
(2016) 10 BOM CK 0132
In the Bombay High Court
Case No : Writ Petition No. 1911 of 2016

M/s. Nirlac Chemicals

APPELLANT

Vs

Haffkine Bio-Pharmaceutical Corporation Ltd.

RESPONDENT

Date of Decision : 07-10-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 14, Article 226, Article 226

Citation : (2016) 6 AIRBomR 440

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : Mr. Sanjay Jain with Mr. Vivek Phadke, Advocates, for the Respondent No. 3; Mr. Mohit Jadhav, AGP, for the Respondent No. 2; Mr. Janak Dwarkadas, Sr. Counsel with Mr. Chirag Mody, Mr. Harshil Parekh and Mr. Manish Parekh i/b M/s. Purnanand and Co, for the

Final Decision : Allowed

Judgement

B.P. Colabawalla, J. - Rule. Respondents waive service. By consent of parties, rule made returnable forthwith and heard finally.

2. This Writ Petition has been filed under Article 226 of the Constitution of India seeking a writ of certiorari to quash and set aside the decision of Respondent No.1 in rejecting the "techno-commercial" bid of the Petitioners in relation to the tender (dated 20th January, 2016) floated for the supply of "Bivalent Oral Polio Vaccine Bulk" ("bOPV") manufactured by a Company called PT. Bio-Farma, Indonesia. The rejection of the Petitioners' techno-commercial bid was informed to them by Respondent No.1 vide its letter dated 22nd June, 2016 [the "impugned letter" (Exh. "I" to the Petition)]. Consequently, the Petitioners have also prayed that Respondent No. 1 be directed to revoke/cancel the tender/contract awarded to Respondent No.3 (Bio Net-Asia Co. Ltd.) for the supply of the said bOPV.

3. In a nutshell, the tender process has been challenged before us on the ground that the same has been carried out in an arbitrary and discriminatory manner

and only with a view to favour Respondent No.3. According to the Petitioners, the entire tender process is in flagrant violation of Central Vigilance Commission Guidelines ("CVC Guidelines") relating to tenders floated by the Government and its Public Sector Undertakings, and hence, the present challenge.

4. At the outset, we must mention that this Writ Petition was initially heard on 25th August, 2016. On the said date, we had called upon Respondent No.1 to produce the original records and files of the aforesaid tender for our perusal. Accordingly, the original records and files were produced before us on 30th August, 2016 and we recorded the statement of Ms. Srivastav, learned counsel appearing on behalf of Respondent No.1, that there is nothing on the files or in the records of the 1st Respondent, other than the record produced before us. She stated that this Court can rest its conclusions on the tender papers, originals of which were produced for our perusal. This Court, by its order dated 30th August, 2016 had also ordered that considering the fact that this Court had called for the original records and which were now produced, none of the parties would be allowed to file any affidavits (other than the ones already on record). However, in order to ensure fairness and transparency in Court proceedings, we had allowed the parties to inspect the original records. It is only after this process was completed that we have heard this Writ Petition finally.

5. Before we deal with the rival contentions, it would be necessary to set out the brief facts in the present case. They are as follows :-

(a) Petitioner No.1 is a registered partnership firm and carries on business in distribution, import and export of pharmaceutical and biotech products. Petitioner No.2 is an enterprise organised and existing under the laws of the United Arab Emirates and is engaged inter alia in the business of distributing in India and other countries, vaccines and other biological products. Petitioner No.1 is the local network partner of Petitioner No.2 in India and helps Petitioner No.2 to sell vaccines and other biological products in India.

(b) Respondent No.1 is a Government of Maharashtra Undertaking engaged in the business of manufacturing vaccines and other pharmaceuticals and/or biological products. Respondent No.1 has floated the tender dated 20th January, 2016 inviting offers from distributors of a company called PT. Bio-Farma, Indonesia for supply of bOPV. It is not in dispute before us that Respondent No.1 is a State within the meaning of Article 12 of the Constitution of India. Respondent No.2 is the State of Maharashtra, through the Ministry of Food, Civil Supplies, Consumer Protection, Food and Drug Administration, and exercises control over Respondent No.1. Respondent No.3 is a competitor of the Petitioners and also a distributor of PT. Bio-Farma. It is the case of the Petitioners that Respondent No.3 has been wrongfully and illegally awarded the tender/contract forming the subject matter of the present Writ Petition.

