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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 11.08.2021

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Judgment delivered on: 05.10.2021

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W.P.(C) 6643/2021

XCELLANCE MEDICAL

TECHNOLOGIES PRIVATE LIMITED

..... Petitioner

Through: Mr. Jayant Mehta, Senior Advocate

Along with Mr. Aman Varma, Mr. Abhishek Adke, Mr. Vikrant Zunzarrao and Mr. Huzan Bhumgara, Advocates.

versus

HLL INFRA TECH SERVICES LTD. & ANR. Respondents

Through: Mr. Nikhilesh Krishnan, Advocate for respondent No. 1.

Mr. Vijay Joshi and Mr. Nikhil Bhardwaj, Advocates for respondent No. 2 / UOI.

Ms. Taru Gupta, Advocate for respondent No. 3

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T O F T H E C O U R T

1. The present petition has been filed by the Petitioner seeking the following substantial prayers:

“(a) to issue a Writ of Mandamus or any other appropriate writ, order or direction quashing & setting aside the decision dated 17th June, 2021 (Annexure K) rejecting the Technical Bid of the Petitioner;

- (b) to issue a Writ of Mandamus or any other appropriate writ or order directing Respondent No.1 to reject the technical bid of Respondent No.3;
- (c) to issue a Writ of Mandamus or any other appropriate writ, order or direction quashing & setting aside the decision dated 30th June, 2021 (Annexure Q) accepting the Financial Bid of Respondent No.3;
- (d) to issue a Writ of Mandamus or any other appropriate writ, order or direction directing Respondent No.1 to open and evaluate the Financial Bid submitted by the Petitioner in accordance with the Domestic Tender Inquiry Document dated 12th March, 2021 bearing tender ID 2021_HLL_73064_1”

2. Briefly stating the facts giving rise to the filing of the present petition are as under:

3. The Petitioner is a company incorporated under the Companies Act, 1956, and has its registered office at Plot No. W-239, MIDC, Rabale, TTC Industrial Area, Navi Mumbai, Thane- 400701. The Petitioner is an MSME registered with the Ministry of Micro, Small and Medium Enterprises and is engaged in the business of development and manufacturing of medical devices under the brand name ‘Shalya’. The Petitioner has a manufacturing and R&D facility located at Navi Mumbai.

4. Respondent No.1 that is HLL INFRA TECH SERVICES Ltd. (HITES) is a wholly owned subsidiary of HLL Lifecare Limited, is a Public Sector Undertaking under the Ministry of Health and Family Welfare, Government of India.

5. Respondent No. 2 is the Union of India and Respondent No. 3 is a subsidiary company of Karl Storz Endoskope, a company incorporated under the laws of Germany.

6. The Respondent No. 1 issued a Domestic Tender Inquiry Document on 12th March, 2021 bearing tender ID 2021_HLL_73064_1 on behalf of Respondent No. 2 for supply, installation and commissioning of the OT Integration (Integration and Data Management Systems for Modular OT) for the new AIIMS/ Medical College/ Institutions to be established under Pradhan Mantri Swasthya Suraksha Yojana Phase IV-V. Under Section – VII, titled “*Technical Specifications*”, the tender laid out various technical specifications of OT Integration. Serial No. 2 of the above Section set out the specifications for Medical Grade Monitors (MGM), as under:

2.	<i>Medical Grade Monitors-</i>
a)	<i>Medical Grade Monitors- a) One 26-inch or more Full High Definition (1920X1080p) medical grade monitor with ceiling suspended spring arm for each Integrated MOT.</i>
b)	<i>One 42-inch or more 4K (minimum resolution of 3840X2160) medical grade color monitor should be flush mounted on OT wall with all necessary frames with glass should be provided by bidder for each integrated MOT. Medical Grade monitor should be of make: Eizo/Barco/Sony/LG/NDS/ Advantech (commercial grade monitors will not be accepted)</i>
c)	<i>All medical grade monitors offered should be BIS/European CE/US FDA certified.</i>
d)	<i>Bidder shall be responsible for Patch panel for power & signals to be laid down for Monitors at Wall/ Pendant/ booms/ OT Light 3rd arm as required.</i>

(emphasis supplied)

7. On 24.03.2021, Respondent No. 1 issued the 1st amendment to the said tender and a number of changes were made. However, the change relevant and germane to the issue in controversy was the one made in respect of MGM at Sr. No. 2. Post the amendment, Sr No. 2 read as under:

<i>Sl No.</i>	<i>Integration and Data Management System for Modular OT</i>			
<i>1</i>	<i>.....</i>			
<i>2</i>	<i>Medical Grade Monitors –</i>			
<i>a)</i>	<i>Medical Grade Monitors -i) One 26-inch or more Full High Definition (1920X1080p) medical grade monitor with ceiling suspended spring arm for each Integrated MOT. Both monitor and arm should have capability to rotate atleast 270 deg. The spring arm should be from the same manufacturer of integration (Price to be, quoted separately).</i>			
<i>b)</i>	<i>Medical Grade Monitors -ii) One 26-inch or more 4K (minimum resolution of 3840 x 2160) medical grade monitor with ceiling suspended spring arm for each Integrated MOT. Both monitor and arm should have capability to rotate atleast 270 deg. The spring arm should be from the same manufacturer of integration (Price to be quoted separately).</i>			
<i>c)</i>	<i>One 42-inch or more 4K (minimum resolution of 3840 x 2160) medical grade color monitor should be flush mounted on OT wall with all necessary frames with glass should be provided by bidder for each integrated MOT. Medical Grade monitor should be of make: Eizo/Barco/Sony/LG (commercial grade monitors will not be accepted)</i>			
<i>d)</i>	<i>All medical grade monitors offered should be BIS/European CE /US FDA certified</i>			
<i>e)</i>	<i>Bidder shall be responsible for Patch panel for power & signals to be laid down for Monitors at Wall/ Pendent/ booms/ OT Light 3rd arm as required</i>			
<i>3</i>	<i>.....</i>			

(emphasis supplied)

8. On 20.04.2021, Respondent No. 1 issued another (3rd) amendment to the tender. Post these amendments, technical specifications of MGM read as under:

“HLL Infra Tech Services Ltd.

20-04-2021

Amendment no. 3

Sub: Clarification to the referred tender enquiry

Ref.: Tender Enquiry Document No.: HITES/PCD/AIIMS-IV/16RT-01/OTIN/20-21 dated 12-03-2021 read with Amendment no 1 & 2 dated 24.03.2021 & 16.04.2021 respectively.

