

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

Date of decision: 09th NOVEMBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 13405/2021 & CM APPLs. 42252/2021, 10436/2022**

M/S. GRANT THORNTON BHARAT LLP Petitioner

Through: Mr. Parag Tripathi, Sr. Advocate with
Mr. Ajay Kumar Talesara, Mr. Ambar
Qamaruddin, Mr. Apoorva Tripathi,
Mr. Anirudh Dusanj and Mr. Rakshit
Shrivastava, Advocates.

versus

NATIONAL INFORMATICS CENTRE SERVICES
INCORPORATED & ANR. Respondents

Through: Mr. Vikram Jetly, CGSC with Mr.
Jitender Kumar Tripathi, Govt.
Pleader with Mr. Shreya Jetly,
Advocate for UOI with Ms. Hemlata,
Legal ASSO, Mr. Sunny Jain, CS,
NICS and Dr. Yoginder Talwar, GM
& HOD (Tender), NICS.

+ **W.P.(C) 14924/2021 & CM APPL. 47130/2021**

PRICEWATERHOUSECOOPERS PRIVATE LIMITED & ANR.

..... Petitioners

Through: Mr. Neeraj Kishan Kaul, Sr.
Advocate with Ms. Shelly Bhasin,
Mr. Chaitanya Safeya and Ms. Ira,
Advocates.

versus

NATIONAL INFORMATICS CENTRE SERVICES
INCORPORATED & ANR. Respondents

Through: Mr. Vikram Jetly, CGSC with Mr.

Jitender Kumar Tripathi, Govt.
Pleader with Mr. Shreya Jetly,
Advocate for UOI with Ms. Hemlata,
Legal ASSO, Mr. Sunny Jain, CS,
NICSI and Dr. Yoginder Talwar, GM
& HOD (Tender), NICSI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. W.P.(C) 13405/2021 has been filed by M/s Grant Thornton Bharat LLP (*hereinafter referred to as "Grant Thornton"*) under Article 226 of the Constitution of India, 1950, challenging the communication dated 08.10.2021 by which the financial bid of Grant Thornton was rejected/disqualified by the Financial Evaluation Committee with respect to Tender No.NICSI/eGov Professionals/2020/11 and File No. 10(08)/2020-NICSI for Empanelment of Agencies for Certified e-Governance Professional Services.
2. W.P.(C) 14924/2021 has been filed by PricewaterhouseCoopers Private Limited (*hereinafter referred to as "PwC"*) under Article 226 of the Constitution of India, 1950, seeking directions to National Informatics Centre Services Incorporated (NICSI) to empanel PwC in the Tier-1 category for Tender No. NICSI/eGov Professionals/2020/11 for Empanelment of Agencies for Certified e-Governance Professional Services.
3. This Court is of the opinion that the decision rendered in W.P.(C) 13405/2021 will have a discernible bearing on the decision that is rendered

in W.P.(C) 14924/2021, and W.P.(C) 14924/2021 is to be considered only if W.P.(C) 13405/2021 is decided in favour of the Petitioner in W.P.(C) 13405/2021. Accordingly, W.P.(C) 14924/2021 is being detagged.

4. The facts leading to the instant petitions are stated as under:

- a) In January 2021, NICSI floated a “Request for Proposal for Empanelment of Agencies for NICSI Certified e-Governance Professional Services”. Thereafter, Corrigendum-XII dated 20.05.2021 was issued as per which the tender document was wholly revised.
- b) On 01.09.2021, Grant Thornton submitted its technical bid for empanelment. The technical bid was accepted by the Technical Evaluation Committee, along with those of Deloitte Touche Tohmatsu India LLP, KPMG Assurance and Consulting Services LLP, Ernst and Young LLP, and PwC. Subsequently, the Detailed Financial Bid was submitted by Grant Thornton and PwC in September 2021.
- c) Grant Thornton was declared as the lowest bidder (L-1) and accordingly, the Detailed Financial Bid of Grant Thornton was opened. This Detailed Financial Bid portrays three tables, i.e. Table 1 for Management/Functional Profile for Tier I, Table 2 for Technology Profile for Tier I, and Table 3 for Subject Matter Expert for Tier I. The A, B and C rows in the tables showcase the sum total of the respective tables. However, on finding that there had been a failure to multiply the variable Unit Price mentioned in Table C with the constant figure of 100 and that the bid

documents had not been filed in proper format, the bid of Grant Thornton was disqualified.

