considered not just for RTPCR tests. Yearly turnover for the three years will be required as per number of circles applied for. That apart, a bidder should have performed at least 3,12,050 tests during the Covid pandemic

and should have capacity to perform at least 5000 tests per day. In this connection, the revised turnover criteria has been mentioned in the corrigendum letter. It is also clarified that a bidder can apply for more than one circle but in such an eventuality the turnover requirement will be cumulative.

16. On a thorough consideration and analysis of the terms and conditions impugned by the petitioner, we are of the view that those cannot be termed as arbitrary and unreasonable. Infact those are necessary as public safety is at stake. Respondent has split up the tender and now instead of the entire State of Maharashtra a bidder can apply for any one or more out of the eight health circles in the State of Maharashtra which has resulted in the reduction of the requirement of annual turnover.

17. In *Tata Cellular Vs. Union of India*, **(1994) 6 SCC 651** which examined the scope of judicial review *vis-a-vis* government contract, Supreme Court held that duty of the court is to confine itself to the question of legality. It is not for the Court to determine whether a particular policy or a particular decision is fair. It is only concerned with the decision making process. It was held as under:-

> "77. The duty of the court is to confine itself to the question of legality. Its concern should be :
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> 1. whether a decision-making authority exceeded its powers?
> 2. committed an error of law,
> 3. committed a breach of the rules of natural justice,
> 4. reached a decision which no reasonable tribunal would have reached or,
> 5. abused its powers.
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> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
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> (i) Illegality : This means the decision-maker must understand correctly the law that regulates his

decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, 'consider whether something has gone wrong of a nature and degree which requires its intervention'."

17.1. After analyzing various decisions Supreme Court deduced the following principles:-

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) 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.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) 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 quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

17.2. Thus, it is evident that while exercising power of judicial review the Court does not sit as a court of appeal. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of a contract. 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 or *quasi*-administrative sphere.

18. Supreme Court reiterated the above principles in *Raunaq International Limited Vs. I.V.R. Construction Limited*, **(1999) 1 SCC 492**, and held that the writ court would not be justified in interfering with commercial transactions in which the state is one of the parties except where there is substantial public interest involved and in cases where the transaction is *mala fide*.

19. Following the above, Supreme Court in *Directorate of Education Vs. Educomp Datamatics Limited*, **(2004) 4 SCC 19**, held that courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or *mala fide*.

20. In *Reliance Airport Developers Private Limited Vs. Airports Authority of India*, **(2006) 10 SCC 1**, Supreme Court acknowledged that while judicial review cannot be denied in contractual matters or in matters where the government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in the larger public interest.

21. Thereafter Supreme Court in *Jagdish Mandal Vs. State of Orissa*, **(2007) 14 SCC 517** held as follows:-

> “22. … Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

> i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
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> OR
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> Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';
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> ii) Whether public interest is affected.
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> If the answers are in the negative, there should be no interference under Article 226. …"

22. This trend of judicial restraint has been reiterated by the Supreme Court in *Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited*, **(2016) 16 SCC 818**, where it has been clarified that a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of *mala fides*, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision making process or the decision. It was also held as under:-

> "15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

23. Recently, Supreme Court in *Galaxy Transport Agencies Vs. New J. K. Roadways, Fleet Owners and Transport Contractors*, **2020 SCC OnLine SC 1035** reiterated the proposition that the authority that authors the tender document is the best person to understand and appreciate its requirements and thus its interpretation should not be

second-guessed by a court in judicial review proceedings. Exercise of power of judicial review would be called for if the approach is arbitrary or *mala fide* or the procedure adopted is meant to favour one.

24. Following the law laid down by the Supreme Court as delineated above and the view taken by us that the impugned terms and conditions as explained by the respondent do not appear to be arbitrary or unreasonable, we are not inclined to entertain the writ petition.

25. Writ petition is accordingly dismissed. No costs.

(MADHAV J. JAMDAR, J.) **(UJJAL BHUYAN, J.)**

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