The following changes are being incorporated in the above referred Tender Enquiry Document.

SECTION VII

Technical Specifications

<u>TECHNICAL AMENDMENT</u>		
Tender ref: HITES/PCD/AIIMS-IV/16RT-01/OTIN/20-21 Dated: 12.03.2021		
Integration and Data Management System for Modular OT		
Para & Pg. No.	Tender Specification	Amended as
Amend-01, pg 03, para 1.b		
Amend-01, pg 04, para 2.a, 2.b, 2.c	2-Medical Grade Monitors- 2.a Medical Grade Monitors-i) One 26-inch or more Full High Definition(1920 x 1080p) medical grade monitor with ceiling suspended spring arm for each integrated MOT. Both monitor and arm should have capability to rotate atleast 270 deg. The spring arm should be from the same manufacture of integration (Price to be quoted separately). 2.b Medical Grade Monitors-ii) One 26-inch or more 4K(minimum resolution of	2-Medical Grade Monitors- a. Medical Grade Monitor: 42-inch or more, of 4K (minimum resolution of 3840 x 2160) resolution, to be flush mounted on OT wall-01 no. per integrated MOT b. Medical Grade Monitor- 26-inch or more 4K (minimum resolution of 3840 x 2160) medical grade monitor with ceiling suspended spring arm. Both monitor and arm should have capability to rotate atleast 270 deg. (Price to be quoted

	3840 x 2160) medical grade monitor with ceiling suspended spring arm for each Integrated MOT. Both monitor and arm should have capability to rotate atleast 270 deg. The spring arm should be from the same manufacturer of integration (Price to be quoted separately). 2.c One 42-inch or more 4K(minimum resolution of 3840 x 2160) medical grade color monitor should be flush mounted on OT wall with all necessary frames with glass should be provided by bidder for each integrated MOT. Medical Grade monitor should be of make: Eizo/Barco/Sony/LG (commercial grade monitors will not be accepted)	separately)-01 no. per integrated MOT c. Optional item- Medical Grade Monitors-26-inch or more Full High Definition (1920 x 1080p) medical grade monitor with ceiling suspended spring arm. Both monitor and arm should have capability to rotate atleast 270 deg. (Price to be quoted separately)-01 no. per integrated MOT. Medical Grade monitor should be of following make:Eizo/Barco/Sony/LG(commercial grade monitors will not be accepted)
Amend- 01,pg 04,para 3.a		

(emphasis supplied)

9. Pursuant to amendment No. 3, Respondent No. 1 also issued a standard format of Bill of Quantities (“BOQ”) to be filled in by the bidders as part of tender bidding process. The petitioner, by way of abundant caution, addressed the letter dated 21.04.2021 seeking clarification from Respondent No. 1 as to whether the requirement of the specific make of monitor mentioned at Sr. No. 2(c) of Section VII is applicable to other monitors mentioned at Sr. No. 2(a) and 2(b) as well. The letter was forwarded vide e-mail dated 22.04.2021. However, no response was received to the said letter. The Petitioner proceeded to

submit its bid on 18.05.2021 by filing the BOQ issued by Respondent No. 1.

10. On 29.05.2021, Respondent No. 1 sought certain clarifications, and the Petitioner states that it was surprised to note that clarifications were sought with regard to MGM at Sr. No. 2(a) and 2(b). The Petitioner, immediately, on 02.06.2021 replied to the e-mail of 29.05.2021 highlighting '*as per the tender requirement, there was no requirement of specific make for serial Nos. 2(a) and 2(b) and offer of medical grade monitors of the make Advantech were in compliance of tender conditions.*' No response was received to the letter of 02.06.2021 and, on 17.06.2021, the Petitioner received an e-mail from the Respondent that the bid of the Petitioner has been rejected during technical evaluation on the grounds that the medical grade monitors offered to be supplied by the Petitioner at Sr. Nos. 2(a) and 2(b) were not from the approved '*make*'.

11. Immediately, the Petitioner addressed the letter on 18.06.2021 to the Respondent No. 1. The petitioner claimed that the rejection of its bid, and acceptance of the bid of Respondent No. 3, was biased and motivated. The Petitioner on 23.06.2021 addressed another letter pointing out discrepancies in Respondent No. 3's (successful bidder) BOQ.

12. On 30.06.2021, Respondent No. 1 replied to the Petitioner's letter providing justification regarding the discrepancies pointed out in

Respondent No. 3's BOQ, and informed the Petitioner that Respondent No. 3 had complied with the criteria set out in the bid.

13. The Petitioner states that it came to know on 09.07.2021, that the financial bid of Respondent No. 3 had been opened, and accepted by Respondent No. 1 on 30.06.2021 itself. Hence the present petition has been filed.

14. The case of the petitioner is that a combined reading of Amendment No. 3 with the BOQ shows that the requirement of specific make/ brand w.r.t. MGM i.e., either of Eizo/Barco/Sony/LG, was only in respect of the optional item 2(c), (for 26 inch or more Full High Definition (1920X1080p) MGM), and no such specific make/ brand was stipulated in respect of item 2(a) (i.e. 42 inch 4K MGM), or item 2(b) (i.e. 26 inch or more 4 K minimum resolution of 3840X2160 MGM). The petitioner further submits that the mandatory requirement regarding certification of the MGM was mentioned at serial No. 2(d) (which was not touched by the Amendment No. 3), which stipulated that '*All medical grade monitors offered should be BIS/European CE/US FDA Certified.*'

15. The Petitioner further submits that it offered to supply MGM of make 'Advantech' in respect of items 2(a) and 2(b). The Petitioner submits that these MGMs were duly certified in terms of serial No. 2(d) of the Technical Specifications, as they both were BIS/European CE/US FDA Certified.

16. The petitioner further submits that it was discriminated against vis-à-vis respondent No.3 inasmuch, as, the MGM offered by Respondent No. 3 in respect of item at Sr. No. 2(a) was of 'Karl Storz' make, which is also not mentioned in the approved list under Item at Serial No. 2(c). Yet respondent No.3 was qualified, whereas the petitioner was disqualified.

17. Respondent No.1 has filed a detailed counter-affidavit and has claimed that the Petitioner has approached the Court with unclean hands.

