SUPREME COURT OF INDIA

Siemens Public Communication Networks Pvt. Ltd.

Vs.

Union of India

C.A.NO. 6515 OF 2008 arising out of SLP(C) No. 15224 of 2007

(Dr. Arijit Pasayat, C.K. Thakker and Lokeshwar Singh Panta)

06/11/2008

JUDGMENT

DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Delhi High Court dismissing the writ petition filed by the appellants. In the writ petition they had inter alia prayed for issuance of directions to the respondents 1 and 2 to award the contract in respect of tender No. DRTS/AREN/Jan-2005 floated by Bharat Electronics Limited-respondent No. 2 on behalf of Union of India-respondent No. 1 in favour of appellant No.1. They further prayed for directions to restrain respondents 1 and 2 from negotiating with any other bidder except appellant No.1 on the ground that it is the lowest bidder of the said tender.

3. The factual position in a nutshell is as follows.

Respondent No. 2, Bharat Electronics Ltd. was nominated by respondent No. 1, Ministry of Defence, Government of India, as the prime contractor for Indian Army's modernization plan for Technical Communication System (in short the `TCS'). Respondent No. 2 floated a Request for Proposal (RFP) for procurement of Digital Radio Trunking System (in short the `DRTS'), also popularly known as Terrestrial Trunked Radio (in short the `TETRA') which is a major component in the TCS Programme of the Indian Army, vide Tender No. DRTS/AREN/Jan-2005. In the RFP floated by respondent No. 2 for the DRTS, the vendors were called upon to make firm technical and commercial proposals for the supply and transfer of technology of DRTS to respondent No. 2 for incorporating in their solution to Indian Army. It was specified that the commercial offers should be for quantities of 80 systems as per Bill of Material enclosed with RFP.

The technical specifications detailed the components of the DRTS by splitting them into 9 sub-systems. The tender also stipulated that the licensed manufacture of DRTS shall be undertaken by respondent No. 2 through a Transfer of Technology (in short the `ToT') for both hardware and software by executing a ToT Agreement between the vendor and respondent No. 2.

In terms of the tender document, the evaluation, trials and completion of the contract was proposed to be carried out in five phases spread over a period of time. Phase-I comprised a Preliminary Evaluation of Vendor Proposal and technical analysis, including presentations to be made by the vendors as also clarifications to be provided on questions raised during the presentations and subsequent analysis to the Technical Evaluation Committee (in short the `TEC') for being shortlisted for the Phase-II evaluations. Phase-II evaluations comprised the visits of the empowered technical team to assess the vendor system at the vendor premises to assess the technical capability, encryption, implementation, confirmation of essential parameters and suitability of equipment as per RFP, demonstration of system capability, mock up installation at the location of the vendors and vendors found qualified by the above criteria were to be shortlisted for Phase-III evaluation.

Phase-III evaluation required the vendors to offer three systems for user trials; one of them was to be installed in a shelter provided by respondent No. 2, which was to be followed by user trials to be conducted by an evaluation team from the Indian Army. The vendors were also required to give a written undertaking that their systems will meet all the requirements of technical and environmental evaluations, maintainability evaluation trials etc. to be conducted in Phase-V.

Phase-IV comprised opening of the commercial offers of such of the vendors whose systems were shortlisted after Phase-III by a Committee in the presence of the tenderers and further negotiations were to be made only with the lowest bidder (L1) as determined by the Committee. Final Phase-V came into play after placement of order when the successful tenderer was required to supply the three systems.

