

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(C) No. 518 of 2024

Hosco Pvt. Ltd. (formerly Known as Hospital Supply Co. Pvt. Ltd.), having its office at 111, Chittaranjan Aavenue, P.O. & P.S. Kolkata, District Kolkata (West Bengal), PIN 700073, through its Authorized Signatory, Bhabotosh Das, S/o Late Sarat Chandra Das, R/o 7/63A, Netaji Nagar, P.O. & P.S. Netaji Nagar, District Kolkata (West Bengal), PIN 700092

... .. **Petitioner**

Versus

- 1.** Jharkhand Medical & Health Infrastructure Development & Procurement Corporation Ltd., through its Managing Director, having its office at MCH Building, RCH Campus, Namkum, P.O. & P.S. Namkum, District Ranchi (Jharkhand), PIN- 834010
- 2.** Cell Head (Procurement), Jharkhand Medical & Health Infrastructure Development & Procurement Corporation Ltd., having its office at MCH Building, RCH Campus, Namkum, P.O. & P.S. Namkum, District Ranchi (Jharkhand), PIN- 834010
- 3.** M/s. Kailash Surgical Pvt. Ltd., through its Director, having its Office at 1, G-1, Shree Gopal Complex, Court Road, P.O.- G.P.O., P.S. Kotwali, District Ranchi (Jharkhand) PIN- 834001

... .. **Respondents**

For the Petitioner

: M/s. Sumeet Gadodia, Shilpi Sandil Gadodia, Shruti Shekhar, Nillohit Choubey, Ritesh Kumar Gupta, Advocates

For the Resp. Nos. 1 & 2. : Mr. Piyush Chitresh, A.C to A.G.

For the Resp. No. 3

: Mr. M.S. Mittal, Sr. Advocate, Mr. Salona Mittal, Ms. Ishika Tulsyan, Mrs. Lavanya Gadodia Mittal, Advocates

P R E S E N T

HON'BLE MR. JUSTICE RONGON MUKHOPADHYAY

HON'BLE MR. JUSTICE DEEPAK ROSHAN

C.A.V. on 19/02/2024

Pronounced on 27 /02/2024

Per Rongon Mukhopadhyay, J.

Heard Mr. Sumeet Gadodia, learned counsel for the petitioner and Mr. Piyush Chitresh, learned A.C. to A.G. appearing for the respondent nos. 1 and 2 as well as Mr. M.S. Mittal, learned Senior Counsel appearing for the respondent no. 3.

2. In this writ application, the petitioner has prayed for the following reliefs:

- (i)** For issuance of an appropriate writ/order/direction, including Writ of Certiorari, for quashing/setting aside the decision of the Tender Committee as contained in Notice dated 30.01.2024 (Annexure-11) in respect of the tender dated 20.06.2023 for supply of PICU Equipments published by Respondent No. 1, to the extent Technical Bid of the Petitioner for supply of Defibrillators has been rejected in a most arbitrary and whimsical manner solely with an intent to favour Respondent No. 3 despite the fact that Respondent No. 3's Technical Bid for supply of Defibrillators was not as per technical specification as specified in the Tender issued by Respondent No. 1.
- (ii)** For issuance of further appropriate writ/order/direction for quashing/setting aside the decision of the Tender Committee as contained in Notice dated 30.01.2024 (Annexure-11) to the extent Respondent No. 3 has been declared as technically qualified for supply of Defibrillators pursuant to the Tender dated 20.06.2023 (Annexure-2) for Supply of PICU Equipments published by Respondent No. 1, especially because Respondent No. 3 had not submitted its Bid as per tender specification and the Zoll Defibrillator which Respondent No. 3 is intending to supply belonging to Defibrillator (Moder R-series Defibrillators) of Zoll Medical Corporation, U.S.A. is not having Re-usable CPR Feedback Sensor, which is one of the essential conditions of the tender specification.
- (iii)** For issuance of further appropriate writ/order/direction, including Writ of Mandamus, directing the Respondent-authorities to declare the Technical Bid of the Petitioner as Compliant of the tender conditions, and further directing Respondent No. 1 to consequentially award the work in question to Petitioner for supply of Defibrillators, if Petitioner's Bid is found to be Lowest being L-1 Bidder.
- (iv)** For issuance of an appropriate writ/order/direction to call for and quash Work Order, if any, issued in favour of Respondent No. 3 for supply of Defibrillators pursuant to the Tender dated 20.06.2023 (Annexure-2) for supply of PICU Equipments issued by Respondent No. 1.
- (v)** For issuance of any other appropriate writ(s)/order(s)/direction(s) as Your Lordships may deem fit and proper in the facts and circumstances of the case.