18. The Respondent submits that in the pre-bid meeting, the Petitioner demanded there should be no brands/ makes named, or NDF and Advantech should be added back, which was declined. The pre-bid meeting was held on 26.03.2021 with the independent Technical Expert Committee (hereinafter "TEC") comprising of :

- (i) Dr. R.B. Kalia, Addl. Professor, Dept. of Orthopedics, AIIMS Rishikesh,
- (ii) Dr. Bhupendra Mehra, Addl. Professor, Dept. of Surgery AIIMS Nagpur,
- (iii) Dr. Nikhil Kothari, Addl. Professor Dept. of Anesthesiology & Critical Care, AIIMS Jodhpur,
- (iv) Dr. Anshu Gupta, Associate Professor, Dept. of Anesthesia LHMC, New Delhi.

19. In the pre-bid meeting, the TEC was of the view that there should be specific makes of MGM for every item under SI. No. 2, and recommended that, instead of stipulating the makes/ brands for each of

items 2(a) to 2(c) individually, the same should be brought under one Column. Consequently, after mentioning the different sizes of monitors under items 2 (a) to 2 (c), it was stipulated that “*Medical Grade Monitor should be of following make: EIZO/Barco/Sony/LG (commercial grade monitors will not be accepted)*”. Thus, recommendation of TEC – made in the presence of petitioner, made it clear that Medical Grade Monitors should only be of makes: EIZO/Barco/Sony/LG. Since the items 2 (a) to 2 (c) talked about medical grade monitors only, as such, the stipulation of brands applied for all the sizes.

20. It was pursuant to the meeting of TEC that Amendment No. 3 dated 20.04.2021 was incorporated, and the issues raised in the letter of 21.04.2021 by the Petitioner was already discussed and clarified in the pre-bid meeting held on 26.03.2021. Thus, the respondent was not obliged to respond to the clarification sought by the petitioner on 21.04.2021.

21. The respondent No.1 further submits that the make/brand “Advantech” is not BIS–Certified, and could not have been imported by the Petitioner. The Respondent no. 1 further submits that the Department of Electronics and Information Technology – under the Ministry of Communications and Information Technology, has issued with the “*Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order, 2012*”, by which it was mandated that no person shall import, sell or distribute goods which do not conform to the specified BIS standard.

22. The respondent No. 1 further submits that there is neither any discrimination against the petitioner, nor unequal treatment has been meted out to the petitioner. The technical bid of the Petitioner was rightly rejected, and that of the Respondent No. 3 rightly accepted, as the Petitioner did not offer MGM for items 2(a) and 2(b) from one of the specified makes/ brands: EIZO/Barco/Sony/LG.

23. The respondent No. 1 further submits that requirement of specific make/ brand MGM was there in the original tender, as well as in Amendment No. 1 – with slight modification in respect of 42-inch MGM, which requirement was extended to other categories of 26 inch MGM as well, vide Amendment No. 3. Further, this is the third tender, and earlier as well the respondent No. 1 had issued a Domestic Tender Inquiry Document dated 07.03.2019 bearing tender ID HITES/PCD/AIIMSIV/16/OTIN/18-19, with specifications that Medical Grade Monitors should be of make/ brand: Eizo/Barco/Sony/LG. The petitioner – in its Compliance Statement pertaining to said tender, had submitted that for Integration and Data Management System for Modular OT, it will be submitting the make/ brand ‘Barco’ for monitors. Thus, the petitioner did not have any confusion, when the tender was floated with similar wordings and specifications, pertaining to the Medical Grade Monitors. Even the amendments in relations to the previous tender came on similar lines, as of the current tender in dispute.

24. The Respondent No. 1 relies on *Municipal Corporation, Ujjain Vs. BVG India ltd.* [2018 (5) SCC 462], wherein the Supreme Court observed:

“35. Evaluating tenders and awarding contracts are essentially commercial transactions/contracts. If the decision relating to award of contract is in public interest, the Courts will not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest. Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with firmness.” (emphasis supplied)

25. Respondent No.1 further submits that the Petitioner by filing the writ petition, is seeking judicial scrutiny of the decision of TEC, which Constitutional Court should refrain from undertaking. Numerous judgments have been cited by the Respondent No.1 in this regard, which have held that courts should only be concerned “*with lawfulness of a decision, and not its soundness.*” [*Bharat Coking Coal Ltd. vs. AMR Dev Prabha*, 2020 SC OnLine SC 335]. Additionally, reliance is placed on *Municipal Corporation, Ujjain vs. BVG India Ltd.* [2018 (5) SCC 462], *Shree Balaji Coal Linkers v. Bharat Sanchar Nigam Ltd. and Ors.*, [2004 (54) ALR 308] and *Jagdish Mandal v. State of Orissa & Ors.* [2007 (14) SCC 517] to highlight judicial restraint in tender matters.

26. Lastly, Respondent No. 1 submits that the present writ petition is barred by delay and laches, as the financial bid was opened on 30.06.2021, whereas, the present writ petition was filed on 15.07.2021. The Respondent No. 1 has relied on *State of M.P. v. Nandlal Jaiswal and Ors.* [(1986) 4 SCC 566] and *The Mining Engineering Corporation v. Union of India & Anr.* [W.P. (C) 5612/2020] to submit that when there is unexplained delay, along with creation of third-party rights, then it is an important factor that has to be weighed by the High Court before exercising its jurisdiction under Article 226.

27. Respondent No. 3 has also filed an affidavit submitting that under the terms of the tender (Clause 9.1 of the Instructions to bidders), the tender conditions categorically stipulated that all clarifications or queries had to be raised to the purchaser in a pre-defined manner, at least 2 days prior to the pre-bid meeting. Respondent No 3 submits that the said term had been included so that all queries/ suggestions are considered and heard by the Respondent no. 1 and, accordingly, thereafter a decision is taken thereon.

28. Respondent No. 3 further submits that, procedurally, the purchaser usually issues amendments after having heard all the bidders, and thereafter addresses the queries raised by the bidders. In the tenders wherein respondent no 3 has participated in the past, it had been seen that the purchasers issue a consolidated clarification/ amendment to address all the queries raised till the pre-bid stage, and thereafter no queries were entertained. Apparently, the same principles were applied by the Respondent no 1 after issuing the Amendment No 3 dated 20.04.2021. It is argued that a bare perusal of the Amendment No.3 establishes that all the Medical Grade Monitors had to be of the specifically mentioned make/ brand.

