

HIGH COURT OF MADHYA PRADESH BENCH AT INDORE

Case Number	W.P.No.16878/2020
Parties Name	Krsnaa Diagnostics Pvt. Ltd. Vs. State of Madhya Pradesh & Ors.
Date of Judgment	22.02.2021
Bench	<u>Division Bench:</u> Justice Sujoy Paul Justice Shailendra Shukla
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	YES
Name of counsel for parties	Shri. Piyush Mathur, learned Sr.Counsel with Shri Manu Maheshwari, learned counsel for petitioner. Shri Vivek Dalal, learned A.A.G with Ms.Kirti Patwardhan, learned P.L. for respondent/ State. Shri Prasanna Prasad, learned counsel for respondent No.2.
Law laid down	*Article 226 of the Constitution and Clause-17 of NIT - contractual matters – Notice inviting tender – Cancellation of NIT based on the relevant Clause permitting the Department to cancel the NIT without assigning reason is not beyond the scope of judicial review. *Judicial review – In contractual matters also the Court can examine following factors:- (i) Whether decision making authority has exceeded its authority? (ii) Whether he committed any error of law? (iii) Whether rules of natural justice are breached by him?

	<p>(iv) Whether he arrived to a decision which hits Wednesbury principles of reasonableness? (v) Whether he abused its power?</p> <p>*Contractual matter – Judicial review - It can be made on the ground of arbitrariness, unreasonableness and when it attracts public interest.</p> <p>*Tender NIT – Tender Condition-Financial Evaluation. The main NIT was issued by respondent No.3 department. Its amendment/modification can be done by department only. The consultancy agency (HITES) is not competent to provide “revised conditions”/parameters of the NIT.</p> <p>* Cancellation of NIT – Judicial review - If NIT is cancelled because revised/amended parameters created confusion, no judicial interference is required.</p>
Significant paragraph numbers	18,26,27,28

ORDER
22.02.2021

As per: Sujoy Paul,J.

The petitioner, a private limited company registered under the Companies Act, 1956 has filed this petition under Article 226 of the Constitution to assail the letter dated 7/10/2020 (Annexure P/9) whereby it was intimated that the tender is scrapped and the bank guarantees furnished by him were returned. It is further prayed that respondents be directed to proceed further in the NIT and execute the agreement with the

petitioner by issuing letter of acceptance for Cluster (II), (III) and (IV). By amending the petition, new NIT is also called in question.

[2] Draped in brevity, the admitted facts between the parties are that respondent No.3 floated an NIT dated 10/12/2019 for setting up, operating, managing and maintenance of computerized tomography – CT and MRI diagnostic facility at six government medical colleges namely Datia, Khandwa, Ratlam, Vidisha, Shahdol and Shivpuri with four more colleges namely Rewa, Sagar, Indore and Jabalpur. The aforesaid 10 colleges were divided in four different clusters. The NIT issued by the respondent No.3 (Director, Medical Education) is Annexure P/3.

[3] Respondent No.2 issued amendment dated 7/1/2020 in the aforesaid NIT and amended last date of submission of bid closing date, time etc. Thereafter another amendment was issued by respondent No.2 on 20/1/2020 (Annexure P/4) whereby last date of submission of online bid was changed and it was made clear that “the bidder who quotes minimum percentage on prevailing CGHS list of Bhopal Circle will be awarded the project”.

[4] The petitioner submitted the bid on 3/2/2020. The Committee appointed by the department opened the technical bid of all the bidders and found petitioner’s bid as responsive and accordingly approved the same, through the e-portal. The consequential message was conveyed to petitioner through an e-mail dated 10/5/2020 by stating that financial bid will be opened on 11th May, 2020. The Committee later-on opened financial bids of petitioner and other bidders and after due evaluation of technical and financial bid for all clusters, the

petitioner came out as offering minimum percentage (highest discount) on prevailing Bhopal CGHS rates as per Clause 16 as amended, for Cluster II, III and IV of the NIT. The tender summary report for all clusters was prepared. The petitioner came out as L-1 in Cluster II, III and IV. The petitioner placed reliance on tender summary report (Annexure P/6) (collectively) of all clusters in support of his submission that petitioner offered minimum discount to the respondents in accordance with provisions of amended NIT.