3. Briefly stated the facts reveal that the petitioner is a company incorporated under the Companies Act, 1956 while the respondent no. 1- Jharkhand Medical & Health Infrastructure Development & Procurement Corporation Ltd. is a Government of Jharkhand entity and is 100% financed by the State of Jharkhand. It has been stated that the respondent no. 1 had published a tender as contained in Bid Ref. No. JMC/NIT-23/PICU EQP/24 dated 20.06.2023 for supply of PICU Equipments. In the said tender several PICU Equipments were required to be supplied and Bidders were to submit their Bids in respect of each of the items to be supplied under the Tender Document. The present writ application pertains to supply of Defibrillators and in the Tender Document itself detailed specification was given with respect to supply of Defibrillators and it was provided therein apart from other technical specifications that the Defibrillators to be supplied should be having accessories, spare parts, consumables being '3 nos. of Reusable CPR feedback Sensor'. The petitioner being eligible to supply Defibrillators had submitted its Bid and the proposed Defibrillators which were to be supplied as per the Bid document was of model 'Mediana D700'. Apart from the petitioner the other participants in the supply of Defibrillators included (a) M/s. Sai Associate and (b) M/s. Kailash Surgical Pvt. Ltd. (Respondent No. 3). After the Bids were submitted by all the Bidders, the respondent no. 2 vide letter as contained in Ref. No. JMC/Proc-23/PICU-M&E/59/2293 dated 03.11.2023 invited the three Bidders for demonstration of their quoted products before the Expert Committee for verification of Technical Specifications. The petitioner during the demonstration exercise had demonstrated its product being 'Mediana Defibrillator D700' while the respondent no. 3 had demonstrated 'Zoll Defibrillator R-series'. The demonstration was completed on 17.11.2023 but since it was pointed out by the petitioner that the Defibrillators intended to be supplied by the respondent no. 3 was not as per the technical specification, the exercise of demonstration was again fixed on 01.12.2023. The petitioner by way of a protest had filed a representation before the respondent no. 1 on 01.12.2023 itself

bringing to its notice the failure on the part of the respondent no. 3 to meet the technical specification as indicated in the tender document. The exercise of demonstration was once again undertaken by the respondent no. 2 wherein the petitioner had demonstrated the capability of its Defibrillator which it intended to supply.

4. It is the case of the petitioner that despite the Defibrillators to be supplied by the petitioner of 'Mediana D700' make was a worldwide leader in Defibrillators but the technical Bid of the petitioner was rejected while that of the respondent no. 3 and the other Bidder namely M/s. Sai Associates were accepted. The petitioner had represented the authorities bringing to their notice the quality of the Defibrillators proposed to be supplied by it and that of the respondent no. 3 but the same was not acted upon and on or about 16.01.2024 the concerned respondents had declared the technical Bid of the petitioner as non-compliant. The petitioner was constrained to move this Court for redressal of his grievance by filing a writ application being W.P.(C) No. 260 of 2024 which was however withdrawn on 24.01.2024 on the submission of the counsel for the petitioner that the authorities concerned are re-evaluating the rejection of the technical Bid of the petitioner. However, the respondent-authorities had subsequently issued a notice dated 30.01.2024 containing therein the extracts of the decision of the Tender Committee, wherein the petitioner's Bid has been disqualified and the Technical Bid of the respondent no. 3 has been noted to be qualified. Being aggrieved with the rejection of the Technical Bid of the petitioner the present writ application has been preferred.