On 8th February, 2005, a pre-bid meeting was held by respondent No. 2 where the prospective bidders were apprised of the contents and basic requirements of the tender. In March 2005, eight bidders, including appellant No.1 submitted their bids in response to the RFP. Phase-I evaluation was carried out by the TEC which shortlisted six bidders for Phase-II evaluation. Phase-II evaluation was carried by the Empowered Technical Committee (in short the `ETC'), which after visiting the factory sites of the six qualified bidders, including appellant No.1 recommended three vendors, namely, petitioner No. 1, respondent No. 3 (/M/s. Selex Communications SpA (M/s. Selex) and M/s. Thales Land & Joint Systems (M/s. Thales) for Phase-III evaluation. In Phase-III evaluation, field trials, maintainability evaluation trials, EMI/EMC testing and discussions on feasibility etc. were held and further evaluation trials were carried out. After approval of the Technical Committee's report, all the three bidders as referred to hereinabove, qualified for Phase-IV evaluation and clearance was accorded for the next phase of evaluation. In Phase-IV, commercial bids were opened on 23rd January, 2007 in the presence of the representatives of all three bidders and the prices of the main items as per their commercial bids were read out. The total price of the three bidders worked out as under:

(i)M/s. Siemens (appellant No. 1) 16,100,969 Euros

(ii)M/s. Selex (Respondent No. 3) 25,775,048 Euros

(iii)M/s. Thales(Respondent No .4) 22,781,769 Euros

However, as the proposals of the bidders comprised various details contained in the enclosures to the bid, they were informed that a comprehensive evaluation would be carried out by the Expert Committee for arriving at L1 bidder and that any further interaction would only be held with L1 bidders. An Evaluation Committee was constituted and the bids of the said three bidders were analyzed. By letter dated 1st February, 2007, the Evaluation Committee asked for certain clarifications in the form of queries from all the three bidders including appellant No. 1. In the meeting dated 7th February, 2007 with the said three bidders they gave their clarifications to the queries raised by respondents No.1 and 2. As a result, the Evaluation Committee completed its evaluation of the bids of the said three bidders and on 10th February, 2007 finalized the total package cost for each of the three bidders working out a comparative statement containing the details as per the scope of the RFP.

According to appellants, since respondent No.2 was not announcing the name of L-1 tenderer, they wrote to the respondents on 16.2.2007 inter alia stating that though the price bid had been opened more than three weeks back the name of L-1 had not yet been announced. On the basis of read out price of all the three bidders on 23.1.2007, the appellant No. 1 had emerged as the lowest bidder and

was, therefore, entitled to be intimated the results of the tender. Grievance was made that they did not get any response from the respondent No. 2 and, therefore, they sent a reminder on 22.2.2007. Finally, by letter dated 23.2.2007 a response was received from respondent No. 2 acknowledging their representation but the outcome of the tender was not intimated. Therefore, the writ petition was filed. The prayers, as set out in the writ petition have been noted above. In essence the appellants wanted respondent No. 2 to award the tender in their favour being the lowest bidder. Counter-affidavits were filed. During the course of the hearing of the writ petition, a preliminary objection was raised regarding non-impleadment of two other bidders and they were impleaded on the oral request of the appellants.

Stand of respondent No. 2 was that the writ petitioner's price is not based on the actual package cost to meet the complete requirement of RFP, in view of the short falls while working out the actual package cost based on the assumption of number of quantities and items which the writ petitioners had ignored and the details were given in Annexure R-5. It was stated that the Evaluation Committee has not violated any norms while preparing the report and holding M/s. Selex as L-1 bidders.

It was further stated that conditions of the tender were not violated and all the guidelines as per CVC were followed scrupulously while arriving at a package price considering the complete requirement of RFP and there is no genuine grievance of the writ petitioners giving rise to any cause of action in their favour. The writ petitioner has indulged in deliberate distortion and contortion of facts and misrepresented the settled law in this regard.

5. The appellants disputed the above position and it was stated that the appellant No. 1's bid was the lowest of the 3 technical qualified bidders whose commercial bids were opened and appellant No.1 was being ousted by adding an imaginary price of EU 11 billion to its bid, which the appellants never quoted and addition to its bid was unwarranted and amounted to artificially loading the bid. It was in essence stated that so far as Item No. 11 is concerned, a wrong view was taken on the basis of absurd reasoning. The addition of EU 11 billion to the bid of the appellants on account of Item No. 11 has resulted in increasing its total bid to EU 28 billion which, on the face of it, is absurd.