- d) It is stated by Grant Thornton that the Detailed Financial Bid had been submitted in accordance with Annexure-13 of the RFP which remained unchanged despite Corrigendum-XII dated 20.05.2021 being issued that had led to the overhauling of the entire tender document. It is stated that the financial formats available on the website continued to display only the unrevised Annexure-13 of the Detailed Financial Bid.
- e) It is stated that on opening of the Detailed Financial Bid of Grant Thornton, a letter dated 27.09.2021 was immediately issued by Grant Thornton to NICS I stating that though an arithmetical error had been committed, the unit rate's weightage in the calculation of the Gross Total Value (GTV) was only 1%, and therefore, the difference in the GTV quoted and the GTV that should have been ideally arrived at was minor and would not impact the L1 position of Grant Thornton. The letter referred to Clause 9.2 (1) of the revised tender document which states as follows:

"9.2 FINANCIAL EVALUATION

a. On a designated day and time, the Abridged Financial Bids (Annexure-12: Abridged Financial Bid) of only those Bidders who satisfy all conditions of the eligibility criteria and have passed the Technical Evaluation Stage will be opened electronically in the presence of the representatives of the technically qualified bidding companies.

b. The lowest quoting vendor (L1) in each category will be the bidder with the lowest Gross Total Value (GTV) among all the quoted eligible GTV in the Abridged Financial Bids (Annexure-12: Abridged Financial Bid).

c. The detailed financial bid Annexure-13: Detailed Financial Bid of only the L1 bidder for each category shall be opened and will be evaluated by a duly constituted Finance Evaluation Committee (FEC).

d. The bidder with the Second Lowest GTV among the Abridged Financial Bids will be the L2 bidder and will then be asked to match the item-wise price of L1, category wise in order to be placed on the panel (within a time-frame prescribed by NICS). If L2 does not agree, L3, L4 & so on ... will be asked to match the item-wise price of L-1. Thus, by way of successive opportunity a panel of vendors as per defined category wise will be formed.

e. If none of L2, L3, L4 agree to match the L1 rates then L1 shall be the sole vendor on the panel. The decision of NICS arrived at, as per above will be final for empanelment and no representation of any kind shall be entertained.

f. If NICS considers necessary, revised Financial Bids could be called from the eligible Bidders, before opening the original financial bids for recommending final empanelment.

g. In the event of revised financial bids being called the revised bids should not be higher than the original bids, otherwise the bid shall be rejected. There will be no negotiation regarding the financial/commercial bid.

h. Quoting '0' (Zero) value of an item with a view to subverting the tender process shall be rejected straight

away and execution of Bid Securing Declaration of such bidders.

i. If there is a mismatch between values quoted in figures and words, the value quoted in words shall prevail.

j. A Financial Evaluation Committee (FEC) would scrutinize the commercial bids. Bids found lacking in strict compliance to the commercial bid format shall be rejected straightaway.

k. If there is only one bid, NICS I reserves the right to process the single bid or take recourse to the process of re-tendering.

l. Arithmetical error will be rectified on the following basis. If there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price with quantity/ weightage, the unit price shall prevail, and the total price shall be corrected. If the bidder does not accept the correction of the errors, its bid will be rejected and Bid Securing Declaration will be executed. If there is a discrepancy between words and figures, the amount in words will prevail.

m. NICS I reserves the right to use this tender to service its clients'/NIC/NICS I needs.

n. The rates quoted should be as per industry standards for the prescribed experience. The bids in which the bidder quote NIL charges/ considerations, such bid will be treated as unresponsive and will not be considered.

o. Bids would be disqualified of those bidders whose Financial Bid's Gross Total Value (GTV) have a deviation of more than or less than 40% (Forty Percent) from the Average of GTV of all the technically qualified bidders."

- f) The letter dated 27.09.2021 conveyed the acceptance of Grant Thornton for rectification of the GTV, and agreed for the GTV to be recalculated while expressing the awareness that it would result in a minor deviation from the quoted GTV.
- g) In continuation of the letter dated 27.09.2021, another letter dated 04.10.2021 was issued by Grant Thornton to NICSI providing a point of reference to indicate that arithmetical errors were rectifiable. Further, the letter requested for the detailed financial bids for all bidders that were technically qualified and accepted for Financial Opening to be made available on the e-procurement portal. Another letter dated 07.10.2021 was also issued to NICSI stating that there was no “material deviation”, and the error was only the result of the multiplier being missing from the format in the original tender document.
- h) On 08.10.2021, the impugned Communication rejecting the bid of Grant Thornton was issued. The bid was rejected with the following observations:

2. This is to inform you that the Financial Evaluation Committee has rejected your bid with the following observations:-

(i) M/s. Grant Thornton Bharat LLP has not provided the Detailed Financial Bid as per the format specified in Revised Tender Document in which the multiplication factor of 100 is mentioned in the Table 3: **Subject Matter Expert**. Hence, Committee found that M/s Grant Thornton Bharat LLP has not quoted the value as per the specified format.

(ii) As per the Clause 8.2 (xi) of the tender which states:

"Ambiguous/Incomplete/Illegible bids may be outrightly rejected. Not quoted bids shall be considered as non-responsive and shall be rejected."

(iii) And as per the Clause 9.2(j) of the tender which states:

"A Financial Evaluation Committee (FEC) would scrutinize the commercial bids. Bids found lacking in strict compliance to the commercial bid format shall be rejected straightaway."

3. In view of the mentioned Clauses in Point 2 (ii) & (iii) above, the Committee has therefore not considered the bid of M/s. Grant Thornton Bharat LLP and rejected from evaluation.