5. Mr. Sumeet Gadodia, learned counsel appearing for the petitioner has submitted that the Technical Bid of the petitioner with respect to supply of Defibrillators has been rejected though the petitioner had fulfilled all the requisite criteria and the supply of Defibrillators of make 'Mediana D700' as intended by the petitioner was as per the requirements and was technically better in all aspects to the Defibrillators which were intended to be supplied by the respondent no. 3. Mr. Gadodia has referred to the

Bidding document more specifically to the physical characteristics wherein the dimension of the Defibrillator has been shown to be not applicable (NA). The other physical characteristics of the said medical equipment which the petitioner intended to supply were present in the said equipment. Mr. Gadodia has taken us through the rejoinder application filed by the petitioner to the counter affidavit of respondent no. 3 wherein various service orders have been brought on record to demonstrate the fact that 'Mediana D700' Defibrillators have been installed by the petitioner in various prestigious Medical Institutions across the country including AIIMS Raiberali, AIIMS Deoghar, DHH Puri and at several other centres. So far as Zoll R-series is concerned, which has found favour with the respondent-corporation the same is an obsolete equipment and may be discontinued soon by the manufacturer. He has referred to a general communication of the company manufacturing Zoll R-series which reveals detection of a process flaw in the manufacture of a component used in the R-series with an advice for return of the devices for replacement of the suspected component. According to Mr. Gadodia, an exorbitant price has been quoted for the Defibrillators intended to be supplied by the respondent no. 3 and since 118 nos. of Defibrillators are to be supplied the total difference in the quoted price of Defibrillators by the petitioner and the respondent no. 3 would be to the tune of Rs. 14,20,56,466/-. The observation of the Demo Committee as brought on record in the counter affidavit filed by the State has been countered by Mr. Gadodia to the effect that the size of the sensor has not been mentioned in the Tender Document. Even otherwise the 'Mediana D700' Defibrillator can be used in a neonatal by pressing a thumb on the pad for resuscitation. The operating procedure of the 'Mediana D700' Defibrillator has also been demonstrated before us. The said device according to Mr. Sumeet Gadodia is an integrated device which is as per the specification chartered out in the Tender Document but in order to make the petitioner ineligible the integration of the devices sought to be supplied by the petitioner and the respondent no. 3 has been differentiated on account of presence of a cable which is connected

to the device externally. Mr. Gadodia in course of his submission has suggested that the Court may constitute a team of specialist doctors to look into the viability, reliability and user friendliness of the devices of both makes. It has been pointed out that the failure of the respondent no. 3 to demonstrate the Zoll R-series which it is to supply before the Court would clearly demonstrate its inferior quality vis-à-vis 'Mediana D700'. The entire exercise carried out by the Corporation according to Mr. Gadodia speaks of unreasonableness and arbitrariness which empowers the Court to set aside the decision of the Tender Committee.

6. Mr. M.S. Mittal, learned Senior Counsel appearing for the respondent no. 3 has submitted that the petitioner has suppressed material facts by not bringing on record the corrigendum which was issued on 18.08.2023 and which specifies that chest compression rate and depth feedback facility should be integrated with the Defibrillators and the requirement of integrated component was missing in the Tender Clause Description. The Defibrillators sought to be supplied by the petitioner suffers from inherent disqualification when viewed in the backdrop of the corrigendum dated 18.08.2023 specifying the necessity of an integrated component as such Defibrillators has to be connected with a cable which is de hors the requirement. It has been submitted that the Zoll R-series has been supplied by the respondent no. 3 to various medical institutions of repute including CMC Vellore and NIMHANS Bangalore. According to Mr. Mittal the Zoll R-series has a captivating presence in the field in which it operates and the communication of Zoll Medical Corporation referred to by the learned counsel for the petitioner is of the year 2009 which also demonstrates a process flaw in the manufacture of a component which has been sought to be replaced by the manufacturing company and such communication cannot lead to formation of an opinion that the Defibrillator of Zoll R-series is flawed. Mr. Mittal has relied upon the observation of the Expert Committee which had disqualified the petitioner on technical ground as in 'Mediana D700' Defibrillators the chest sensor was CPR which is too big for a neonatal CPR and the

integration of the device is not at the level of interface as well as in the monitor. It has been submitted that the Defibrillators to be supplied by the respondent no. 3 are much superior in quality to that of the Defibrillator demonstrated by the petitioner and can be used on neonatal and paediatric patients and is equipped with the latest technology thus having a higher price than that of Mediana D700 Defibrillator. In fact, the respondent no. 3 supplies the same device to various medical institutions in the country at a price which is similar to the one quoted in the present Tender. The model Zoll R-series Defibrillators is not a decrepit device but has undergone constant upgradation and is technically suited for neonatal and paediatric patients. Since the evaluation has been made by a committee consisting of experts such evaluation cannot be truncated or replaced by an opinion of the Court. The decision-making process does not suffer from any flaws and according to Mr. Mittal the Court would be averse to interfere in the decision-making process itself. He therefore, on the basis of his submissions has prayed for dismissal of the writ application.