6. Further the stand of respondent No. 2 was that the appellants could have sought necessary clarification in this regard, as was done by them in the case of other issues raised on 7.2.2007.

7. In the course of arguments the appellants stated that they were willing to provide software for 1200 users for the price quoted in the bid, i.e., for EU 8977.34. The respondents, as noted above, disputed the factual scenario as narrated by the appellants and they specifically stated that different stands have been taken at different points of time by the writ petitioners to suit their own purpose. Therefore, there was no scope for interference considering the limited scope of judicial review, particularly when, no malafides have been alleged or pleaded. The High Court by the impugned

judgment dismissed the writ petition.

8. In support of the appeal, stands taken before the High Court were reiterated. With reference to the figures indicated in the bid documents, it was submitted that confusion was being created about the nature of the bid. It was clearly the intention of the appellants to indicate the price for 100 units. The unit base is 1 for 100 and that is how the appellants have understood the matter and had accordingly put the figure. It was submitted that there is a great price variation and in the greater public interest the bid offered by the appellants should be accepted and even they are willing to supply 1200 units at the price quoted for 1 unit, i.e., EU 8977.34.

9. Learned counsel for the respondents on the other hand submitted that the appellants with their eyes open had quoted the figures and at different points of time have taken totally varying stands. Initially, they had stated the quantity to be "as required" and the unit price in EU to be 8977.34. The total price was left blank. At that point of time the quantity was not known and that a similar indication was made by each of the bidders. All the bidders understood the required quantity to be 1200. Interestingly the appellants had indicated the quantity to be 1 and had quoted the total price at EU 8977.34. They further submitted that the High Court rightly noted that had the respondent No. 2 proceeded on the basis of the rates furnished by the appellants in the composite bid schedule in the column (total price EU). Nothing could have precluded the appellants from turning around later on, and seeking to bind respondent No. 2 down to the rates as offered by it for a single unit in the original, the same being part of the original tender documents. It is also submitted that the variation in figures is not exorbitantly high, as is being projected by the appellants.

10. It would be appropriate to first deal with the scope of power of judicial review, more particularly, in the matter of tenders before we take note of various conclusions arrived at by the High Court.

11. In Master Marine Services (P) Ltd. Vs. Hodgkinson (P) Ltd. And Another (2005) 3 SCC, 138, it was observed as follows:

"11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in Tata Cellular Vs. Union of India (1994) 6 SCC, 651. It was observed 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 of that power will be struck down.

After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The Government must have freedom of contract. In other words, a fairplay 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 principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. It was also

pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

12. In Sterling Computers Ltd. Vs. M.N.Publications Ltd. (1993) 1 SCC 445 it was held as under :

"18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process." By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry. But at the same time the Courts can certainly examine whether "decision making process" was reasonable rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract."

13. In Raunaq International Ltd. v. I.V.R. Construction Ltd. (1999 (1) SCC 492) it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of ability to deliver the goods or services as per specifications.

14. The law relating to award of contract by State and public sector corporations was discussed in Air India Ltd. v. Cochin International Airport Ltd. [2000 (2) SCC 617] and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.

15. In M/s.B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. AIR 2007 SC 437, while summarizing the scope of judicial review and the interference of superior Courts in the award of contracts, it was observed as under :

"67. We are not oblivious of the expansive role of the superior courts on judicial review.

68. 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 summarized 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 of 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."

16. In Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India and Others, (2006) 10 SCC 1, at paragraphs 56, 57 and 77, it was observed as follows :-

"56. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See State of U.P. and Ors. v. Renusagar Power Co. and Ors. (AIR 1988 SC 1737). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work 'Judicial Review of Administrative Action' 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The

two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

57. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is illegality the second irrationality, and the third procedural impropriety. These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1984 (3) All.ER.935), (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See Commissioner of Income-tax v. Mahindra and Mahindra Ltd.(AIR 1984 SC 1182). The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book Applications for Judicial Review, Law and Practice thus:

"There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. May prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.