[5] The stand of petitioner is that he did not receive any letter of acceptance and, therefore, after waiting for some time preferred representations dated 22/5/2020, 17/6/2020, 8/7/2020 for issuance of letter of acceptance which are collectively marked as Annexure P/7. These letters were followed by yet another representation dated 12/10/2020 (Annexure P/8).

[6] Shri Piyush Mathur, learned Sr.Counsel assisted by Shri Manu Maheshwari, learned counsel submits that impugned order dated 7/10/2020 (Annexure P/9) issued by respondent No.2 came as a bolt from blue to the petitioner whereby it was informed that tender has been scrapped and accordingly BGs are returned herewith. Learned Sr.Counsel submits that the decision to scrap the NIT is wholly arbitrary, unjust, unreasonable and unconstitutional. The decision runs contrary to settled legal position. The principles of legitimate expectation were grossly violated. The cancellation process of NIT is pregnant with serious procedural improprieties. The decision to cancel the tender is against public interest which should be paramount consideration in a matter of this nature. The reason of cancellation spelled out in order dated 27/6/2020 (Annexure R-2/3) are bad in law.

[7] To elaborate, learned Sr.Counsel for petitioner contends that if any bidder had any doubt about the conditions of the original NIT, that stood clarified in view of clarification No.2 (Annexure P/4) issued by respondent No.2. Clause 5 and 6 of this clarification leaves no room for any doubt for anybody. In other words, bid evaluation criteria is made explicitly clear which admits of no doubt. The bidders knowing fully well about the conditions submitted their bid with eyes open and, therefore, it was no more open for an unsuccessful bidder to take a different stand at a later point of time. To everybody's surprise, one bidder namely Sanya Hospital and Diagnostics Pvt. Ltd preferred a representation to respondent No.3 on 12/5/2020 (Annexure R-2/2) and stated as under:-

“We would like to clarify that we have quoted for discount rate of CGHS as given above, therefore, we would be charging as $100-28=72\%$ of the BGHS rates to the patient. We have inadvertently quoted for the above discount rates only and therefore threat the final rate for patient, which is 100% minus the discount rate offered.”

(emphasis supplied)

[8] It is submitted that on the strength of this communication the DME issued the letter dated 27/6/2020 and termed the process as irregular and decided to decline the bids with further direction to proceed as per conditions of NIT and Rules.

[9] Further more, heavy reliance is placed on document dated 28th May, 2020 written by respondent No.2 to respondent No.3 wherein summary of price bids is reproduced and it was made clear that the NIT was issued keeping into account “emergency requirement of services”. Since the services were “emergency” in nature it goes without saying that an element of public interest was involved in the NIT. The learned Sr.Counsel

placed reliance on following portion of this document:-

“The summary of the price bids as opened on 11.05.2020 are as below:-

S. No	Cluster	Colleges Name	Name of the bidders (M/s)	Percentage of CGHS Rate quoted			Ranking and remarks
				Jabalpur	Vidisha		
1	Cluster-1	Jabalpur, Vidhisha	Sanya GIC Imaging Pvt. Ltd	23	23		Clarification letters received from Sanya GIC Imaging Pvt. Ltd and Sanya Hospital and Diagnostics Pvt. Ltd post price bid opening is attached for reference.
			Sanya Hospital and Diagnostics Pvt. Ltd	28	28		
			Krsnaa Diagnostics Pvt. Ltd	76.96	76.96		
			Add Annex Health Care Pvt. Ltd	84.61	92.17		
				Indore	Khandwa	Ratlam	
2	Cluster-2	Indore (Super Specialty), Khandwa, Ratlam	Krsnaa Diagnostics Pvt. Ltd.	76.96	76.96	76.96	Single bid (L1 for all colleges in Cluster2)
				Sagar	Datia	Shivpuri	
3	Cluster-3	Sagar, Datia, Shivpuri	Krsnaa Diagnostics Pvt. Ltd.	76.96	76.96	76.96	Single bid (L1 for all colleges in Cluster3)
			Consortium of (M/s Medion Diagnostics Ltd and M/s Faiguni Niman Pvt. Ltd)	78.89	211.11	211.11	L2 for all Colleges in Cluster 3
				Rewa	Shahdol		