- i) Emphasising that the arithmetical error was in accordance with the financial bid format as uploaded on the website and that there was recourse as per the tender document for rectification of error, Grant Thornton issued another letter dated 22.10.2021 seeking re-evaluation of the financial bid by an independent Financial Evaluation Committee afresh.
- j) In the meanwhile, PwC, i.e. Petitioner in W.P.(C) 14924/2021, as a result of the disqualification of Grant Thornton as per the impugned Communication dated 08.10.2021, it has been stated that the categorization of the bidders stood re-characterized with Deloitte being shortlisted as L-1 and PwC as L-4. It is stated that post the disqualification, as per the terms and conditions of the tender document, all the empanelled vendors were required to match the rates submitted by the L-1 bidder, i.e. Deloitte.
- k) Accordingly, a letter dated 29.10.2021 was sent by NICS I to PwC requesting its acceptance of L-1 rates latest by 02.12.2021 till 03:00 PM. PwC requested for an extension in the submission of the acceptance on 03.11.2021 which was done first on 03.11.2021 itself and then on 12.11.2021. Thereafter, on 19.11.2021, PwC wrote to NICS I stating that considering the current market standards, the man-month rates discovered as part of the Financial Evaluation process were extremely low, and in fact, lower than the existing man-month rates as per the current NICS I empanelled rates.
- l) It is stated that in light of the final deadline dated 02.12.2021, PwC communicated its acceptance to match the L-1 rates of Deloitte. It is stated that despite the acceptance, no empanelment

letter was issued by NICS I to PwC. Consequently, on 14.12.2021, a letter was issued by PwC to NICS I bringing their attention to the fact that the empanelment letter from NICS I had not been issued. However, no response to the same was received.

- m) Aggrieved by the aforementioned events, Grant Thornton has filed W.P.(C) 13404/2021 seeking setting aside of its disqualification and re-calculation of its financial bid after taking into consideration the arithmetical error, and PwC has filed W.P.(C) 14924/2021 seeking empanelment pursuant to the letter dated 02.12.2021 issued by PwC accepting the financial quote of the L-1 bidder.

5. Mr. Parag P. Tripathi, learned Senior Counsel appearing on behalf of Grant Thornton, submits that the actions of NICS I in disqualifying/rejecting its Detailed Financial Bid are illegal and arbitrary. He states that Clause 9.2(1) of the tender document explicitly states that arithmetic errors of this nature can be rectified, subject to the bidder accepting the correction of its errors. He further brings to the notice of the Court the fact that two formats of Annexure-13 of the Detailed Financial Bid are available on the portal, with the unrevised Annexure-13 not providing for multiplication of the Unit Price in "C" by 100, and thus, the submission of the Financial Bid in either of the formats ought to have been accepted.

6. The learned Senior Counsel contends that even assuming that there is a mistake in the mode of calculation of the GTV value, the Petitioner would still be the lowest bidder.

7. The learned Senior Counsel submits that the reluctance on the part of NICS I in opening and uploading the Detailed Financial Bid of other bidders demonstrates *mala fide* and favouritism on the part of the bidders. He further

notes that rectification of the arithmetical error on the part of Grant Thornton would have still ensured Grant Thornton being the L-1 bidder and its disqualification is against public interest.

8. Mr. Tripathi relies upon Poddar Steel Corporation v. Ganesh Engineering Works and Ors., (1991) 3 SCC 273, Jal Mahal Resorts Private Limited v. K.P. Sharma and Ors., (2014) 8 SCC 804, Ramunia Fabricators SdnBhd and Ors. v. Oil and Natural Gas Corpn. Ltd. and Ors., 2008 SCC OnLine Del 483, and Everest Instruments Pvt. Ltd. v. Tamil Nadu Cooperative Milk Producers Federation Ltd. and Anr., 2021 SCC OnLine Mad 5206, to submit that if certain conditions of eligibility are not essential then it must be open to the authority to deviate from the same and not insist upon the strict literal compliance of the condition in appropriate cases. Accordingly, he submits that, in consonance with Clause 9.2(l) of the bid document and the judgements hereinabove, the arithmetical error on the part of Grant Thornton was rectifiable and, therefore, the Financial Bid of Grant Thornton should not have been disqualified. It was further contended that the present tender was not for award of any work but only a panel was being created and, therefore, it would not matter even if 5 entities were empanelled. It is stated by Mr. Tripathi that declaring the Petitioner herein as L-1 will only save the exchequer of substantial amount of money because the Petitioner's bid is lower than Deloitte Touche Tohmatsu India LLP which has been considered as L-1. Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing for PwC, expresses his agreement with the contention of Mr. Tripathi, and states that he has instructions that PwC is agreeable to this proposal and he has no objection if Grant Thornton is declared as L1.

9. Since, the result of W.P. (C) 13405/2021 will have a direct bearing on W.P. (C) 14924/2021 inasmuch as W.P. (C) 14924/2021 would have to be

considered only if the Court is inclined to allow the W.P. (C) 13405/2021, Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing for PwC, requested that W.P.(C) 14924/2021 may be heard after W.P. (C) 13405/2021 is decided.