(c) It's the Petitioners' case that pursuant to a Sale Purchase Agreement entered into by Petitioner No. 2 with PT. Bio-Farma, Petitioner No.2 was appointed as an

exclusive distributor by PT. Bio-Farma for distribution of its vaccines for human consumption in India and other territories, as more particularly set out therein. This Agreement was initially valid upto 31st March, 2014 and was extended from time to time. As on today, this Agreement, according to the Petitioners, is valid upto 31st March, 2019.

(d) Pursuant to the aforesaid Agreement, it is the case of the Petitioners that they have been supplying bOPV (procured from the said PT. Bio-Farma) to Respondent No.1 since the year 2000 without any complaint. The details of the supply made by the Petitioners to Respondent No.1 from the year 2012 to 2015 have been set out by the Petitioners in paragraph 4(d) of the Petition.

(e) It is thereafter stated that Petitioner No.2 had entered into a Sale Purchase Agreement dated 2nd January, 2014 with Respondent No.1 for exclusive supply of bOPV until 31st March, 2016. According to the Petitioners, under this Agreement, Respondent No.1 was to exclusively purchase bOPV from Petitioner No.2 during the subsistence of this Agreement. Thereafter, though it is averred that Respondent No.1 had breached the aforesaid Agreement by purchasing about 60 million doses of the said bOPV from Respondent No.3, Mr. Dwarkadas, learned Sr. Counsel appearing on behalf of the Petitioners, has not addressed us on this issue at all. He very fairly stated that he is restricting his arguments to only challenge the tender process and has accordingly addressed us only on this issue.

(f) Be that as it may, it is the case of the Petitioners that Respondent No.1 had initially uploaded on their website an undated tender notice some time in January 2016, to be opened on 29th January 2016. The Petitioners accidentally learnt about this tender while browsing the website of Respondent No.1. However, subsequently Respondent No.1 withdrew the said tender notice from its website. Thereafter, on 20th January, 2016, the 1st Respondent once again issued another tender notice calling for bids from distributors for supply of the said bOPV manufactured by PT. Bio-Farma only. Despite the fact that the Petitioners were the past suppliers of the said bOPV to Respondent No.1, the 1st Respondent did not inform the Petitioners about floating of the said tender and the Petitioners learnt of the same only while browsing the website of Respondent No.1. This tender provided for issuing two separate bids viz. the techno-commercial bid and the price bid respectively.

(g) Accordingly, the Petitioners submitted their bid vide their letter dated 25th January, 2016. A copy of the bid submitted by the Petitioners along with the documents are annexed at Exh. "D" to the Petition. As per the said tender notice, the bids received by Respondent No.1 were scheduled not to be opened before 10th February, 2016. Respondent No.1 accordingly decided that the bids/tenders would be opened on 12th February, 2016. It is the case of the Petitioners that no prior intimation was given to them of this date and the Petitioners, on 12th February, 2016 itself, at around 10.37 a.m., received an e-mail from Respondent No.1 informing the Petitioners that the bids/tenders would be opened on 12th

February, 2016 at 12.00 noon. With great difficulties, the Petitioners managed to reach the office of Respondent No.1 and attended the tender opening meeting. At that time, the Petitioners were informed that the tender opening would take place at around 1.00 p.m.

(h) During the tender opening (at around 1.00 p.m.), the Petitioners were informed by Respondent No.1 that they had received two bids viz. one from the Petitioners and the other from Respondent No.3. However, none were present on behalf of Respondent No.3. This fact has been duly admitted during the course of arguments by Mr. Jain, learned counsel appearing on behalf of Respondent No.3, stating that on the date when the tenders were opened, none of the representatives of Respondent No.3 were present in India.