4	Cluster-4	Rewa (Super Speciality), Shahdol	Krsnaa Diagnostics Pvt. Ltd.	76.96	76.96		Single bid (L1 for all colleges in Cluster4)
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HITES submission to DME:

For Cluster 1: (No. of price bids opened:4, No. of Bids received:4)

The bidder Sanyua GIC Imaging Pvt. Ltd. Post opening of price bids have submitted a letter (encls) stating that they inadvertently mentioned 23% in the price bid and submitted that they had quoted the discount % in the price bid instead of Percentage offered on CGHS rate. They have also requested to consider their quote as 77% on CGHS rate.

Similarly, Sanya Hospital And Diagnostics Pvt. Ltd, post opening of price bids have submitted a letter (encl) stating that they inadvertently mentioned 28% in the price bid and submitted that thy had quoted the discount % in the price bid instead of Percentage offered on CGHS rate. They have also requested to consider their quote as 72% on CGHS rate.

It is noted that these clarifications were received post price bid opening and hence the same are submitted after considering % rate quoted by other firms for perusal of competent authority.

Going by the rules of procurement, no post facto clarification should be taken into cognizance subsequent to price bid opening. Going by rules award can be given only at 23% of the CGHS rate list of Bhopal circle. Since the bidders namely M/s Sanya GIS Imaging Pvt. Ltd and M/s Sanya Hospital and Diagnostics Pvt. Ltd offer should be ignored considering the mistake and subsequent revision in the offer. M/s Krsnaa Diagnostics Pvt. Ltd should be asked to offer the services at 72% of CGHS approved Bhopal rate list or the current tender should be canceled and a fresh tender should be recalled for this cluster. Competent authority may take decision depending upon the emergency requirement of the service.”

(emphasis supplied)

[10] It is urged that the opinion of respondent No.2 for issuance of fresh tender is confined to cluster No. I whereas for

remaining clusters, he opined in favour of the petitioner. The respondent No.3 by ignoring the opinion of its own agency, took a different view for no valid reasons and decided to cancel the entire NIT. The reasons assigned in the letter dated 27/6/2020 Annexure R-2/3 are erroneous and based on improper parameters. To bolster this argument, it is averred that the bidders were directed to quote zero percent on prevailing CGHS Bhopal rates. It was further mentioned that if bidders are quoting 90% then discount, they agreed to provide an offer of 10% discount on the CGHS rates. In the present scenario, the petitioner for one of the cluster quoted 76% which means that petitioner is offering to provide 24% discount on the CGHS rates. The concept to calculate the discount is very much clear whereas respondents have miscalculated and misunderstood it. It is further averred that one of the bidders referred by respondent No.2 has quoted the bid amount as 23% for cluster No.1 and thus that bidder was declared L-1 in that bid. If one of the bidders have quoted wrong percentage then NIT for cluster I cannot be scrapped because that bidder misunderstood or quoted it mistakenly. Reference is made to ***W.B. State Electricity Board Vs. Patel Engineering Co. Ltd & Ors. (2001) 2 SCC 451*** to contend that mistakes in bid whether intentional or unintentional, cannot be pardoned and permission of its correction would be discriminatory. Negligence or inadvertant mistakes in the bid document cannot be permitted to be corrected even on the principles of equity more so said direction cannot be issued when bids have already been opened.

[11] The learned Sr.counsel for petitioner submits that the respondent State is under an obligation to act fairly even in the

matters of contract. The State and its instrumentalities' action must be in conformity with Article 14 of the Constitution. It should also be in conformity with principles of legitimate expectation. Reliance is placed on ***Ramana Dayaram Shetty Vs. International Airport Authority of India (1979) 3 SCC 489, Food Corporation of India Vs. M/s. Kamdhenu Cattle Feeds Industries (1993) 1 SCC 71, Sterling Computers Ltd. Vs. M & N Publications Ltd (1993) 1 SCC 445.*** Safeguarding public interest should be paramount consideration is also an argument based on ***Raunaq International Ltd. Vs. I.V.R. Construction Ltd. (1999) 1 SCC 492.*** Lastly, reliance is placed on ***Glodyne Techno Serve Vs. State of Madhya Pradesh (2011) 5 SCC 103*** to contend that criteria of bid evaluation must be strictly followed.