7. Mr. Piyush Chitresh, learned A.C. to A.G. appearing for the respondent nos. 1 and 2 has submitted that the petitioner has deliberately not brought on record the corrigendum dated 18.08.2023. He has also referred to the observation of the Expert Body and has submitted that such observation cannot be tinkered with as it is based on sound knowledge as well as keeping in mind the specifications required as per the Tender Document. Mr. Chitresh has also adopted the argument advanced by Mr. Mittal, learned Senior Counsel appearing on behalf of the respondent no. 3.

8. Mr. Sumeet Gadodia, learned counsel for the petitioner in reply has submitted that the counter affidavit filed by the State does not contain any averment with respect to the corrigendum dated 18.08.2023. It has been submitted that 'Mediana D700' Defibrillator is hundred per cent compliant of the Tender specifications. The Defibrillators to be supplied by the petitioner is also an integrated device and only on account of an

external cable attached to the device the same would not catapult the device into a non-specification category.

9. The tender for supply of PICU machines dated 20.06.2023 at Annexure-X has the list of equipments to be supplied and Serial No. 5 is with respect to the supply of Defibrillators. The corrigendum was issued being Corrigendum No. 06 dated 18.08.2023 in which certain rectifications with respect to the specification of the Defibrillators to be supplied were made. As per Tender Clause Description the following were the initial specifications; *“the machine should have facility for ECG monitoring, defibrillation, transcutaneous pacing, defibrillation and synchronized cardioversion with CPR feedback to measure chest compression rate and depth in real time and visual on-screen feedback.”*

10. The modified specification as suggested by the Bidders were accepted and the Defibrillators which is to be supplied must have the following specifications; *“Defibrillators is the most critical life saving equipment in medical facilities. The most important clinical part is that when the user does the CPR to the patient it is of utmost important to measure the real time compression rate and depth and it should be visualized on the screen. Chest compression rate and depth feedback facility must be integrated with Defibrillator and it should work on paediatric and neonatal patients as the product is being procured for paediatrics and neonatal patient. If this feature is not integrated in the Defibrillator the user doing the CPR will not be aware of, he/she is doing CPR correctly or the CPR he/she is doing to the patient is correct or not. This feature helps the user to correctly give CPR to the patient.”*

11. A Defibrillator is medical equipment which provides electric shock to the heart to allow it to get out of the potentially abnormal heart rhythm or arrhythmia, ventricular tachycardia or ventricular fibrillation and back to a normal rhythm and, therefore, its importance as a life saving device.

12. What can be culled out from the accepted suggestions is that the Defibrillators to be supplied must be (a) an

integrated equipment and, (b) it is being procured for paediatrics and neonatal patients. The Expert Committee had in the background of such specifications considered 'Mediana D700' Defibrillator and Zoll R-series Defibrillators and had come to the following conclusion:

“The chest Sensor for CPR Mediana defibrillator (Hosco Pvt Ltd) is a solid and hard spherical object. The size of which is too big for a neonatal CPR. AHA’s recommendation for neonatal resuscitation indicates that eight two fingers or a thumb should be used for chest compression. The spherical solid device, which was shown with the Mediana defibrillator (Hosco Pvt Ltd) company, is almost four times the size of thumb, Hence, it cannot be considered for neonatal resuscitation. Moreover, it can cause damage to the chest wall and ribs. The devices’s proper placement and stable positioning will also be a concern in Neonates.

Secondly, the CPR Sensor (which senses the rate and depth of compression) is attached externally to the device with a separate cable. Hence, the integration is at the monitor level and not through a single cable. (As per our understanding, the integrated system means integration at the level of interface as well as monitor). The other two competitors have a single interface cable.

The above report has been prepared on the basis of presentation and evidences provided by three different companies during technical review meeting.