10. Mr. Kaul submits that despite PwC having accepted the L-1 rates, no Proforma Invoices confirming the empanelment of the PwC have been issued to it, and that this is leading to various opportunities being taken away or not circulated to it. He states that the same is in violation of settled law in Reliance Energy Limited v. Maharashtra State Road Development Corpn. Ltd., (2007) 8 SCC 1, which stipulates that “legal certainty” is a pertinent aspect of rule of law and any deviation from the same violates the doctrine of “level-playing field”. He states that no reasons have been provided to exclude PwC from being empanelled.

11. *Per contra*, Mr. Vikram Jetley, learned CGSC appearing for NICS, submits that submissions of Grant Thornton are indicative of ulterior motives and that they are replete with falsities. He states that Grant Thornton scored the lowest marks in the Technical Evaluation report that was submitted by the Technical Evaluation Committee. Further, Grant Thornton had submitted its bids on dates other than the ones mentioned. Mr. Jetley further submits that once a document is uploaded on the website, it cannot be taken down, and that Corrigendum XII dated 20.05.2021 explicitly superseded the previously published documents. He states that Grant Thornton cannot now take advantage of its own wrongdoing and negligence by placing the blame on NICS. He further brings attention to the Minutes of the Meeting of the Financial Evaluation Committee for the tender in question which showcases that Grant Thornton scored the lowest technical score, which is 94 out of a 100, while the other four qualified bidders scored a 100.

12. The learned CGSC submits that being an L-1 bidder does not entitle the bidder in question in getting the empanelment and that there is a certain evaluation process that is mentioned in Annexure-20 of the tender document to which one must adhere. He states that the letter dated 08.10.2021 enumerates the reasons for the rejection of Grant Thornton's bid which is that Grant Thornton has not provided the Detailed Financial Bid as per the format of the revised tender document. He submits that as per Clause 8.2 (xi) which states that ambiguous/incomplete/illegible bids may be outrightly rejected, and Clause 9.2 (j), which notes that bids found lacking in strict compliance to the commercial bid format shall be rejected straightaway, the Detailed Financial Bid of Grant Thornton was liable to be disqualified as the arithmetical error was crucial in nature.

13. The learned CGSC further submits that the bids have not been submitted in the format. He draws the attention of this Court on as to how the financial bids were to be filled. He places reliance on Annexure 13 of the Tender Document which is reproduced as under:

ANNEXURE-13: DETAILED FINANCIAL BID

DETAILED FINANCIAL BID

Name of the Agency: _____

Category: Tier-...<mention Tier category>.....

Table 1: Management/Functional Profile for Tier-...<mention Tier category>..

Sl. No	Management/Functional Profile Resources with Experience	Man-Month Rate of the agency (without tax) (R)	Multiplication Factor (f)	Total (R*f)
	1	2	3	4=2x3
1	Consultant (15 years & above)		4	
2	Consultant (10 years and < 15 years)		16	
3	Consultant (6 years and < 10 years)		41	
4	Consultant (3 years and < 6 years)		34	
5	Consultant (< 3 years)		5	
A = Sum of Column (4) of Rows Sl. No. 1 to 5				A

Table 2: Technology Profile for Tier-...<mention Tier category>..

S.No	Technology Profile Resources with Experience	Man-Month Rate of the agency (without tax) (R)	Multiplication Factor (f)	Total (R*f)
1	2	3	4=2x3	
1	Consultant (15 years & above)		2	
2	Consultant (10 years and < 15 years)		18	
3	Consultant (6 years and < 10 years)		36	
4	Consultant (3 years and < 6 years)		35	
5	Consultant (< 3 years)		9	
B = Sum of Column (4) of Rows SL. No. 1 to 5				B

TABLE 3: SUBJECT MATTER EXPERT FOR TIER-...<mention Tier category>..

S.NO	Subject Matter Expert Resources with Experience	Man-Month rate of the agency (without tax) (R)	Multiplication Factor (f)	Total (R*f)
1	2	3	4=2x3	
1	Subject Matter Expert (10+ yrs.)		100	
C = Value at SL. No. 1 of Column 4				C

As calculated above, the calculation for GTV is:

$$\text{GROSS TOTAL VALUE (X)} = 0.61 \cdot A + 0.38 \cdot B + 0.01 \cdot C$$

Grand Total Value (X) in figure= Rs. _____

Grand Total Value(X) in Words = Rupees.....

Authorized Signatory

Name

Date:

Place

Company Seal

He then draws the attention of this Court to what has actually been filed by the Petitioner and states that table 3 is not in the requisite format.

14. With regard to PwC, Mr. Jetley submits that seeking consent for matching of L-1 bidder rates does not entail acceptance of the consent and issuance of an empanelment letter. He states that the letter of acceptance on the part of PwC was dated 02.11.2021 and was received via email on 02.12.2021, and that there is no reason for a post-dated mail to be sent.

15. Heard Mr. Parag P. Tripathi, learned Senior Counsel appearing for Grant Thornton, Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing for PwC, Mr. Vikram Jetley, learned CGSC, and perused the material on record.