[12] Based on these judgments, learned Sr.Counsel for petitioner submits that the decision to scrap the NIT is based on unjustifiable, arbitrary and impermissible reasons. Hence, the impugned order may be set aside and respondents be directed to proceed with the NIT and issue a letter of acceptance to the petitioner. New NIT is attacked on the basis of grounds raised in the amendment application.

[13] *Per contra*, Shri Vivek Dalal, learned A.A.G supported the impugned order/action. By placing reliance on Clause 17 of the NIT, the impugned action was supported. Clause 17 reads as under:-

“17. RIGHT TO ACCEPT OR REJECT ANY OR ALL THE PROPOSALS

Notwithstanding anything contained in this RFP document, the authority reserves the right to accept or reject any proposal and to annul the selection process and reject all the proposals, at any time without any liability or any obligation for such acceptance, rejection

or annulment, and without assigning any reasons thereof.

(emphasis supplied)

[14] Learned A.A.G submits that financial bid of petitioner (Page 68) has creates serious confusion. On the one hand the petitioner has mentioned that he is offering “following percentage discounts” whereas in the relevant column he has mentioned about “percentage offered on prevailing CGHS rates”. The reasons mentioned in letter of respondent No.3 dated 27/6/2020 Annexure R-2/3 were supported by the counsel by contending that all the reasons mentioned in this letter are legal and justifiable. It was prerogative of the respondent No.3 to take a decision on the basis of enabling provisions. Since he found serious confusion, infirmities and illegalities in the process, he rightly decided to cancel the tender process. The decision so taken is strictly in public interest, in order to save public money and save the public from unnecessary financial burden. The petitioner is free to participate in the new NIT. No right is created in favour of petitioner as per previous NIT. The mathematical calculation which also became foundation for issuing letter dated 26/7/2020 is also supported. Reliance is placed on the judgment of Apex Court in ***Maa Binda Express Carrier & another Vs. North-East Frontier Railway & Ors. (2014) 3 SCC 760*** which affirmed the action of department in cancelling the tendering process. For these cumulative reasons, no fault can be found in the impugned action.

[15] Shri Prasannd Prasad, learned counsel for respondent No.2 entered appearance and borrowed the argument of learned A.A.G. Thus, it is common ground that decision to

scrap the NIT does not suffer from any procedural impropriety, illegality, arbitrariness or unreasonableness. Indeed decision is based on public interest.

[16] The parties confined their arguments to the extent indicated above.

[17] We have heard the learned counsel for parties at length and perused the record.

[18] We deem it proper to first deal with the argument of learned AAG and Counsel for the respondent No.2 based on Clause-17 of the NIT. It was argued that the order of scrapping NIT is founded upon Clause-17 aforesaid which gives power to the Competent Authority to accept, reject or annul any selection process/NIT. In our view, existence of power and exercise of power are two different things. Mere existence of power does not insulate the ultimate order which is passed in exercise of such power. Whether power is exercised in a justifiable manner is always subject to judicial review. Despite existence of power like one which is mentioned in Clause-17, it is duty of the Court to examine following factors:-

- i) Whether the decision making authority exceeded its power?
- ii) Committed an error of law.
- iii) Breached the rules of natural justice.
- iv) Arrived to a decision which no reasonable authority would have reached (Wednesbury principle of reasonableness).
- v) Abused its power.

[19] Thus any enabling provision does not make the ultimate order passed in exercise of such power as sacred or sacrosanct.