(i) Be that as it may, at about 1.00 p.m. (on 12th February, 2016) the Petitioners' techno-commercial bid was opened and the Petitioners were informed that they would have to return after the lunch break. What is important to note and which fact is now admitted before us, is that the bid submitted by Respondent No.3 was not opened by Respondent No.1 in the presence of the Petitioners and the Petitioners were asked to return after the lunch break without opening the tender of Respondent No.3.

(j) It is the case of the Petitioners that after the lunch break, the representatives of the Petitioners' were made to wait till 5.00 p.m. and thereafter at around 5.15 p.m. they met Mr. Shankarwar, who was in charge of opening the tenders. To their shock and surprise, the Petitioners were informed that the bid of Respondent No.3 was already opened. At this juncture, the Petitioners called upon Respondent No.1 to show the bid submitted by Respondent No.3 and the documents relating thereto. However, the representatives of the Petitioners were informed that they could not be shown the bid or the documents submitted by Respondent No.3 as they were confidential in nature. Thereafter, the Petitioners' representatives were made to wait till 5.45 p.m. when a comparative analysis sheet of the techno-commercial bids was shown to the representatives of the Petitioners. At this juncture, the Petitioners found that Respondent No.1 had put negative marks against their techno-commercial bid under the following headings :-

- "1. List of current buyers in India with quantities supplied for 3 consecutive years.
2. Company turn over should be in excess of Rs.100 crores.
3. Detailed background of Bidders.
4. Audited Annual Report of last 3 years.
5. List of WHO pre-qualified human vaccines supplied in last 3 years.
6. Supply of minimum 70 million doses.
7. Experience for more than 15 years in the field of human vaccines."

(k) According to the Petitioners, they had provided all the details in its tender document as sought for by Respondent No.1. These details have been set out in paragraph 17 of the Petition.

(l) Accordingly, the Petitioners, immediately by their letter dated 12th February, 2016 addressed to the Managing Director of Respondent No.1, inter alia pointed out the various irregularities committed in opening its techno-commercial bid and also called upon Respondent No.1 not to reject its bid on totally false, flimsy and frivolous grounds. The Petitioners further sought inspection of the techno-commercial bid of Respondent No.3 as also the letter of authorisation purportedly issued to Respondent No.3 by the said PT. Bio-Farma.

(m) Thereafter, the Petitioners, by their letters dated 16th February, 2016 and 24th February, 2016 (Exhs. "G" and "H" to the Petition) also made complaints to Respondent No.2 herein (being the concerned Ministry of the Government of Maharashtra) placing the true and correct facts on record and pointed out the various irregularities committed in opening the techno-commercial bid of the Petitioners. It was also pointed out to the said Ministry that favouritism was being shown to Respondent No.3 as was evident from the conduct of Respondent No.1. Accordingly, Respondent No.2 was called upon to look into and investigate the tender floated by Respondent No.1.

(n) Pursuant to these letters, a meeting took place when Respondent No.2 asked Respondent No.1 to look into the grievances of the Petitioners, and after considering the same, if Respondent No.1 felt that the bid of the Petitioners was disqualified, then the same was to be communicated to the Petitioners along with the reasons for disqualification, so as to enable the Petitioners to take appropriate steps, if they so desired.

(o) After this meeting, no communication was received by the Petitioners for almost three months. However, on 30th June, 2016, the Petitioners received an e-mail from Respondent No.1 enclosing a letter dated 22nd June, 2016 (the impugned letter), wherein the Petitioners were informed that Respondent No.1 had constituted a Committee for the purpose of assessing the technical documents submitted by the Petitioners and Respondent No.3. This Committee had observed that the techno-commercial bid submitted by the Petitioners was not in compliance with the technical requirements of Respondent No.1. However, without elaborating any further and without assigning any reasons, the Petitioners' bid was rejected. Since the Petitioners' techno-commercial bid failed to meet the technical requirements of Respondent No.1, the Petitioners were also informed that their price bid was not opened. It is on receipt of this letter, and the Petitioners being informed for the first time that their bid is rejected, that the Petitioners have approached this Court under Article 226 of the Constitution of India challenging the entire tender process for procurement of the said bOPV by Respondent No.1.