Based on the above findings Mediana defibrillator (Hosco Pvt Ltd.) cannot be considered qualified on technical grounds. The other two bidders ZOLL R Series (M/s Kailash Surgical Pvt. Ltd.) and MTel (Sai Associates) can be considered as qualified.”

13. None of the specifications in the Tender Document in the corrigendum dated 18.08.2023 could be met by Mediana Defibrillator and, therefore, the Bid of the petitioner was disqualified. In the context of the above, we may refer to the case of *“State of Kerala and Another versus RDS Project Ltd. and Others”* reported in (2020) 9 SCC 108, wherein it has been held as follows:

9. *Having perused the High Court judgment, what is clear is that the High Court, instead of applying the well-established parameters of judicial review and ascertaining whether the decision of the State*

Government would violate Article 14, went into the matter itself and stated that it is better to have a “load test conducted to avoid any further controversy in the matter”.

10. *Given the fact that an Expert Committee, which is a High Level Committee of five experts was set up to go into the divergent opinions of IIT Madras and Dr E. Sreedharan, and the experts having come to a particular conclusion, it is very difficult then to say that the Government, in accepting such Expert Committee Report, could be said to have behaved arbitrarily. On this ground alone, we set aside the judgment of the High Court, as also the review judgment.*

14. Similarly in the case of “*Agmatel India Private Limited versus Resoursys Telecom and Others*” reported in (2022) 5 SCC 362, it has been held as follows:

26. *The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.*

15. The Expert Committee had based its findings on presentation and evidence produced by the Bidders and since the Committee comprise of persons having expertise in the field which has been accepted by the respondent no. 1 and such observations by the Committee cannot be interfered with more so when appropriate reasons have been furnished by the Committee while coming to a conclusion regarding the eligibility/ineligibility of the Bidders. This Court cannot substitute its own view on the observation of the Expert Committee. Reference by Mr. Gadodia, learned counsel appearing for the petitioner to the communication of Zoll Medical Corporation highlighting a process flaw in the manufacture of a component would not act as a benchmark to discard Zoll R-series Defibrillators as such suspicious component was detected in the year 2009 and as the language of the said

communication would suggest steps were taken to restore the viability of the said component.

16. Mr. Gadodia has also highlighted the price aspect as according to him, awarding the contract to the respondent no. 3 would burden the public exchequer of an amount of approximately Rs. 14 crores. Mere pricing of a product cannot be the sole criteria for declaring a Bidder successful as quality of the product, while meeting the specifications as per the Tender Documents would be the predominant features governing such selection. We may refer to the case of “*Bharat Coking Coal Limited and Others versus AMR Dev Prabha and Others*” reported in (2020) 16 SCC 759, wherein the following observations were made:

38. *Additionally, we are not impressed with the first respondent’s argument that there is a certain public interest at stake whenever the public exchequer is involved. There are various factors in play, in addition to mere bidding price, like technical ability and timely completion which must be kept in mind. And adopting such interpretation would permanently blur the line between contractual disputes involving the State and those affecting public law. This has aptly been highlighted in Raunaq International Ltd. v. I.V.R. Construction Ltd.: (SCC p. 501, para 11)*

“11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.” (emphasis supplied)

39. *Further, the first respondent has failed to demonstrate which public law right it was claiming.*

The main thrust of AMR Dev Prabha's case has been on the fact that at 1.03 p.m. on 5-5-2015 it was declared the lowest bidder (or L-1). However, being declared the L-1 bidder does not bestow upon any entity a public law entitlement to award of the contract, as noted in Maa Binda Express Carrier v. North-East Frontier Railway: (SCC pp. 764-65, para 8)

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."