[20] The Apex Court in catena of judgments held that the judicial review of a contractual matter is permissible on certain parameters spelled out by us in the previous paragraph. In ***Tata Cellular vs. Union of India, (1994) 6 SCC 651*** and ***Elektron Lighting Systems (P) Ltd. vs. Shah Investments Financial Developments & Consultants (P) Ltd., (2015) 15 SCC 137***, the Apex Court opined that the judicial review in contract matter is permissible if action impugned is shown to be arbitrary. In ***Ramana Dayaram Shetty vs. International Airport Authority of India, (1979) 1 SCC 489***, ***Dutta Associates (P) Ltd. v. Indo Merchantiles (P) Ltd., (1997) 1 SCC 53***, ***Heinz India (P) Ltd. v. State of U.P., (2012) 5 SCC 443*** and ***Kalinga Mining Corpn. v. Union of India, (2013) 5 SCC 252***, the Supreme Court ruled that if decision making process or the decision is unreasonable, interference can be made even in contractual matters. In ***Sterling Computers Ltd. v. M & N Publications Ltd., (1993) 1 SCC 44***, ***Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138***, ***Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216*** and ***State of Jharkhand v. CWE-SOMA Consortium, (2016) 14 SCC 172***, the Wednesbury principle is also applied to test the decision making process adopted in a contractual matter. Reference may be made to ***Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492***, ***Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617***, ***Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517***, ***Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd., (2007) 8 SCC 1***, ***Sanjay Kumar Shukla v. Bharat Petroleum Corpn. Ltd., (2014) 3 SCC 493***

and ***Siemens Aktiengesellschaft & Siemens Ltd. v. DMRC Ltd., (2014) 11 SCC 288***, wherein Apex Court opined that apart from the facets of arbitrariness, unreasonableness and parameters relating to Wednesbury principles, the public interest element is also an essential facet which needs to be looked into in a contractual matter. In view of these judgments, there is no cavil of doubt that judicial review of impugned order is permissible and enabling provision namely, Clause-17 aforesaid does not insulate the process and impugned order from judicial review. Despite the fact that it contained a phrase that no reasons are required to be given for invoking Section 17. This, in our view, does not mean that without any reasons or justifiable reasons, power under Clause 17 can be invoked.

[21] In view of principles laid down in aforesaid cases, the impugned order/action needs to be tested. Impugned communication dated 07/10/2020 (Annexure P/9) is written by respondent No.2 HITES. During the course of arguments, the learned counsel for the parties informed that HITES is subsidiary of HLL Life Care Ltd., a Govt of India enterprise. This organization provides consultancy to official respondents in contractual matters. The letter dated 07/10/2020 (Annexure P/9) only shows that tender has been scrapped. The real reasons for scrapping the tender are spelled out in letter dated 27/06/2020 (Annexure R-2/3). Relevant portion of which reads as under:-

संदर्भित पत्र दिनांक 28.05.2020 के माध्यम से आपके द्वारा निविदा उपरांत चयनित एजेंसी एवं उनके द्वारा प्रस्तावित दरों के अनुमोदन हेतु प्रस्ताव आयुक्त, चिकित्सा शिक्षा के समक्ष प्रस्तुत किये गये हैं। प्रस्तुत प्रस्ताव का अवलोकन करने पर निविदा में प्रथम दृष्टया निम्नानुसार विसंगतियां परिलक्षित होती है :

1. वित्तीय निविदा प्रपत्र तथा आपके द्वारा अपलोडेड

संशोधन/कोरीजेंडम में वर्णित शर्तों में भिन्नता परिलक्षित होती है। निविदाकारों द्वारा जिस प्रपत्र पर वित्तीय निविदा डिजिटल हस्ताक्षर कर प्रस्तुत की गई है, उस पर % discount on CGHS Rate अंकित है। जिससे ऐसा प्रतीत होता है, कि एजेंसी द्वारा % discount on CGHS Offer किया गया है।