6. In this factual backdrop, Mr. Dwarkadas, learned Sr. Counsel appearing on

behalf of the Petitioners, submitted that the entire tender process is vitiated by discriminatory treatment of the Petitioners and arbitrariness in the process itself. Awarding the said tender to Respondent No.3 and disqualifying the Petitioners at techno-commercial bid stage itself, smacks of malafides, is arbitrary and discriminatory, and was done only to favour Respondent No.3, was the submission. Mr. Dwarkadas submitted that in a matter like this, Respondent No.1 ought to have issued a global tender inviting bids from all pharmaceutical companies. In a public tender process, as per the CVC Guidelines, issuance of global tender was the most preferred and transparent mode of procurement of goods and services, was the submission. Mr. Dwarkadas submitted that however this was not done only with a view to favour Respondent No.3.

7. In particular, Mr. Dwarkadas submitted that when the Petitioners reached the office of Respondent No.1 at around 1.00 p.m. on 12th February, 2016 the following Officers of Respondent No.1 were present at the meeting for opening the bids/tenders:-

- (1) General Manager (Production);
- (2) Manager (Marketing);
- (3) Manager (Quality Assurances);
- (4) Materials Manager;
- (5) Audit Officer, HBPCL.

8. The techno-commercial bid of the Petitioners was opened in the presence of the Petitioners and thereafter the meeting was adjourned for lunch without opening the bid/tender of Respondent No.3. Thereafter, the Petitioners were made to wait till 5.45 p.m. without any information about the techno-commercial bid received from Respondent No.3. At 5.45 p.m., a comparative analysis sheet drawn up by the above Officers was shown to the representative of the Petitioners and the Petitioners were marked Negative in respect of seven items. Mr. Dwarkadas submitted that on the date when the comparative analysis sheet was shown to the Petitioners, only the aforesaid Officers were present and the Managing Director of Respondent No.1 was not present at the said meeting. It is in these circumstances that the Petitioners had addressed a letter dated 12th February, 2016 to the Managing Director of Respondent No.1 placing on record the events that had transpired on the said date. Mr. Dwarkadas submitted that this comparative analysis sheet that was shown to the Petitioners did not bear any signatures at the bottom. However, it now transpires from the original record produced before the Court, and inspection of which was taken by the Petitioners, that the comparative analysis sheet bears not only the signature of the aforesaid five Officers but also that of the Managing Director, when in fact the Managing Director was not even present during the tender opening. He submitted that the record also indicates that the techno-commercial bid of Respondent No.3 was not opened in the presence of the Petitioners and in fact there is no mention in the

minutes of the meeting dated 12th February, 2016 of the bids being opened either in the presence of the Petitioners or Respondent No.3. In fact, the record does not indicate as to when and by whom the bid of Respondent No.3 was opened. Further, despite a specific request being made by the Petitioner, the techno-commercial bid of Respondent No.3 was not shown to the representative of the Petitioners citing confidentiality, and which according to Mr. Dwarkadas, was in total contravention of the CVC Guidelines.