(emphasis supplied)

52. *The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality.*

17. The petitioner was technically disqualified by the Expert Committee as its Mediana Defibrillators did not meet the specifications. Whether a Bidder who is technically not qualified can challenge the award of a Tender to another Bidder had come

up for consideration in the case of “Tata Motors Limited versus Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Others” reported in 2023 SCC OnLine SC 671, wherein it has been held as follows:

49. *It is not in dispute that the first and the foremost requirement of the Tender was the prescribed operating range of the single decker buses which would operate for around and average of 200 Kms in a single charge in “actual conditions” with 80% SoC without any interruption. Then materials on record would indicate that the TATA Motors in its bid deviated from this requirement and had informed BEST that it could carry the operating range in the “standard test conditions” which was not in accordance with the Tender conditions. The High Court has rightly observed in its impugned judgment that the bid of the TATA Motors failed to comply with the said clause. TATA Motors deviated from the material and the essential term of the Tender. It may not be out of place to state at this stage that it is only TATA Motors who deviated from the condition referred to above. However, we are of the view that the High Court having once declared TATA Motors as “non-responsive” and having stood disqualified from the Tender process should not have entered into the fray of investigating into the decision of BEST to declare EVEY as the eligible bidder. We are saying so because the High Court was not exercising its writ jurisdiction in public interest. The High Court looked into a petition filed by a party trying to assert its own rights. As held by this Court in Raunaq International Ltd. (supra), that grant of judicial relief at the instance of a party which does not fulfil the requisite criteria is something which could be termed as misplaced. In Raunaq International Ltd. (supra), this Court observed as under:*

“27. *In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s. Raunaq International Ltd. is on valid principles looking to the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s. I.V.R. Construction Ltd. who have challenged this award of tender themselves do not fulfil the requisite criteria. They do not possess the prescribed experience qualification.*

Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced. Even if the criteria can be relaxed both for M/s. Raunaq International Ltd. and M/s. I.V.R. Construction Ltd., it is clear that the offer of M/s. Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s. Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfil the requisite criteria itself and whose offer is higher than the offer which has been accepted. It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210 MW, is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people. In the present case, there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s. Raunaq International Ltd.”

(Emphasis supplied)

52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in *Association of Registration Plates v. Union of India*, reported in (2005) 1 SCC 679.

18. This Court in its writ jurisdiction has limited scope of entering into the arena of judicial review in a contractual matter and that to with respect to the decision-making process unless the

said process is flawed or is peppered with arbitrariness and unreasonable. We may in such context profitably refer to the case of “*N.G. Projects Limited versus Vinod Kumar Jain and Others*” reported in (2022) 6 SCC 127, which reads as under:

10. *We find that the interference in contract awarded to the appellant is wholly unwarranted and has caused loss to public interest. Construction of roads is an essential part of development of infrastructure in any State. The learned Single Bench and the Division Bench of the High Court were exercising power of judicial review to find out whether the decision of the State was manifestly arbitrary or unjust as laid down by this Court in *Tata Cellular v. Union of India* and to act as appellate authority over the decision of the State. This Court in *Tata Cellular*⁵ held as under : (SCC pp. 675, 677-78 & 687-88, paras 70, 77 & 94)*

“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.

* * *

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

- 1. Whether a decision-making authority exceeded its powers?*
- 2. committed an error of law,*
- 3. committed a breach of the rules of natural justice,*
- 4. reached a decision which no reasonable tribunal would have reached or,*
- 5. abused its powers.*

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*.

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

* * *

94. The principles deducible from the above are:

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

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

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.

(6) Quashing decisions may impose heavy

administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.” (emphasis in original)

23. *In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.*

19. We may also refer to the case of “*Silppi Constructions Contractors versus Union of India and Another*” reported in (2020) 16 SCC 489, the relevant of which reads as follows:

19. *This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly*

and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

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.*

25. *That brings us to the most contentious issue as to whether the learned Single Judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. Respondents 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done.*

20. As we have noted above the Expert Committee had evaluated the features of Mediana defibrillator and Zoll R-series

defibrillator and based on sound reasonings qua the specifications mentioned in the Tender Document and the corrigendum dated 18.08.2023 disqualified the Bid of the petitioner on technical grounds. The learned counsel for the petitioner has failed to point out any arbitrariness or unreasonableness in the action of the respondent no. 1-Corporation in declaring the respondent no. 3 as eligible and the petitioner ineligible and the entire conspectus of the case would suggest that the decision taken by the respondent no. 1 was in tune with the fundamental necessities based on the conditions put forward in the Tender notice and its subsequent corrigendum and backed up by sound reasonings as well.

21. We therefore, on the basis of the discussions made hereinabove do not find any reason to entertain this writ application which consequently stands dismissed.

22. Pending I.As., if any, stands closed.

(Rongon Mukhopadhyay, J.)

(Deepak Roshan, J.)