2. उदाहरणस्वरूप Cluster 2 में आपके द्वारा प्रस्तावित किया गया है कि न्यूनतम दर वाली एजेंसी मेसर्स कृष्णा द्वारा 76 % CGHS पर निविदा भरी गई है, किंतु मेसर्स कृष्णा द्वारा प्रस्तुत Bid Format के अवलोकन से प्रथम दृष्टया यह प्रतीत होता है, कि 76 % का discount CGHS रेट पर दिया गया है। अर्थात् यदि किसी क्लस्टर की CGHS की Test की दर रु 100 निर्धारित है, तो आपके प्रस्ताव के अनुसार मेसर्स कृष्णा द्वारा CTMRI Test हेतु रु 76 Charge किया जायेगा (शासन/मरीज)। जबकि निविदा प्रपत्र की भाषा से यह आशय स्पष्ट हो रहा है, कि मेसर्स कृष्णा द्वारा टेस्ट हेतु रु 24 (100-76 = 24) Charge किया जायेगा। इस प्रकार से Charge की जाने वाली राशि में रु 52 (76-24 = 52) का अंतर है, जोकि बहुत अधिक है जिससे रु 52 का नुकसान मरीजों अथवा शासन को हो सकता है। इसी क्रम में निविदा स्पष्ट न होने के कारण 02 निविदाकारों द्वारा Bidding Criteria के सम्बंध में Post Tender स्पष्टीकरण प्रस्तुत किया गया है, जोकि इसी असमंजस एवं अस्पष्टता को इंगित करता है।

3. यह स्पष्ट करना चाहेंगे कि उपरोक्त निविदा CTMRI जैसे महत्वपूर्ण कार्य से संबंधित होकर PPP मॉडल पर 10 वर्षों के लिए है। जोकि आम जनता एवं मरीजों से प्रत्यक्ष रूप से जुड़ा हुआ विषय है। यहां यह लेख है, कि वित्तीय प्रस्ताव किसी भी निविदा का अंतिम चरण होता है। जिससे इस प्रकार की विरोधाभासी निविदा को स्वीकार करने पर भविष्य में विधिक एवं वित्तीय प्रश्न निर्मित हो सकते हैं।

अतः सम्पादित निविदा के माध्यम से चयनित एजेंसी एवं प्रस्तावित दरों को स्वीकार करने पर इसे अनियमितता की श्रेणी में माना जा सकता है। इस प्रकार की विरोधाभासी निविदा स्वीकार किये जाने योग्य नहीं है।

अतः उक्त संबंध में निविदा शर्तों एवं नियमों के अनुसार आगामी आवश्यक कार्यवाही की जावें।

(Emphasis Supplied)

[22] As noticed above, the argument of learned Senior Counsel for the petitioners were aimed against and confined to

reasons mentioned in para-2 & 3 of aforesaid letter dated 27/06/2020. It was strenuously contended that the mathematical calculation and parameters mentioned in para-2 are erroneous and arbitrary in nature. In our view, the decision to scrap the contract is not solely based on para-2 of said letter. The first and foremost reason is contained in para-1 of the said letter reproduced herein-above. Pertinently, nothing is averred and argued against the reason mentioned in para-1 of said letter. The reason spelled out in para-1 is that there exists a difference in the conditions mentioned in the main financial NIT and in the amended one issued by HITES. Importantly, this letter is addressed to head of HITES. The main NIT was issued by the Directorate of Medical Education, Govt. of Madhya Pradesh. Clause-15 deals with financial proposal bid. Sub-**Clause-b** reads as under:-

“**b** - The bidder has to quote % discount rate applicable for each Medical College of the cluster (up to 2 decimal points). All the discounts will be applicable on the CGHS rates (Bhopal circle).”

[23] Similarly, in **Clause-16 (Selection Process)** it is ruled that :-

“The bidder, who will offer **maximum % discount** on prevailing CGHS rate list of Bhopal circle will be awarded the project.”

[24] The respondent No.2 issued the “amendment No.2” (Annexure P/4) and revised tender clause. Relevant portion is reproduced for ready reference:-