29. The allegation of the Petitioner against Respondent No 3 – that the MGM offered by it for item at serial no 2(a) was of "Karl Storz" make, and not of the specific make/ brand is denied. It is submitted that the MGM offered by the Respondent No 3 for item 2(a) was of Model TM440, where the OEM was 'Eizo' – a make/ brand stipulated under the Technical specifications duly amended. It is submitted that Respondent

No 3 had submitted the OEM certificate from 'Eizo' in this respect, and provided the BIS certificate of the same.

30. We have heard the Learned Counsels for the parties and considered their submissions in the light of the documents placed on record.

ANALYSIS:

31. The primary issue that arises for our consideration is as to what is the plausible interpretation of Clause 2 of the Technical Specification of the Tender Condition, and; whether the interpretation adopted by respondent No.1 in respect of the said clause is a plausible interpretation. Only if the answer to the second question is in the negative, would it require our consideration as to what further course of action we should resort to in the facts and circumstances of the case.

32. In brief, the Respondent No. 1 has made the following arguments and contentions for holding the Petitioner Technically Non-responsive and for disallowing the petition:

- a. The Petitioner, having submitted the "Advantech" model that was not one of the makes prescribed in tender conditions for items 2(a) and 2(b), the petitioner was declared technically non-responsive. There was no confusion in the tender condition as sought to be argued by the Petitioner.

- b. The Petitioner was aware of the amendment, as the same was discussed in the pre-bid meeting held on 26.03.2021 and, therefore, there was no ambiguity.
- c. As per the tender conditions, the tender authority is not obligated to issue clarifications, post the pre-bid meeting.
- d. The Advantech model offered by the Petitioner is not BIS certified.
- e. Lastly, the petition should not be allowed on account of delay in filing, and creation of third-party rights.

33. The relevant extract from Amendment No. 3 issued by Respondent No. 1 has been extracted hereinabove. Before we proceed to analyze the same, for comprehensive understanding of the plausible meaning of the amended Technical Specifications laid down for MGM – post Amendment No.3, we must also look to the BOQ, which also forms part of the same tender. Following is the relevant extract of the BOQ:

HLL INFRA TECH SERVICES LTD							
				COMPLIANCE STATEMENT			
Tender ref no:				HITES/PCD/AIIMS-IV/16RT-01/OTIN/20-21 dated 12-03-2021			
Name of the item :				Integration and Data Management(2021_HLL_73064_1)			
Name of the Bidder :							
Name of the Manufacturer of quoted item :							
Country of Origin of quoted item :							
Model Quoted:							
SN	Technical Specification			Compliance to the Tender Specification- Give Comments		Data Sheet Para & Page No	Deviation if any(Y/N), if YES -Give Comments

2.	Medical Grade Monitors -		
a)	Medical Grade Monitor: 42-inch or more, of 4K (minimum resolution of 3840 x 2160) resolution, to be flush mounted on OT wall - 01 no. per integrated MOT.		
b)	Medical Grade Monitor : 26-inch or more 4K (minimum resolution of 3840 x 2160) medical grade monitor with ceiling suspended spring arm. Both monitor and arm should have capability to rotate atleast 270 deg. (Price to be quoted separately) – 01 no. per integrated MOT		
c)	Optional item – Medical Grade Monitors – 26-inch or more Full High Definition (1920 x 1080p) medical grade monitor with ceiling suspended spring arm. Both monitor and arm should have capability to rotate atleast 270 deg. (Price to be quoted separately) - 01 no. per integrated MOT. Medical grade monitor should be of following make: Eizo/Barco/Sony/LG (commercial grade monitors will not be accepted)		
d)	All medical grade monitors offered should be BIS/ European CE/ US FDA certified		
e)	Bidder shall be responsible for Patch panel for power & signals to be laid down for Monitors at Wall/ Pendent/ booms/ OT Light 3rd arm as required.		

(emphasis supplied)

34. A perusal of the original and amended technical specifications for Medical Grade Monitors firstly throws up an important aspect, which is that the technical specification in respect of item 2 Medical Grade Monitors in the original tender; after the first amendment and; even after the third amendment continued to display the clear intent of respondent No.1 to stipulate specific makes/ brand only in respect of one specified item. Earlier – in the original tender, and after the first amendment, it was the item 42

Inch or more 4K Medical Grade Monitor, and after amendment No.3, the specific makes/ brand were stipulated in respect of optional Item 2(c).

35. Sub-Clauses (a) and (b) of Clause “2 – *Medical Grade **Monitors*** –”, both use the expression “Medical Grade **Monitor**”. However, Sub-Clause (c) of Clause 2 uses the expression “Medical Grade **Monitors**”. What follows Sub-Clause (c) of Clause 2 “Optional Item” is “*Medical Grade **monitor** should be of following make:Eizo/Barco/Sony/LG(commercial grade monitors will not be accepted)*”. The respondent No.1, therefore, consciously used singular “Monitor” and plural “Monitors” at different places in Clause 2. Had the intention of respondent No.1 been to stipulate that all Medical Grade Monitors should be of the named make/ brand, the expression used by the respondent would have been “Medical Grade **Monitors** should be of the following make.....”. Pertinently, the requirement of Medical Grade Monitor being of the specified make/ brand was not put separately as a part of Clause 2 (d), or in any other manner so as to indicate that the stipulation of the Medical Grade Monitors being of the stipulate make/ brand did not form part of Sub-Clause (c) of Clause 2 alone, and that it was a standalone Sub-Clause of Clause 2 – applicable to Clauses 2(a) to 2(c), just like Clause 2(d). The respondent did not use the expression “Medical Grade **Monitors**”, to indicate plurality, and also did not state “*Above Medical Grade **Monitors** should be of following make.....*”

36. The use of the word “Monitor” while stipulating the specific makes/ brands conveyed singularity and not plurality. Consequently, there is no basis for respondent No. 1 to claim that the clause relating to stipulation of makes/ brands would apply to Items 2(a) and 2(b) as well.