77. Expression of different views and discussions in different meetings really lead to a transparent process and transparency in the decision-making process. In the realms of contract, various choices were available. Comparison of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review."

17. While arriving at the aforesaid conclusions, this Court took note of the illustrious case of Tata Cellular Vs. Union of India (1994) 6 SCC 651 wherein at paras 77 and 94, it was noted as follows :

"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 fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(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, Wednesday unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course

of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention."

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.

18. In Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. And Others (1997) 1 SCC 738, it was held as follows:

"10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on opinion that non of the criteria has been satisfied justifying court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr. Parasaran, learned senior counsel that the High Court committed a factual error in coming to the conclusion that respondent no. 1 was the lowest bidder and the alleged mistake committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and the contention of Mr. Sorabjee, learned senior counsel that it has been conceded by all parties concerned before the High Court that on correction being made respondent no. 1 was the lowest bidder. As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the contract though ordinarily the concerned authorities should accept the lowest bid. Further we find from the letter dated 12th July, 1996, that Paradip Port Trust itself has come to the following conclusion :-

"The technical capability of any of the three bidders to undertake the works is not in question. Two of the bids are very similar in price. If additional commercial information which has now been provided by bidders through Paradip Port Trust, had been available at the time of assessment, the outcome appear to the favour award to AFCONS."

Strong reliance has been placed by learned counsel for the appellants on the observations of this Court in the case of W.B. State Electricity Board Vs. Patel Engineering Co. Ltd. And Others (2001) 2 SCC 451, more particularly para 31.

19. It is no doubt true that while considering the matter in a broader perspective, larger public interest has to be kept in view but at the same time the other relevant factors noted by this Court in the said judgment, as reflected in paragraphs 6, 23, 24, 28, 31 and 34, need to be noted.

"6. Mr.Bhaskar P.Gupta, the learned senior counsel appearing for respondent No.10, submitted that the unit rate given by respondent Nos.1 to 4 was an essential term which would be evident from Clauses 14, 27 and 29 of the ITB, so permitting them to correct the bid would tantamount to modifying the essential term of thebid and as such the High Court ought not to have directed the appellant to permit correction of bid documents and further to consider their bid along with the other bids.

23. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as a repetitive systematic computer typographical transmission failure. It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional

but it was not beyond the control of respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half month of opening of the bids will also be violative of Clauses 24.1,24.3 and 29.1 of ITB.

24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondents 1 to 4 and respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casuality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.

28. In the instant case, we have also noted that the mistakes in the bid documents of respondent Nos.1 to 4 even though caused on account of faulty functioning of computer, could have been discovered and notified by the said respondents with exercise of ordinary care and diligence. Here, the mistakes remained in the documents due to gross negligence in not checking the same before the submission of bid. Further Clauses 24 and 27 of ITB permit modification or withdrawal of bids after bid submission but before the dead line for submissions of the bids and not thereafter. And equity follows the law. Having submitted the bid they did not promptly act in discovering the errors and informing the same to the appellant. Though letters were written on 25- 10-1999, and 17-12-1999, yet the real nature of errors/mistakes and corrections sought were not pointed out till 23-12-1999 when representation was made after interim direction of the High Court was given on 21-12- 1999. Indeed it appears to us that they improved their claim in the representation. In our view the said respondents are not entitled to rectification of mistakes/error for being considered along with the other bidders.