16. The undisputed facts of the case reveal that in response to the tenders issued by the Respondent No.1 herein, there were five bidders. As per the original bid received from the Petitioner, the GTV was Rs.2,61,83,814.40 and in the corrected bid, the GTV quoted by the Petitioner was Rs.2,64,61,014.40. The bids of the other bidders are as follows:

2.	<i>Deloitte Touche Tohmatsu India LLP</i>	2,64,97,850
3.	<i>KPMG Assurance and Consulting Services</i>	3,11,90,305
4.	<i>Ernst and Young LLP</i>	3,14,70,282
5.	<i>Price water House Coopers</i>	3,22,05,770

17. At the outset, it becomes imperative for this Court to note that essential clauses of a tender should be enforced strictly and no deviation is permissible under the law. The Supreme Court in Poddar Steel Corporation v. Ganesh Engineering Works and Ors. (supra) observed that requirements in a tender notice can be classified into two categories – those which lay down the essential conditions of eligibility and those which are merely ancillary or

subsidiary with the main object to be achieved by the condition. The relevant paragraph stating the same has been reproduced as under:

“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the

question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.”

18. The Supreme Court in Poddar Steel Corporation v. Ganesh Engineering Works and Ors. (supra) had relied upon G.J. Fernandez v. State of Karnataka and Ors., (1990) 2 SCC 488, to observe that if the party issuing the tender is punctiliously and rigidly enforcing conditions and stipulations in a tender document, and the bidder does not strictly comply with the requirements, then it is open to the party issuing the tender to decline consideration of a part for the contract. The paragraphs of the said Judgement observing the same have been reproduced as follows:

“13. Interesting as this argument is, we do not see much force in it. In the first place, although, as we have explained above, para V cannot but be read with para I and that the supply of some of the documents referred to in para V is indispensable to assess whether the applicant fulfils the pre-qualifying requirements set out in para I, it will be too extreme to hold that the omission to supply every small detail referred to in para V would affect the eligibility under para I and disqualify the tenderer. The question how far the delayed supply, or omission to supply, any one or more of the details referred to therein will affect any of the pre-qualifying conditions is a matter which it is for the KPC to assess. We have seen that the documents having a direct bearing on para I viz. regarding output of concrete and brick work had been supplied in time. The delay was only in supplying the details regarding “hollow cement blocks” and to what extent this lacuna affected the conditions in para I was for the KPC to

assess. The minutes relied upon show that, after getting a clarification from the General Manager (Technical), the conclusion was reached that “the use of cement hollow block masonry may not be required at all and instead the brick masonry may be used”. In other words, the contract was unlikely to need any work in hollow cement blocks and so the document in question was considered to be of no importance in judging the pre-qualifying requirements. There is nothing wrong with this, particularly as this document was eventually supplied.

14. Secondly, whatever may be the interpretation that a court may place on the NIT, the way in which the tender documents issued by it has been understood and implemented by the KPC is explained in its “note”, which sets out the general procedure which the KPC was following in regard to NITs issued by it from time to time. Para 2.00 of the “note” makes it clear that the KPC took the view that para I alone incorporated the “minimum pre-qualifying/eligibility conditions” and the data called for under para V was in the nature “general requirements”. It further clarifies that while tenders will be issued only to those who comply with the pre-qualifying conditions, any deficiency in the general requirements will not disqualify the applicant from receiving tender documents and that data regarding these requirements could be supplied later. Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed the applications for contracts all along. The minutes show that they did not deviate or want to deviate from this established procedure in regard to this contract, but, on the contrary, decided to adhere to it even in regard to this contract. They only decided, in view of the contentions raised by the appellant that para V should also be treated as part of the pre-qualifying conditions, that they would make it specific and clear in their future NITs that only the fulfilment of pre-qualifying conditions would be mandatory. If a

party has been consistently and bona fide interpreting the standards prescribed by it in a particular manner, we do not think this Court should interfere though it may be inclined to read or construe the conditions differently. We are, therefore, of opinion that the High Court was right in declining to interfere.

15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it

thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Shri Vaidyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to court with any such grievance. The question, then, is whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana case [(1990) 2 SCC 486] will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis-a-vis MCC are, however, a matter for the KPC (counselled by the TCE) to decide and not for the

courts. We were, therefore, rightly not called upon to go into this question.” (emphasis supplied)

19. In Jal Mahal Resorts Private Limited v. K.P. Sharma and Ors. (supra), it had been held by the Supreme Court that *minor technical irregularity* and deviation from *non-essential* or ancillary/subsidiary requirements could be waived. However, emphasis was laid on how the term being waived had to be non-essential in nature and the waiver had to be done for *bona fide* reasons and in public interest.

“114. In support of the submission, the learned counsel for the appellant has cited several authorities of this Court inter alia being B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] and the relevant portion at p. 571, paras 66(v) and (vii) states as follows : (SCC p. 572)

“66. (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”

115. Similarly reliance was also placed on Poddar Steel Corpn. v. Ganesh Engg. Works [(1991) 3 SCC 273] by the appellant, wherein this Court held that : (SCC p. 276, para 6)

“6. ... As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, it is not entitled to waive even a technical irregularity of little or no significance.”