37. The submission of the petitioner that the stipulation with regard to makes was only in respect of Item 2(c) i.e. the optional item, also gains credence from the fact that even in the BOQ, the stipulation with regard to the make/ brand was only contained in Clause 2(c). We have extracted hereinabove, the BOQ issued by the respondent No.1, in which the bidders were required to submit their quotation. The said BOQ contains clearly marked out rows and columns. A bare perusal of the same would show that the stipulation of makes/ brands is only in respect of Item 2(c) i.e. the optional item. Nothing prevented respondent No.1 from incorporating the clause relating to approved makes/ brands in Clause 2(d) of the BOQ, which stipulated – explicitly, that “*All medical grade monitors offered should be BIS/European CE/US FDA certified*”. Pertinently, when the respondent No.1 intended to stipulate a common condition for all the items, namely Item 2(a), 2(b) and 2(c), it very clearly stated in the technical specifications, as well as in the BOQ – at Clause 2(d), that “*All medical grade monitors offered should be BIS/European CE/US FDA certified*”. In the same clause, namely Clause 2(d), or by incorporating a similar separate clause, the respondent authority could have stipulated “*All Medical Grade Monitors should of the following make: Eizo/Barco/Sony/LG (commercial grade monitors will not be accepted)*”. However, that was not done, leaving the field open for the prospective bidders to genuinely and reasonably conclude that the stipulation of the makes was only in respect of item 2(c) – the optional item, and did not attach to the items at 2(a) and 2(b). In our view, the interpretation of the Amended clause 2 in the Technical Specifications – as amended by Amendment No.3, advanced by the petitioner, is the only plausible view, and the interpretation sought to be advanced by respondent

No.1 is clearly not borne out from a plain reading of the said clause, in conjunction with the BOQ.

38. For the aforesaid reasons, we hold that the specified make criteria did not attach to Items at Serial No. 2(a) and 2(b) of the Technical Specifications.

39. The stand taken by respondent No.1 in their counter affidavit is that the TEC held the pre-bid meeting with the prospective bidders, where after amendment No. 3 – with which we are concerned was issued and, therefore, the respondent was not obliged to clarify the position to the petitioner as to whether, or not, the prescription of making of Medical Grade Monitor would apply to the items at Serial Nos. 2(a) and 2(b).

40. The pre-bid meeting took place on 26.03.2021. The minutes of this meeting are dated 06.04.2021. Subsequently, 2 amendments were carried out. Amendment No. 2 was issued on 16.04.2021, and Amendment No. 3 was issued on 20.04.2021. The second Amendment dated 16.04.2021 has not been referred to by either of the parties and it has also not been placed on record. We, therefore, assume that it did not relate to MGM. We have perused the minutes of the meeting dated 06.04.2021, of the pre-bid meeting dated 26.03.2021, and even from the minutes, it cannot be inferred that the specified make requirement was made applicable to all items, including those at serial No. 2(a) and 2(b). The relevant extract from the minutes of the pre-bid meeting held on 26.03.2021 are extracted hereinbelow:

“

Prebid-Representation disposal s note (Prebid dated 26.03.2021)					
Tender ref: HITES /PCD/AIIMS-IV /16RT-01/OTIN/20-21 Dated 12.03.2021					
Integration and Data Management System for Modular OT (TenderId: 2021_HLL_73064_1					
Sl. No.	Tender Specification	Bidder	Representation received from the bidders	Committee Recommendations	Justification
.....					
Amend 01, pg 04 Para	2. Medical Grade Monitors: Medical Grade Monitors - i) One 26-inch or more full High Definition (1920 x1080) medical grade monitor with ceiling Suspended spring arm for each Integrated MOT. Both the monitor and the arm should have capability to rotate at least 270 deg. The spring am should be from the same manufacturer of Integration (price to be quoted separately)	M/s Karl Storz	Request for deletion: "Spring arm should be from the same manufacture of integration" Justification: Spring arm and manufacture of integration are different	2. Medical Grade Monitors- a. Medical Grade Monitor: 42 inch more or 4 k (minimum resolution of 3840x2160) resolution, to be flush mounted on	For better clarity
2.a		M/s Rohit Surgicals	Pointy 2.a, you have asked for 26° full HD monitor, whereas system you're asking for should before keep at 4K at 3.c and 4.c We would request that it should be 4K, as asked at 2.b also, as full HD for 4K system does not make any sense.	OT Wall- 01 no. per integrated MOT. b. Medical Grade Monitor – 26 inch or more 4k (minimum	
		M/s Stryker	Amendment required: 132 inch or more 4K medical grade monitor mounted on ceiling suspended spring arm for each integrated MOT		
		M/s DSS Stroz	kindly remove spring arm should be from the same manufacturer of integration. Kindly allow		

			<i>third-party make or remove this point.</i>	<i>resolution of 3840x2160) medical grade monitor with ceiling suspended spring arm. Both monitor and arm should have capability to rotate 270 deg. (Price to be quoted separately) – 01 n o. per integrated MOT.</i>	
<i>Amend -01, pg 04, para 2.b</i>	<i>Medical grade monitors-ii) One 26-inch or more 4K (minimum resolution 3840'x 2160) Medical grade monitor with ceiling suspended spring arm for each integrated MOT. Both monitor and arm should have capability to rotate at least 270 deg. The spring arm should be from the same manufacturer of integration (price to be quoted separately)</i>	<i>M/s Karl Storz</i>	<i>kindly amend this as: 126 inch or more full hi definition (1920 x 1080p) medical grade monitor mounted with ceiling suspended spring arm for each integrated MOT. Both monitor and arm should have capability to rotate at least 270-.</i> <i>Justification:</i> <i>A) 4K monitor shall be a part of purchase of a 4K camera system.</i> <i>B) the 4K camera system is mainly endovision, endoscopy camera.</i> <i>e) not all the OTs shall be used for Minimal Invasive Surgery.</i> <i>Request for deletion: "spring ram should be from the same manufacturer of integration."</i> <i>Justification: spring arm and manufacturers Of integration are different.</i>	<i>c. optional item-</i> <i>Medical Grade Monitors - 26 inch or more full High Definition (1920xl080p)medi cal grade monitor with ceiling suspended spring arm. Both monitor and arm should have capability to rotate at least 270 deg.</i> <i>(Price to be quoted separately) - 01 no. per integrated MOT</i> <i>Medical Grade Monitor should be of following make: Eizo/Barco/Sony/</i>	

				LG commercial grade monitors will not be accepted.	
		M/s Xcellance (Shalya)	Please clarify what are Criteria/documentation required for proving that spring arm is from same manufacturer as of integration. or Better still, we suggest changing it to spring arm from any vendor, with quality criteria added for a better quality and price equality among various vendors. Reason: most vendors are having OEM supplies of spring home, and that way equality in quality cannot be ascertained.		
		M/s DSS Image tech	Kindly remove spring arm should be from the same manufacturer of integration. Kindly allow third-party make or remove this point.		
Amend 01, pg 04, para 2.c	One 42-inch or more 4K (minimum resolution of 3840 x 2160) medical grade colour monitor should be flash mounted on OT wall with all necessary frames with glass should be provided by bidder for each integrated MOT.	M/s Karl Storz	Kindly amend this as: 142 inch or more FHD (minimum resolution of 1920 x 1080) medical grade color monitor should be flash mounted on OT wall. Necessary frames with glass to be under the scope of MOT vendor. Medical grade monitors should be of make: Eizo/Barco/Sony/LG/NDS/		