31. The submission that remains to be considered is that as the price bid of respondents 1 to 4 is lesser by 40 crores and 80 crores than that of respondents 11 and10 respectively, public interest demands that the bid of respondents 1 to 4 should be considered. The project undertaken by the appellant is undoubtedly for the benefit of public. The mode of execution of the work of the project

should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and on the other hand it affords the appellant a choice to select the best of the competitors on competitive price without prejudice to the quality of the work. Above all it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance of rules and conditions cannot be ignored. It is obvious that the bid of respondents 1 to 4 is the lowest of bids offered. As the bid documents of respondents 1 to 4 stands without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it cannot be directed to be considered along with other bid on the sole ground of being the lowest.

34. For the reasons abovementioned, though the impugned order of the High Court insofar as it relates to quashing of letter of the appellant dated 18-12-1999 falls within the purview of judicial review, yet the direction to the appellant to permit correction of errors by Respondents 1 to 4 in their bid documents and consider their bid along with other bid, goes far beyond the scope of judicial review, as elucidated by this Court in Tata Cellular. In the result, we uphold the impugned order of the Division Bench insofar as it relates to quashing of communication and letter dated 18-12-1999 and set aside that part of the impugned order giving direction to the appellant to permit Respondents 1 to 4 to correct bid documents and to consider their bid after correction along with other bids. The appeal is thus allowed in part. On the facts and in the circumstances of this case we leave the parties to bear their own costs."

20. This Court emphasized that in international competitive bidding which postulates keen competition and high efficiency, the bidders should have assistance of technical experts because the degree of care required in such a bidding is greater than in ordinary local bids for small works.

21. In Jagdish Mandal Vs. State of Orissa & Ors. 2006 (14) SCALE, 224, the scope of limited power of judicial review in tender and award of contracts was also lucidly stated in paragraph 19 as follows :-

"19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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 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. 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 reasonable 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. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

22. After having taken note of the parameters for exercise of power of judicial review, the conclusions arrived at by the High Court need to be noted. The High Court has elaborately dealt with the factual position and inter alia observed as follows:-

"35. In the instant case, it may be noted that it is not denied by any of the parties that at the time of floating the tender, no separate quantities were furnished to the vendors in respect of item No. 11. Thus all the bidders were in the same state as regards the required quantity by respondent No. 1. While petitioners inserted the words "As Required" in the column of "Quantity" against the said item, respondent No. 3 inserted the figure "1" in the column of "Quantity" and respondent No. 4 left the column of "Quantity" as blank. However, unit price was entered in the column "Unit Price" by each of the vendors. This was at the time of submitting the bid documents. The next relevant stage arrived on 23rd January, 2007 when the commercial bids were opened in the meeting held where the three successful vendors, namely, petitioner No. 1 and the respondents No. 3 and 4 were called. At that stage, respondent No. 2 for the first time declared the quantity of Vehicular Mobile Terminals as 1200 in number, based on the requirement given by the Indian Army to whom the systems were to

be ultimately supplied by it. Thus the bids of each of the vendors became public on 23rd January, 2007. Once the bids became public, there was no question of changing/adding/ altering/modifying the same by any of the parties."

23. It needs to be noted that after opening of the bids, the Expert Committee was required to carry out a comprehensive evaluation for arriving at the L1 bidder. The Evaluation Committee while undertaking the said process, analyzed the bids of each of the vendors and sought clarifications from all the three vendors wherever felt necessary and also held meetings with each of them to enable them to furnish their clarifications. In so far as appellant No. 1 was concerned, a meeting was held on 7th February, 2007, on which date, only two queries were raised on it, neither of which related to Item No. 11. However, appellant No. 1 while responding to the two queries raised by respondent No. 2, gave a written reply under cover of letter dated 7th February, 2007 where at the end of the response, it noted as below : "Separate pricing sheets of FF, SKD and CKD which is breakup of the composite Price Schedule are enclosed for your ready reference. Enclosed please find the composite price schedule as well for ready reference in line with RFP requirements."