9. Mr. Dwarkadas submitted that from a perusal of the record produced before this Court and more particularly the minutes of the meeting held on 12th February, 2016, the Petitioners have now for the first time learnt the process followed by Respondent No.1 for assessing the bids submitted by the Petitioners and Respondent No.3. He submitted that it appears that one Committee was constituted (purportedly called a newly constituted Committee) of Officers (more particularly set out above) to assess the outcome of the tender. These Officers opened the techno-commercial bids of the Petitioners and Respondent No.3 in the absence of the two bidders and handed over the documents to the Committee for their appraisal. Thereafter, the Committee purportedly verified and scrutinised all the documents and unanimously decided that the documents submitted by the Petitioners were not in sync with the terms and conditions of the tender and hence, the price bid of the Petitioners was not opened. The minutes record that the price bid of the Petitioners was proposed to be returned to the Petitioners, however, the same has not been done till date. He submitted that in the minutes of the meeting of 12th February, 2016, there is no reference of the comparative analysis sheet of the technical bids of the Petitioners and Respondent No.3. Significantly, in the handwritten comparative analysis sheet shown to the Petitioners, there were seven deficiencies in the Petitioners' bid whereas in the typed comparative analysis sheet, there were six deficiencies contained in the Petitioners' technical bid. He submitted that although the Managing Director of Respondent No.1 is shown to be present and has also signed the minutes of the meeting dated 12th February, 2016, it appears that she was not a part of the newly constituted committee which assessed the technical bids. It would therefore follow that if the Managing Director was present as indicated in the minutes of the meeting, and that the newly constituted Committee had unanimously decided that the technical bid of the Petitioners was not in sync with the tender conditions and therefore rejected, there is no explanation as to why the Managing Director has intimated to the Petitioners only for the first time on 30th June, 2016 that their techno-commercial bid was rejected. He submitted that it now appears from the affidavit in reply filed by Respondent No.1 that much prior to informing the Petitioners that their techno-commercial bid was rejected, on 9th March, 2016 itself, the tender / contract was awarded to Respondent No.3. According to Mr. Dwarkadas, all this clearly shows that the actions of Respondent No.1 in awarding the tender to Respondent No.3 smacks of malafides and only to favour Respondent No.3 and somehow disqualify the Petitioners on false and flimsy grounds. He submitted

that in the facts of the present case, this is even more evident because the Petitioners have been supplying bOPV to Respondent No.1 since the year 2000 and that too without any complaint in respect of the said supply. Therefore, it was strange that Respondent No.1 found the techno-commercial bid of the Petitioners not in sync with the tender conditions, which tender was floated to procure the very same bOPV that was being supplied by the Petitioners to Respondent No.1 from the year 2000.

10. Mr. Dwarkadas submitted that according to the Petitioners, the Managing Director of Respondent No.1 was never present in the tender evaluation process and it is for this very reason that the Petitioners had addressed the letter dated 12th February, 2016 to the Managing Director and asked her to look into the irregularities and sought her intervention to ensure that the Petitioners' techno-commercial bid was not rejected on flimsy grounds. Mr. Dwarkadas submitted that admittedly there is no communication by Respondent No.1 of the decision taken by it in the purported meeting held on 12th February, 2016 and neither these decisions have ever been posted on the website of Respondent No.1. Apart from the comparative analysis sheet, Mr. Dwarkadas submitted that there is no document on record which gives a detailed analysis of the technical bid submitted by the Petitioners and Respondent No.3 and the reasons for rejection of Petitioners' bid and acceptance of Respondent No.3's bid. He therefore submitted that the entire tender process and awarding the tender to Respondent No.3 is vitiated on the ground that it is discriminatory, smacks of malafides and arbitrariness, and only to favour Respondent No.3.

11. Mr. Dwarkadas submitted that being aggrieved by these actions of Respondent No.1, the Petitioners by their letters/complaints dated 16th February, 2016 and 24th February, 2016 (pages 217 to 219 of the paper-book) requested Respondent No.2 to look into the irregularities in the tender process. Pursuant to the aforesaid complaints, a meeting was held in the office of Respondent No.2. At this meeting Respondent No.1 was asked to look into the grievances of the Petitioners and if it felt that the bid of the Petitioners was disqualified, then the same was to be communicated to the Petitioners in writing. Mr. Dwarkadas submitted that in this meeting, Respondent No.1 never mentioned that the techno-commercial bid of the Petitioners was already rejected and that the tender was already awarded to Respondent No.3 on 9th March, 2016. The Petitioners were informed for the first time only 30th June, 2016 that the tender documents submitted by the Petitioners were not in compliance with the technical requirements and therefore, the Petitioners were disqualified on this ground. Mr. Dwarkadas submitted that what is also important to note is that in the original record produced before us, there is absolutely no reference of the letter dated 22nd June, 2016 or any internal note prepared for the purposes of issuing the said letter. The entire record is completely silent and does not indicate as to why and in what circumstances, the letter dated 22nd June, 2016 was issued by the Managing Director of Respondent No.1, especially in view of the fact that according to Respondent No.1, the Petitioners' bid was disqualified