Thus, it was held that minor technical irregularity and deviation from non-essential or ancillary/subsidiary requirement can be waived and the Government would be justified in waiving technical compliance with a tender condition.

116. The thrust of the aforesaid case law cited is to reinforce the submission that when there is substantial compliance with the terms of tender, the Government is entitled to waive any non-essential term in the tender for the bona fide reasons and in public interest. In any case, since the Project in terms of RFP had to be executed through an SPV and the appellant being such an SPV, then the vehement insistence by the respondent that the lead member must be a company is not a violation of a substantial condition of the tender. In conclusion, therefore, it had to be held that there were no mala fides in the decision-making process and the finding given by the High Court is perverse and cannot be sustained and deserves to be set aside.”

20. The principles pertaining to essentiality of conditions of a tender document and the power of deviation from the same have been summarised by the Supreme Court in B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd. and Ors., (2006) 11 SCC 548. If there are essential conditions, the same must be adhered to, and if there is no power of general relaxation, the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully. The Supreme Court in the said Judgement held as follows:

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”

21. What constitutes as an essential term and condition in a tender document is dependent upon the author of the said document. It is well settled that the interpretation of a tender document can only be done by the author of the said document and that Courts are obligated to defer to author's rendition of the same. This has been expounded time and again by the Supreme Court in a catena of judgements, such as Agmatel India Private Limited v. Resoursys Telecom and Ors., (2022) 5 SCC 362, wherein the Supreme Court had observed that author of the tender document is taken to be the best person to understand and appreciate its requirements. The relevant paragraph of the said Judgement has been reproduced as follows:

“20.4. With reference to the decision of this Court in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , the learned Solicitor General has argued that author of the tender document is the best person to understand and appreciate its requirements; and that the courts must defer to such understanding and appreciation of tender documents by the tender inviting authority, unless there be any allegation of mala fide or perversity. The learned Solicitor General has particularly referred to the enunciation by this Court that even if an interpretation to the tender document by the author of the tender is not acceptable to the constitutional court,

that, by itself, would not be a reason for interfering with the interpretation given.

20.5. It has further been contended that the threshold of mala fide intention to favour someone or arbitrariness or irrationality or perversity must be met before the Court would interfere with the decision-making process or the decision itself. Even in the case of ambiguity or doubt, the Court would be refraining from giving its own interpretation unless the interpretation given by the administrative authority is shown to be perverse or mala fide or intended to favour someone. The learned Solicitor General has contended that there being no finding about any mala fide or perversity or bias, the High Court has erred in interfering in the present tender process. It has been argued that even if the interpretation of tender document by the appellant was not found acceptable by the High Court, that, by itself, was not a sufficient reason for interference. It has also been submitted that the interpretation of the appellant NVS is based on the pre-dominant purpose of the goods sought to be procured and no arbitrariness or irrationality could be imputed therein.”

22. The Supreme Court, in Agmatel India Private Limited (supra), had relied upon Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Anr., (2016) 16 SCC 818 wherein it was observed that constitutional courts must defer to the understanding and appreciation of the author 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. The paragraph of the said Judgement iterating the same is as under:

“14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of

India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

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. In Silippi Constructions Contractors v. Union of India, **2019 SCC OnLine SC 1133**, the Supreme Court, while discussing the aspect of judicial intervention in matters of contract involving state instrumentalities had held that the authority which floats the contract or tender, and has authored the tender documents is the best judge regarding interpretation of the same. Any interference by the Court has to be for the purposes of preventing arbitrariness, irrationality, bias, *mala fides* or perversity. In paragraph 20 of the said Judgement, the Supreme Court observed as follows:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract

involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

24. The foregoing judicial pronouncements demonstrate that the interpretation of the clauses of a tender document are best comprehended and interpreted by the author of the tender document itself. If there are two possible interpretations of a clause of the tender document, then the Courts must defer to the interpretation accorded by the author and refrain from substituting the same with its own understanding. It is only when the circumstances reveal that a certain clause of the tender document explicitly violates the mandate of Article 14 of the Constitution of India can the Courts step in to interfere in such contractual matters.

25. The actual detailed bid submitted by Grant Thornton is as follows:

Annexure 2

No. 10[08]/2020-NICSI

ANNEXURE 13 - DETAILED FINANCIAL BID

Name of the Agency: Grant Thornton Bharat LLP

Category: Tier (mention Tier category): Tier I

Table 1: Management/Functional Profile for Tier I

S.no.	Management/Functional Profile Resources with Experience	Man-Month Rate of the agency (without tax) (R)	Multiplication factor (f)	Total (R*f)
1.	Consultants (15 yrs & above)	349920	4	1399680
2.	Consultants (10 yrs and < 15 Yrs)	301320	15	4519800
3.	Consultants (6 yrs and < 10 Yrs)	272160	41	11158560
4.	Consultants (3 yrs and < 6 Yrs)	243000	34	8262000
5.	Consultants (< 3 Yrs)	194400	5	972000
A = Sum of Column (4) of Rows Sl. No. 1 to 6				25613960