In the composite price sheet in respect of Item No.11, as indicated in the statement referred to in the High Court's judgment appellant No. 1 endorsed the figure "1" in the column of "Quantity", and while filling in the price in the column of "Unit Price Euro" as also "Total Price Euro", inserted the figure, "8,977.34". The said composite price statement was at variance with the original Bill of Materials submitted by the appellant No. 1 in respect of item No.11 for the reason that in the original Bill of Materials, in the column of "Quantity" the appellant had indicated "As required" and the column of "Total Price Euro" was left blank by it. The appellant have placed heavy reliance on the composite price schedule to state that there was no corelation of the quantity of 1200 given for Vehicular Mobile Stations, as specified in Item No4.1, with item No.11 to state that the quantity against item No.11 was never declared and further, that at best the respondent No.2

could have bound the appellant No.1 down to the price indicated in the column "Total Price Euro" indicated in the composite price schedule, but it could not have multiplied the rate given in the "Unit Price" with the figure of 1200 which had resulted in absurdity.

24. As rightly noted by the High Court, the aforesaid submission, as any reference to or reliance upon the said composite price schedule submitted after opening of the commercial bids of all the vendors on an earlier date, is impermissible. Had respondent No.2 taken the composite price schedule into consideration in respect of item No.11, it would have created justifiable doubts in the minds of respondents No. 3 and 4 and defeated the rule of transparency and fairness on the part of respondent No. 2, as it would have amounted to improving the bid made originally by appellant No. 1, by supplying details upon ascertaining the rates quoted by the others. It was not as if the respondent No. 2 had asked any of the vendors to furnish a composite price bid to it on 7.2.2007. Specific queries were put forward by respondent No. 2 to each of the three bidders wherever clarifications were required qua particular items in the Bill of Materials submitted and other aspects of the bid. No query was raised by the respondent No. 2 on the appellant No. 1 in respect of item No.11. Hence, the question of taking into consideration the clarifications given thereon by appellant

No. 1 did not arise.

25. Thus, while taking note of the changes made by appellant No. 1 in respect of item No.11 in the composite price schedule, as against the original Bill of Materials submitted, the former was not taken into consideration by the Committee. Instead, the Committee made a point to observe in its analysis that no technical explanation was given by the appellant as to why the quantity had been changed by appellant No. 1 from "As required" to "1" while the "Unit Price" and "Total Price" was kept as the same in the composite price schedule. Thus the Committee multiplied the unit price furnished by appellant No. 1 with the figure 1200 to arrive at the total price, and the same method was uniformly adopted for the other two bidders. Looking at it from another angle, had the respondent No. 2 proceeded on the basis of the rate furnished by the appellants in the composite price schedule in the column, "Total Price Euro", then nothing could have precluded them from turning around later on, and seeking to bind respondent No. 2 down to the rates as offered by it for a single unit in the original Bill of Materials, the same being a part of the original tender documents. Thus, respondent No. 2 cannot be faulted for strictly adhering to the rates furnished by appellant No. 1 in its original bid documents.

26. The plea of petitioner No. 1 that the software at item No.11 had no connection or relationship with Vehicular Mobile Stations as specified in items No. 4.1 and 7 is also not acceptable inasmuch as for the Vehicular Mobile Stations to be operational and functional, they have to be attached to PC with software to enable a sending/receiving party to send/receive any speech/image, to/from another vehicular mobile. Thus all the three items mentioned at items No. 4, 7 and 11 were inter-connected and inter-related and only upon being integrated they be used for the DRTS. In any case, nothing material would turn on this for the reason that originally, prices were quoted by all the three bidders for item No.11 on a unit rate basis. The figure of 1200 cropped up much later. It is the common case of all the parties that commercial offers were to be made by all the bidders for quantities of 80 systems as per the Bill of Materials enclosed with the RFA. As no quantity was disclosed for item No.11 in the Bill of Materials, none of the bidders quoted rates for any specific quantity, but did so only for a single unit. Thus the unit rate quote remained the deciding factor for the Committee, while finally analyzing the bids.