on 12th February, 2016 itself. He submitted that even though the affidavit in reply mentions that the tender was awarded to Respondent No.3 on 9th March 2016, there is nothing in the original record produced, with reference to this contract. In fact, this contract has not been produced along with the original record and nor is there any reference to the quantities of supply made by Respondent No.3 to Respondent No.1. He submitted that there is nothing in the original record to show or indicate that there was any contract entered into on 9th March, 2016 with Respondent No.3. Mr. Dwarkadas submitted that while looking to all these facts and specially after taking inspection of the original records, it is clear that the techno-commercial bid of the Petitioners was rejected on specious grounds and the tender was awarded to Respondent No.3. He accordingly submitted that the entire tender process was vitiated as it suffers from arbitrariness, is discriminatory, and violative of the CVC Guidelines. In these circumstances, it was the submission of Mr. Dwarkadas, that the Writ Petition be allowed and Respondent No.1 be directed to float a fresh tender for procurement of the said bOPV.

12. On the other hand, Ms Srivastav, learned counsel appearing on behalf of Respondent No.1, submitted that the entire tender process was carried out in a fair and transparent manner. She submitted that from the averments in the Petition itself, it was clear that the Petitioners were aware that their techno-commercial bid was rejected on 12th February, 2016. She submitted that as the Petitioners were made aware on 12th February, 2016 itself that their techno-commercial bid was rejected, Respondent No.1 did not feel it necessary to deal with the contentions raised by the Petitioners in their letter dated 12th February, 2016. Ms. Srivastav submitted that after opening the techno-commercial bids of the Petitioners and Respondent No.3 the same were placed before a Committee, expressly constituted for the purposes of assessing the said bids. This Committee found that the technical papers submitted by the Petitioners were not in compliance with the technical requirements as mentioned in the tender document. The tender document clearly stated that if any participating firm failed to comply with the requirements contained therein, the said firm would be disqualified and their price bid would not be opened. In these circumstances, Ms. Srivastav submitted that Respondent No.1 had followed the tender process in a fair and transparent manner, and after evaluation of the respective tenders of the Petitioners and Respondent No.3, awarded the contract/tender to Respondent No.3. Thereafter, a Supply Agreement was executed between Respondent No.1 and Respondent No.3 on 9th March, 2016.

13. Ms. Srivastav submitted that despite the Petitioners being fully aware that they had not complied with the technical requirements of the tender document, they continued writing letters complaining to the authorities. It is in this light, and since the Petitioners insisted that their bid wasn't rejected in writing, that Respondent No.1 issued the letter dated 22nd June, 2016 formally rejecting the techno-commercial bid of the Petitioners. She submitted that the Petitioners were always aware that their techno-commercial bid was rejected on 12th February,

2016 itself and this decision was formally communicated to the Petitioners vide Respondent No.1's letter dated 22nd June, 2016. To conclude, Ms Srivastav submitted that there are no irregularities in the tender process and Respondent No.1 has acted in a transparent, fair and honest manner not only in the process but also in awarding the contract to Respondent No.3. She therefore submitted that there is no merit in this Writ Petition and the same ought to be dismissed.