Table 2: Technology Profile for Tier I

S.no.	Technology Profile Resources with Experience	Man-Month Rate of the agency (without tax) (R)	Multiplication factor (f)	Total (R*f)
1.	Consultants (15 yrs & above)	349920	2	699840
2.	Consultants (10 yrs and < 15 Yrs)	301320	18	5423760
3.	Consultants (6 yrs and < 10 Yrs)	272160	36	9797760
4.	Consultants (3 yrs and < 6 Yrs)	243000	35	8505000
5.	Consultants (< 3 Yrs)	194400	9	1749600
B = Sum of Column (4) of Rows Sl. No. 1 to 6				26175960

Table 3: Subject Matter Expert for Tier I

Sr. No.	Subject Matter Expert Resources with Experience	Man-Month rate of the agency (without tax) ⁸
1	Subject Matter Expert (10+ yrs.)	280000
	C = Sl. No. 1 of Row no. 2	

As calculated above, the calculation of GTV is:

$$\text{GROSS TOTAL VALUE (X)} = 0.61 * A + 0.38 * B + 0.01 * C$$

Grand Total Value (X) in figure= Rs. 26183814.4

Grand Total Value(X) in Words = Rupees. Two Crore Sixty-One lakh Eighty Three Thousand Eight Hundred and Fourteen and Four Paise Only.



Authorized Signatory Name:

Mr. T. Ravinder Reddy,
Partner,
Government Consulting,
Grant Thornton Bharat LLP

Date: 25/08/2021

Place: New Delhi



26. In the instant case, the Detailed Financial Bid that was to be submitted by the bidders who had scored the requisite technical score awarded after scrutiny by the Technical Evaluation Committee was to be done in

accordance with Annexure-13 of Corrigendum-XII dated 20.05.2021 which revised the tender document in question. As per Table 3 of Annexure-13, which pertained to the Subject Matter Expert for Tier-1 or 2, the Unit Value at Sl.No.1 of Column 1 was to be multiplied by a multiplication factor of 100 before arriving at the total (C). Accordingly, the values (A, B and C) in Table 1, 2 and 3 were required to be calculated by way of an equation $(0.61*A + 0.38*B + 0.01*C)$ to arrive at the Gross Total Value (X). Further, Table 3 is also not in the format prescribed in Annexure - 13.

27. A perusal of the Detailed Financial Bid of Grant Thornton reveals that the company failed in multiplying the Unit Value at Sl.No.1 of Column 1 with 100 before arriving at the total (C), and this led to a discrepancy in the GTV. On account of this arithmetical error, the Detailed Financial Bid of Grant Thornton was disqualified by way of the letter dated 08.10.2021 for not having quoted the value as per the specified format. It has been submitted by learned Senior Counsel appearing for Grant Thornton that the arithmetical error is rectifiable, as stipulated in Clause 9.2 (l) of the tender document, and the error was caused due to the placement of both the formats for submission of the bid. Neither of the contentions advanced by the learned Senior Counsel hold any water.

28. Clause 9.2 (l) of the revised tender document, as reproduced above, categorically notes that if faced with discrepancy between the unit price and the total price, the unit price must prevail and the total price shall be corrected. It does not envisage a system where there is a grave error in omitting the multiplying factor itself and the same is rectified. Omission of the multiplying factor of 100 has a consequential bearing on the GTV, and it cannot be said that the arithmetical error is minute. Further, it is pertinent to note at this juncture that NICS I reserves the right to accept any bid under

Clause 9 (i) of the tender document and mere acceptance of Grant Thornton's technical bid does not entitle it to getting empanelled.

29. In fact, Clauses 8.2 (x), 8.2 (xi) and 9.2 (j) of the tender document have been reproduced as under for ease of comprehension:

“8.2 GENERAL INSTRUCTIONS FOR BID SUBMISSION

.....

x. Bids not submitted as per the specified format and nomenclature may be rejected.

xi. Ambiguous/Incomplete/Illegible bids may be out rightly rejected. Not quoted bids shall be consider as non-responsive and shall be rejected.

9.2 FINANCIAL EVALUATION

j. A Financial Evaluation Committee (FEC) would scrutinize the commercial bids. Bids found lacking in strict compliance to the commercial bid format shall be rejected straightaway.”

30. Thus, Clauses 8.2 (x) and 8.2 (xi) state that bids that have not been submitted as per the prescribed format or are incomplete, may be rejected, and Clause 9.2 (j) notes that bids that are lacking in strict compliance to the commercial bid format shall be rejected straightaway. These Clauses have been noted in the impugned Communication dated 08.10.2021 and Grant Thornton has been conveyed the reasoning for its disqualification. Further, it cannot be said that the financial bid format as duly prescribed in Annexure-13 is not an essential condition that can be waived or rectified at a later juncture. Due to the omission in multiplying the unit value with the multiplying factor of 100, Grant Thornton had been denoted the L-1 bidder.

This Court is of the opinion that on account of Grant Thornton being declared as the L-1 bidder, it cannot be said that the omission was of such nature that it was unessential or ancillary.