27. The contention of the appellants that they had a license for the software under which one software unit would serve 100 units of Vehicular Mobile Terminals and as a result, the total requirement of software unit was only 12(12x100 = 1200) and not 1200 (1x1200=1200), is misconceived and without any basis for the reason that a perusal of item No. 11 of the Bill of Materials submitted by the appellants does not show that any such remarks were made therefor. In fact, the remarks column in the said Bill of Materials was left blank. Had such been the intention of appellant No. 1, nothing prevented it from indicating so in the remarks column. This conclusion is further fortified by the fact that remarks were specifically given by appellant No. 1 in the remarks column of the Bill of Materials in respect of other items, wherein it made observations to indicate wherever the price of a particular item was included in another item or where the price quoted in respect of an item was exclusive of certain other items. Thus, if appellant No. 1 wanted to offer the price of one unit which as per its contention, was good to serve 100 users, then the same should

have been so indicated in the Bill of Materials. There being no such indication in the original bid documents, respondent No. 2 could not have been expected to assume on its own that appellant No. 1 possessed a license which permitted to use the software mentioned at item No.11 for serving 100 units. Nor can respondent No. 2 be blamed for using the multiplying factor of 1200 to arrive at the total price of units required under item No.11.

28. The appellants have also not been able to establish that respondent No.2 adopted a pick and choose policy or discriminated against appellant No.1. Respondent No. 2 dealt with all the three bidders with an even hand as the same method was adopted for arriving at the total price of materials specified in item No.11 in respect of all the three bidders. It is not the case of the appellant that they had not quoted the said price as that of a single unit. There is nothing on record by way of any remarks in the bid document to effect that the said price of a single unit was to hold good for 100 units on the ground that appellant No. 1 was granted a software license which catered to 100 users at one time. A basic distinction has to be drawn between a case where against an item, no rates or prices or quantities are quoted, and those where some rate is quoted. Appellant No.1 having quoted a rate on a unit basis in respect of item No.11, respondent No. 2 had no option but to make the said rate the basis for arriving at the total price.

29. Accepting the interpretation as sought to be given by the appellants would amount to re-writing the entries in the bid document and reading into the bid document, terms that did not exist therein. An international bidding of such a nature being highly competitive is also expected to be extremely precise. The technical nature of the subject matter of the contract itself postulated assistance of technical experts and thus, a very high degree of care and meticulous adherence to the requirements of the bid was inherent in such bidding. On its part, respondent No. 2 was under an obligation to not only maintain a great degree of transparency and fair dealing on its part, but was also expected to maintain the sanctity and integrity of the entire process. Thus it was incumbent upon respondent No. 2 to ensure that no different yardstick were adopted for any of the vendors and at the same time, to ensure that there was not the remotest possibility of discrimination, arbitrariness or favouritism.

30. There was no scope for respondent No. 2 to read into the documents, terms and conditions which did not exist in the bid documents. The appellants have also not levelled any personal allegations of malafides or favouritism against respondent No. 2.

31. The approach of the High Court is in the right direction and the factual position obtaining has also been noted in detail and the conclusions have been arrived at.

32. The matter can be looked at from a different angle. As noted in the case of Reliance Airport Developers (P) Ltd. (supra) at para 77, if two views are possible and no malafides or arbitrariness is alleged or shown, there is no scope for interference with the view taken by the authorities in inviting tenders.

33. As was noted in the case of Asia Foundation & Construction Ltd. (supra) though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose.

34. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

35. In the instant case, as has been rightly contended by the learned Addl. Solicitor General appearing for Union of India, the contract is in respect of sensitive Army equipments which are urgently needed. It cannot be held that the process adopted or decision made is so arbitrary or irrational that no responsible authority acting reasonably or in accordance with the relevant law could not have taken such a decision. The inevitable conclusion is that the appeal is devoid of any merit and deserves dismissal, which we order. However, there shall be no order as to costs.

36. Appeal dismissed.