S.No	Para Nos. of the TED	Existing Tender Clause	Revised Tender Clause
5	Schedule of RFP 14	Bid Evaluation Criteria: % discount offered on prevailing CGHS rate list of Bhopal Circle	Bidding Criterion would be the lowest percentage offered on prevailing CGHS rate list of Bhopal circle,

			offered for each medical college of the cluster.
6	15 Page 20 Financial Proposal Bid	<p><u>Bidding Criterion would be highest % discount on prevailing CGHS rate list of Bhopal circle,</u> offered for each medical college of the cluster,</p> <p>a) All bidders have to compulsorily bid for all GMCs in a particular cluster.</p> <p>b) The bidder has to quote % discount rate applicable for each Medical College of the cluster (up to 2 decimal points). All the discounts will be applicable on the CGHS rate (Bhopal Circle).</p> <p>c) GI bidder for the GMC would be awarded the Contract</p> <p>d) Contract would be individually awarded by the respective GMC to the respective HI bidder.</p>	<p><u>Bidding Criterion would be the lowest percentage offered on prevailing CGHS rate list of Bhopal circle,</u> offered for each Medical college of the bluster.</p> <p>a) All bidders have to compulsorily bid for all GMCs in a particular Cluster.</p> <p>b) The bidder has to quote % on prevailing CGHS Bhopal rate list (upto 2decimal points). Percentage offered will be applicable on all seans as mentioned in prevailing CGHS Bhopal rate list .</p> <p>c) Bidders interested in giving discount may quote percentage below 100% (for example 90% means a discount of 10% on CGHS rates have been offered)</p> <p>d) Bidders intersted in premium over CGHS rate list may quote above 100% (for example 110% means a premium of 10% over CGHS rates have been offered.</p> <p>e) L1 bidder (Bidder who quotes minimum percentage for the GMC would be awarded the Contract).</p>

(Emphasis Supplied)

[25] The above chart contains the main/'existing tender Clause' and 'revised tender Clause'. The revision in tender Clause is not made by the issuing authority i.e.respondent No.3. Indeed, the revised tender clauses are introduced by HITES. If revised Clauses are examined in juxtaposition to the main Clauses of NIT issued by respondent No.3, it will be crystal clear that parameters of the conditions of evaluation are different. This is the primary reason the respondents decided to

scrap the contract. In any event, a confusion is created by HITES by introducing the revised clauses. The petitioner projected Annexure P/4 as clarification of clauses of previous NIT. We are unable to persuade ourselves with this line of argument. As caption of this document suggests, it is “amendment number 2” and not a ‘clarification’. The existing tender clause stood revised by providing a different tender clause. Had it been a ‘clarification’ of existing tender clause there was no occasion for HITES to term it as “revised tender clause”.

[26] In our considered view, if NIT was issued by the Department/respondent No.3, its conditions could have been altered by respondent No.3/Competent Authority only. The consultancy agency/respondent No.2 was neither justified nor competent in revising the tender clauses. A comparative reading of existing tender Clause and revised tender Clause shows that the decision taken in para-1 of order dated 27/06/2020 is a plausible decision and is not hit by Wednesbury principles nor it can be treated to be against public interest. We find no infirmity or illegality in the decision to scrap the contract.

[27] New NIT dated 30/12/2020 (Annexure P/13) is challenged by contending that it relates to same scope of work and when matter relating to previous NIT is subject matter of challenge, the issuance of new NIT is illegal. The petitioner is already declared L-1 in certain clusters and has disclosed his price pursuant to previous NIT and hence issuance of another NIT covering same work is bad in law. We have already dealt with the validity of decision scrapping the previous NIT and upheld it. Since that decision of scrapping is not interfered

with, we find no reason to interfere with the new NIT. The grounds raised to assail new NIT are devoid of substance and cannot be reason to interfere with the NIT.

[28] To sum up, in a contractual matter, the judicial review is permissible on the aspect of arbitrariness, unreasonableness and on the touchstone of Wednesbury principle. Public interest is also an essential element which needs to be looked into while exercising power of judicial review. Clause-17 of NIT does not give unfettered power to the authority to take a decision to cancel the NIT. The decision taken by Competent Authority in exercise of enabling provision can also be subject matter of judicial review on above parameters. However, introduction of revised tender clauses by HITES which are in variance with existing tender clause issued by Respondent No.3 has made the entire process vulnerable and, therefore, decision taken on 27/06/2020 cannot be said to be arbitrary, unreasonable or against public interest. Thus, we find no reason to interfere in the present case.

[29] Writ petition is **dismissed**. No cost.

(Sujoy Paul)
Judge

(Shailendra Shukla)
Judge

vm/soumya