	<i>Medical grade monitor should be of make: Eizo/Barco/Sony/LG (Commercial grade monitors will not be accepted)</i>		<i>Advantech (commercial grade monitors would not be accepted.)</i> <i>Justification: 42 inch monitor on the wall shall not be used for viewing procedure in 3D/4K, necessary monitor shall be procured along with the camera system and shall be used near the surgical field. 42" wall monitor shall be used for Telemedicine.</i>		
		<i>M/s Xcellance (Shalya)</i>	<i>There should not be any brand name specified for monitors, rather there should be Technical specifications and Quality Certification requirement to ascertain the quality of monitors</i> <i>OR</i> <i>All other brands mentioned in previous specifications which has been deleted now, should be added back in the list, i.e. NDS & Advantech</i>		
		<i>M/s Stryker</i>	<i>Amendment required.</i> <i>One 55 inch 4K medical grade (commercial grade monitors will not be accepted) color monitor should be flush mounted on OT wall with all necessary frames with glass should be provided by bidder for each integrated MOT. The monitor should have the feature of picture in picture viewing multiple inputs in</i>		

			a single screen. The monitor should be flush mounted on the wall with necessary frames with glass top for better sealing. Justification: 42" wall monitor is not sufficient as the same will be mounted on wall panel also using 42" will not make much difference when compared with ceiling, suspended monitor. So, we recommend 55" inch FHD (1920 x1080p) medical grade (commercial grade monitors will not be accepted) color monitor should be flush mounted on OT wall with all necessary frames with glass should be provided by bidder for each integrated MOT.		
		M/s Rohit Surgicals	42" monitor as asked at point 2.c, it should be 55" or more as no company has 42" 4K monitor At 2.c we would request you to ass brand name "NDS", as NDS is the leading monitor brand In the world		
....		...			

”

41. Clause 9.1 of the Tender Conditions stipulates:

“9.1 A tenderer requiring any clarification or elucidation on any issue of the TE documents may take up the same with the purchaser in writing in their letter head duly signed and scanned through email to pcd@hllhites.com and bmenoida@hllhites.com. The purchaser will respond to such request provided the same is received by the purchaser two days prior to the pre-bid meeting. Any queries/ representations received later shall not be taken into cognizance.”

42. In our view, this stipulation would not debar the tenderer to seek clarification about the amended terms and conditions. Every time an amendment of the Technical Specifications of a tender are issued, the prospective and interested bidders would be entitled to seek clarifications, so as to not fall foul of the amended Technical Specifications. The clarification sought by the petitioner on 21.04.2021 was, firstly, prompt and, secondly, pertinent. This clarification was sought since respondent No.1 had drastically changed the Technical Specifications in respect of Medical Grade Monitors from those stipulated in the tender as initially issued and, also from the amendment made vide amendment No.1. The stipulation of specified makes in the tender as originally issued specifically related to Clause 2(b) – which was for 42-inch or more 4K(minimum resolution of 3840 x 2160) medical grade colour monitor. Pertinently, the original technical specifications also provided in Clause (c) that *“All medical grade monitors offered should be BIS/European CE/US FDA certified.”* After the first amendment, the item at 2(a), as initially mentioned in the original NIT was split up and re-numbered as 2(a) and 2(b). Both these items were in respect of “26 Inch or more” Medical Grade Monitors. Whereas Clause 2(a) stipulated the technical specification as *“Full High Definition (1920 X 1080p) Medical Grade Monitor”*, item 2(b) was in respect of *“26-inch or*

more 4K (minimum resolution of 3840 x 2160) Medical Grade Monitor”. Item relating to *“42 inch or more 4K (minimum resolution of 3840 x 2160) Medical Grade Monitor”* was re-numbered as item 2(c) and, it was only in respect of item 2(c) that the makes were clearly stipulated. Specifications in Clause 2(c) of original NIT was re-numbered as 2(d). With the issuance of the 3rd Amendment, clauses 2(a), 2(b) and 2(c) were amended. Pertinently, on this occasion, the stipulation with regard to the approved make/ brand was not attached to the item *“42 inch or more 4K (minimum resolution of 3840 x 2160)”* [now numbered as item 2(a)]. The said stipulation of makes was attached to Clause 2(c) – which was the “Optional Item”. Pertinently, clause 2(d) continued to remain unaffected, which stipulated that *“All medical grade monitors offered should be BIS/European CE/US FDA certified.”*. It was, therefore, completely reasonable and justified on the part of the petitioner to seek a clarification as to whether the stipulation of makes was attached to items 2(a) and 2(b), as amended vide Amendment No.3.

43. The respondent No.1, which is the Tender Inviting Authority cannot play games with the bidders as such an Authority has to act fairly, and it should be responsive to fair and reasonable queries that may be raised by prospective and serious bidders. The endeavour of respondent No.1 cannot be to trick any bidder by laying down unclear or vague specifications/ conditions and, after the bids are invited, claiming that the intention of the respondent No. 1 was to accept one – and not other, interpretation of the tender conditions/ technical specifications. The Tender Inviting Authority was obliged to, in the first place, lay down clear specifications/ conditions – which are clear as daylight to everyone. However, if any prospective bidder

points out any ambiguity or, bona fide, seeks a clarification, respondent No.1 cannot be stiff necked while dealing with such a query and refuse to answer the same, only with a view to non-suit a prospective bidder subsequently.

44. In tender matters, the tender inviting authority should not have a myopic view. Its objective should be to encourage maximum participation in a fair manner and not to stump the bidders with unclear/ambiguous terms. If the tender issuing authority is stumping the bidder by confusing them, or not resolving their doubts, then the act of the tendering authority would be antithesis to the very idea of a tender, which is to encourage maximum public participation, and not to oust a bidder by devious means. We are aware that the tendering authority is considered the best authority to interpret the tender document. But when the plain and express meaning of the words used in the tender specifications and conditions is clear, then there is no room for interpretation by going into the mind of the author of the tender – to find out what its intention was.

45. Therefore, having issued amendments post pre-bid meeting held on 26.03.2021, the Respondent No. 1 was obligated to resolve any ambiguity or confusion that may have arisen. The *ipsi dixit* of respondent No.1 that all bidders were informed in the pre-bid meeting by the TEC that all Medical Grade Monitors should be of the specified makes only, cannot be accepted.