31. Having arrived at the conclusion that Grant Thornton had failed to follow an essential condition that had been prescribed in the tender document, this Court deems it fit to delve into whether this Court can exercise its power of judicial review in the instant matter. The inherent limitations in the exercise of power of judicial review of contractual matters have been delineated by the Supreme Court consistently in various judgements. It has been observed that Courts may only interfere in an administrative decision if, and only if, the same is arbitrary, irrational, unreasonable, *mala fide* or biased. In the absence of these situations, the Courts must not countenance interference with the decision merely at the behest of an unsuccessful bidder.

32. The aforementioned observation was made by the Supreme Court in the case of Tata Cellular v. Union of India, (1994) 6 SCC 651, wherein it was categorically noted that *the Government is the guardian of the finances of the State; it is expected to protect the financial interest of the State and, therefore, the right to refuse the lowest or any other tender is available to the Government*. The relevant portion of the said Judgement has been reproduced as under:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is

expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. In Chief Constable of the North Wales Police v. Evans [(1982) 3 All ER 141, 154] Lord Brightman said:

“Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the

guise of preventing the abuse of power, be itself guilty of usurping power.”

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

“This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160).”

In R. v. Panel on Take-overs and Mergers, ex p Datafin plc [(1987) 1 All ER 564] , Sir John Donaldson, M.R. commented:

“An application for judicial review is not an appeal.”

In Lonrho plc v. Secretary of State for Trade and Industry [(1989) 2 All ER 609] , Lord Keith said:

“Judicial review is a protection and not a weapon.”

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In Amin, Re [Amin

*v. Entry Clearance Officer, (1983) 2 All ER 864] ,
Lord Fraser observed that:*

“Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.””

33. In Central Coalfields Limited and Anr. v. SLL-SML (Joint Venture Consortium) and Ors., (2016) 8 SCC 622, the Supreme Court observed that a contract is a commercial transaction, and evaluating tenders and awarding contracts are essential commercial functions. In view of this, the power of judicial review should not be permitted to be invoked to protect private interests at the cost of public interest, or to decide contractual disputes. The Supreme Court in the matter therein stated as under:

“43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially

review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651]) in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or

final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.”

This Court then laid down the questions that ought to be asked in such a situation. It was said: (Jagdish Mandal case [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , SCC p. 531, para 22)

“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;

or

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”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.”

34. Grant Thornton has submitted a flawed bid which is not in the format prescribed and there are calculation mistakes in the original bid submitted by them which had resulted in the rejection of the bid. As stated earlier, the Courts are very rigid in substituting their own conclusion to the one arrived at by the tender evaluating authority unless that decision is completely perverse and accentuated by mala fides. The present tender is one of creation

of panel. It cannot be said that Grant Thornton's bid is being rejected to favour a certain entity solely on the ground that no work has been awarded to Grant Thornton.

35. Flowing from the aforesaid Judgements, it is clear as day that the scope of interference by way of judicial review in tender matters is extremely limited, and can only be justified if done to rectify patent arbitrariness, unreasonableness, *mala fides*, or bias, in the administrative decision. In the absence of the same, the Court must stay its hands and should not interfere, even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. In the matter herein, the decision taken to disqualify Grant Thornton for having committed an arithmetical error is in accordance with the Clauses of the tender document as have been delineated above. It cannot be said that the decision of NICS I is tainted with patent arbitrariness, unreasonableness, *mala fides*, or bias, that would require the interference of this Court. This Court is of the opinion that NICS I's decision to disqualify Grant Thornton from the bidding process for lacking in strict compliance to the commercial bid format was appropriate and correct. This Court, therefore, keeping in mind the limited scope of judicial intervention in contractual matters, refrains itself from interfering in the same.

36. Having arrived at the conclusion that W.P.(C) 13405/2021 is liable to be dismissed, a perusal of the record in W.P.(C) 14924/2021 brings to the notice of this Court that there is strength in the submissions of the learned Senior Counsel for PwC that there is indeed no legal basis for having excluded PwC from the panel of agencies. On disqualification of Grant Thornton and with Deloitte having been denoted the L-1 bidder, by way of the letter dated 29.10.2021, NICS I had sought acceptance on the part of PwC to match the L-1 rates by 02.12.2021. Despite having consented to

acceptance of the L-1 rates by 02.12.2021, PwC was not issued a letter of empanelment.

37. No cogent reasoning has been provided by NICS I for having issued a letter of empanelment to the other three bidders and for not having issued the letter of empanelment to PwC. As has been deliberated upon hereinabove, this Court retains the right to interfere in contractual matters if the decision taken is arbitrary, irrational, unreasonable, *mala fide* or biased. This Court is of the opinion that in absence of proper reasoning having been provided by NICS I for not issuing a letter of empanelment to PwC despite the acceptance being conveyed by PwC, NICS I is obligated to issue a letter of empanelment to PwC

38. Accordingly, the W.P.(C) 13405/2021 is dismissed, along with the pending application(s), if any.

39. List W.P.(C) 14924/2021 on 02.12.2022.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

NOVEMBER 09, 2022
Rahul/RR