46. Therefore, onus was on Respondent No. 1 to resolve the ambiguity due to subsequent amendments (if there was any), and since the tendering

authority/ Respondent No. 1 hasn't done that – despite specific query, then it shall bear the consequences of the same.

47. We find support for our opinion from the Supreme Court judgment in *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*¹, wherein the Court has stated the following:

*“36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of “non-discrimination”. However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to “right to life”. It includes “opportunity”. In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N. [(2007) 2 SCC 1] , Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. “Level playing field” is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of “level playing field”. We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. **The doctrine of “level playing field” is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest.** “Globalisation”, in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of “globalisation”. **Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of “equality” should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life.** There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of “level playing field”. According to Lord Goldsmith, commitment to the “rule of law” is the heart of parliamentary democracy. One of the important elements of the “rule of law” is legal certainty. Article 14 applies to government policies and if the policy*

¹ (2007) 8 SCC 1.

or act of the Government, even in contractual matters, fails to satisfy the test of “reasonableness”, then such an act or decision would be unconstitutional.

38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This “legal certainty” is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of “level playing field”.

39. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India [(2006) 10 SCC 1] the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of “judicial review” cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above “certainty” is an important aspect of the rule of law. In Reliance Airport Developers [(2006) 10 SCC 1] the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided.” (emphasis supplied)

48. Therefore, to ensure that there is “level playing field” for all the bidders, it is imperative for the tendering authority to make sure that there is certainty in the tender conditions, especially where there have been amendments issued in the tender condition. Changing the rules of the game post the clarification round, should allow the bidders to seek any clarification

that they may have, at least in relation to the amendment. Right after the issuance of the Amendment no. 3 on 20.04.2021, the Petitioner had written on 21.04.2021 to the tendering authority to clarify its doubts. The Respondent no. 1 should have been forthcoming with clarifications since the pre-bid meeting was over. We are at pains to understand the attitude of the tender floating authorities. The laudable objectives of “ease of doing business in India” was frustrated by this high-ended attitude of the respondent. If the aim and objective of an open bidding process is to encourage bidding, and maximize participation to get the optimum price, then the attitude of the Respondent cannot be countenanced. The act of not clarifying the Petitioner’s doubt has prejudiced him and left him in the dark. This Act/ omission of Respondent no. 1 cannot be to the disadvantage of the petitioner.

49. If it was the intention of respondent No.1 to apply the specified makes criteria for items 2(a) and 2(b), the clauses of Amendment No.3 should have been clearly framed, and not in a manner that is ambiguous and creates confusion in the mind of any bidder. When there is ambiguity in a tender condition, the *doctrine of Contra Proferentem* is attracted. In ***Industrial Promotion & Investment Corp. of Orissa Ltd. v. New India Assurance Co. Ltd.***², it was observed-

“10. We proceed to deal with the submission made by the counsel for the appellant regarding the rule of contra proferentem. The Common Law rule of construction “verba chartarum fortius accipiuntur contra proferentem” means that ambiguity in the wording of the policy is to be resolved against the party who prepared it. MacGillivray on Insurance Law [Legh-Jones, Longmore et al (Eds.), MacGillivray on Insurance Law (9th Edn., Sweet and Maxwell, London 1997) at p. 280.] deals with the rule of contra proferentem as follows:

² (2016) 15 SCC 315.

“The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. ‘One must not use the rule to create the ambiguity — one must find the ambiguity first.’ The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances.” (footnotes omitted)

11. *Colinvaux's Law of Insurance [Robert and Merkin (Eds.), Colinvaux's Law of Insurance (6th Edn., 1990) at p. 42.] propounds the contra proferentem rule as under:*

“Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases the rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentes, against those who offer it. In a doubtful case the turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt.

But a clause is only to be contra proferentes in cases of real ambiguity. One must not use the rule to create an ambiguity. One must find the ambiguity first. Even where a clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly.”

(footnotes omitted)”

50. The doctrine of contra proferentem states that the plain and express meaning of the contract has to be given heed to and in case there is any ambiguity in the contract, then the same is construed against the drafter of the said contract.

51. It has also been stated in *Kamala Sarmah v. State of Assam*³ that “A notice inviting tender must indicate the terms and conditions without any ambiguity and in clear terms.”

52. It is important to remember the objective of a tender. The same has also been observed in *NHAI v. Gwalior-Jhansi Expressway Ltd.*⁴ wherein it was stated:

“20.The objective of tender process is not only to adhere to a transparent mechanism but to encourage competition and give equal opportunity to all tenderers with the end result of getting a fair offer or value for money.....”

53. We may now move on to consider other defences raised by the respondents. The stand of Respondent no. 1 is that the Advantech model is not BIS certified. We cannot agree with this contention. Sr. 2(d) clearly states that, “All medical grade monitors offered should be BIS/ European CE/ US FDA certified”. The Petitioner has stated on record – and shown the relevant documents, to show that Advantech is European CE certified. The presence of the punctuation “/” shows that it means “or”, and not “and”, and if the Respondent wanted the monitor to be BIS and European CE, and US FDA certified, then the Respondents should have clearly used the word “and”, and not “/”. Pertinently, when it comes to specified makes/ brands, the respondent No.1 uses the same method to describe the several makes i.e. “Eizo/Barco/Sony/LG”. This, obviously, means one, or the other makes. The punctuation “/” is used as an “or” and not an “and”. Even otherwise, it does not stand to reason that all the MGMs should be BIS, and European CE, and USFDA certified. There may be manufacturers, who may choose not to go

³ 2018 SCC OnLine Gau 2152.

⁴ (2018) 8 SCC 243.

for clarification of the MGMs by all these certifying agencies. For example, an Indian Manufacturer is not obliged to obtain USFDA certification to be able to offer his product in India, and it would suffice if his product is BIS certified. Similar would be the case for other manufacturers in India and abroad. Thus, the above submission of the respondent No.1 has no merit and is rejected.

54. We also find merit in the petitioner's submission that the petitioner has been discriminated against vis-à-vis respondent No.3. Admittedly, respondent No.3 had also not offered the Medical Grade Monitors of one of the specified makes/ brand – assuming that the bidders were obliged to offer only the specified makes for items at Sr. No. 2(a) and 2(b). Admittedly, the make offered by respondent No.3 was "Karl Storz" – which is not one of the specified makes of Medical Grade Monitors. The tender conditions do not permit a bidder to offer a make, different from one of the specified makes only, on the ground that the original equipment manufacturer of the offered make is one of the specified makes. It is a common and well known trade practice that manufacturers sell the same products with different brands, so as to have access to different segments of the same market. The same manufacturer offers a premium range under one brand, and a more affordable range under a different brand/ name. If the manner in which the respondent No.1 has proceeded to accept the tender of respondent No.3 were to be permitted, it would become easy for any bidder to push the cheaper/ inferior brand from the same manufacturer, even though the premium make/ brand may have been specified as acceptable make/ brand. The manner in which the respondent No. 1 has accepted the item offered by respondent

No.3 at serial 2(a) of the make "Karl Storz", also discriminates against those bidders who may have similarly been in a position to offer the item at serial No. 2(a) of the make "Karl Storz", or other brands- whose OEM was one of the specified makes/ brands, but did not participate in the tendering process, since they were not in a position to offer the said item at serial No. 2(a) of one of the specified make/ brands. Thus, respondent No.1 has disturbed the level playing field and discriminated against all such prospective bidders and favoured respondent No.3 by agreeing to accept the item at serial No.2(a) of a make/ brand which is not specified make/ brand.

55. The Respondents have also alleged delay in filing the present petition. It is the case of Petitioner that they resorted to making several representations to the Respondent no. 1. An email was sent on 22.04.2021, requesting clarification on Amendment no. 3. Then a letter was issued on 02.06.2021 replying to the mail of the Respondent no. 1, and again seeking clarification with respect to items at Sr. 2(a), 2(b) and 2(c). Subsequently, a letter was issued on 18.06.2021 pointing out the discrepancies in the bid of Respondent no. 3, and again pointing out the ambiguity in Item at Sr. 2 of the technical specification. The Petitioner received an email as response from the Respondent on 30.06.2021, replying to the representation of the Petitioner. In response, the Petitioner on 01.07.2021, sent another communication raising its grievance. Considering that the respondent responded on 30.06.2021, the filing of the present petition on or about 15.07.2021, cannot be said to be delayed. Pertinently, respondent No.1 has not awarded the contract to respondent No.3 as it is not even so claimed by the respondents in their replies/ counter affidavits. The supplies under the

tender have, obviously, not been made by respondent No.3 to respondent No.1. Vide our order dated 16.07.2021, we had directed that *“Till the next date of hearing, no further steps shall be taken by the Respondents for award of the tender in question to respondent No.3”*. That interim order has continues to operate. Thus, there is no delay in filing of this petition.

56. The Supreme Court in *Vetindia Pharmaceuticals Ltd. v. State of U.P.*⁵, observed the following:

“15. That brings us to the question of delay. There is no doubt that the High Court in its discretionary jurisdiction may decline to exercise the discretionary writ jurisdiction on the ground of delay in approaching the court. But it is only a rule of discretion by exercise of self-restraint evolved by the court in exercise of the discretionary equitable jurisdiction and not a mandatory requirement that every delayed petition must be dismissed on the ground of delay. The Limitation Act stricto sensu does not apply to the writ jurisdiction. The discretion vested in the court under Article 226 of the Constitution therefore has to be a judicious exercise of the discretion after considering all pros and cons of the matter, including the nature of the dispute, the explanation for the delay, whether any third-party rights have intervened, etc. The jurisdiction under Article 226 being equitable in nature, questions of proportionality in considering whether the impugned order merits interference or not in exercise of the discretionary jurisdiction will also arise. This Court in Basanti Prasad v. Bihar School Examination Board [Basanti Prasad v. Bihar School Examination Board, (2009) 6 SCC 791 : (2009) 2 SCC (L&S) 252] , after referring to Moon Mills Ltd. v. M.R. Meher [Moon Mills Ltd. v. M.R. Meher, AIR 1967 SC 1450] , Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, (1969) 1 SCR 808 : AIR 1969 SC 329] and State of M.P. v. Nandlal Jaiswal [State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566] , held that if the delay is properly explained and no third-party rights are being affected, the writ court under Article 226 of the Constitution may condone the delay, holding as follows: (Basanti Prasad case [Basanti Prasad v. Bihar School Examination Board, (2009) 6 SCC 791 : (2009) 2 SCC (L&S) 252] , SCC p. 796, para 18)

“18. In the normal course, we would not have taken exception to the order passed by the High Court. They are justified in saying that a delinquent employee should not be permitted to revive the stale claim and the High Court

⁵ (2021) 1 SCC 804.

in exercise of its discretion would not ordinarily assist the tardy and indolent person. This is the traditional view and is well supported by a plethora of decisions of this Court. This Court also has taken the view that there is no inviolable rule, that, whenever there is delay the Court must refuse to entertain a petition. This Court has stated that the writ court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution may condone the delay in filing the petition, if the delay is satisfactorily explained.””

(emphasis supplied)

57. Reliance placed on judgments to state that the scope of judicial review is limited in tender matter, is of no avail in the facts of the present case. The scope of judicial review and scrutiny encompasses arbitrary, unreasonable, and illegal treatment of the bidders by the Respondent. This has also been stated in the Supreme Court judgment of *Tata Cellular v. Union of India*⁶ that -

“77. ...

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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:

- (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.”*

58. It is imperative to mention here that we are not concerned with the decision of the Respondent no. 1 to drop ‘Advantech’ as a model from the specified brands qua Item 2(c) of the Technical Specifications, and the BOQ, but the failure of the Respondent no. 1 to:

⁶ (1994) 6 SCC 651.

- (i) Lay down clear and unambiguous tender conditions – if the intention of the respondent was contrary to the plain and clear language and structure of the Technical Specifications;
- (ii) issue clarifications to the Petitioner after Amendment no. 3 was issued.

By the aforesaid acts/ omissions the respondent No.1 has:

- (i) Frustrated the very objective of the tender process.
- (ii) Resorted to a procedure that is hit by the wednesbury principle of unreasonableness.

59. Hence, we allow the writ petition and quash/set aside email dated 17.06.2021 rejecting the technical bid of the Petitioner. We further direct Respondent no. 1 to open and evaluate the financial bid submitted by the Petitioner in accordance with the Domestic Tender Inquiry Document dated 12th March, 2021 bearing tender ID 2021_HLL_73064_1 and process the tender in accordance with law.

VIPIN SANGHI, J

JASMEET SINGH, J

OCTOBER 05, 2021/dm