14. Mr. Jain, learned counsel appearing on behalf of Respondent No.3, apart from adopting the arguments of Ms. Srivastav, additionally submitted that in the present Writ petition, there is no challenge to the conditions of the tender document. He submitted that the conditions are mandatory and if one does not satisfy these mandatory conditions, their techno-commercial bid would stand disqualified. He submitted that in the facts of the present case, the record would clearly indicate that the Petitioners had not complied with the mandatory conditions of the tender document and therefore, they could not make any grievance of their techno-commercial bid being rejected by Respondent No.1. He submitted that even assuming that Respondent No.3's bid was not opened in the presence of the Petitioners, there was no irregularity committed because the outcome was known to them and this was also evident from the Petitioners' own letter dated 12th February, 2016. He submitted that it is true that none of the representatives of Respondent No.3 were present when the bids were opened as none of them were in India on the said date and the bid of Respondent No.3 was opened in their absence. He submitted that Respondent No.3, not having any grievance that their bid was opened in their absence, the Petitioners could not make the said grievance. He submitted that after 12th February, 2016 and up until 22nd June 2016, not a single letter or other correspondence was addressed by the Petitioners to Respondent No.1 making any grievance. He submitted that to vitiate a tender, the Court has to be satisfied that - (a) there is a mistake or fault in the process itself; (b) that favouritism has been shown to a particular party and (c) in public interest, the tender ought to be struck down. He submitted that in the facts of the present case, none of these conditions have been satisfied and therefore, no interference is called for by us in our equitable, extraordinary and discretionary jurisdiction under Article 226 of the Constitution of India. Accordingly, the Writ Petition be dismissed, was the submission of Mr. Jain.

15. We have heard the learned counsel for the parties at length and perused the papers and proceedings in the Writ Petition along with the annexures thereto. We have also gone through the original record and files produced by Respondent No.1 for our perusal. Before dealing with the rival contentions, we would like to reiterate briefly the scope of judicial review in matters like the present one. The principles covering judicial review of administrative decisions are now very well settled by a long line of decisions rendered by the Supreme Court. The Supreme Court has time and again reiterated that judicial review would apply even to the exercise of contractual powers of the Government and its instrumentalities, in order to prevent arbitrariness and favouritism. This, of course, does not mean

that the State is not free to protect its interest as guardian of its finances. There could be no infringement of Article 14 of the Constitution of India if the Government or its instrumentalities tried to get the best person or the best price. The right to choose could not be considered to be an arbitrary power unless that power was exercised for any collateral purposes. Basically, the scope of judicial review was confined in a broad sense to the following three distinct aspects;

(i) Whether there was any illegality in the decision, which would imply whether the decision making authority has correctly understood the law that regulates its decision making power and whether it has given effect to it;

(ii) Whether there was any irrationality in the decision taken by the authority, implying thereby, whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and

(iii) Whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.

16. What the Court has to bear in mind is that it does not sit in appeal but merely reviews the manner in which the decision is made. The Government and its instrumentalities must have the freedom to contract and for that purpose a fair play in the joints is necessary for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision must not only be tested by application of the Wednesbury principle of reasonableness but must be free from arbitrariness and not affected by bias or actuated by mala fides. To put it in a nutshell, in a matter like the present one, what can be questioned on certain grounds, is the decision making process and not the decision itself. If the Court finds no fault in the decision making process, it cannot substitute its own decision for that of the authority, merely because it feels that its decision (rather than that of the authority) would be a more correct and/or prudent decision. The aforesaid principles are too well settled, but if one must refer to any authority on this subject, a useful reference can be made to a decision of the Supreme Court in the case of *Siemens Aktiengesellschaft and Siemens Ltd. v. Delhi Metro Rail Corporation Ltd. & Ors.*, (2014) 11 SCC 288 [paragraphs 18 to 23 of the SCC Report where the aforesaid principles have been succinctly set out.

17. Having said this, we shall now examine the rival contentions as put forth by the learned counsel for respective parties. The first contention advanced by Mr. Dwarkadas was that the techno-commercial bid of the Petitioners was opened in the presence of the Petitioners and thereafter the meeting was adjourned for lunch without opening the bid/tender of Respondent No.3. In this regard, we must note and the record indicates that it is an admitted fact that the bid/tender of Respondent No.3 was not shown or opened in the presence of the Petitioners. In fact, on perusal of the original record, we find that it is completely silent as to when and by whom the bid of Respondent No.3 was opened. It is also an

admitted fact that Respondent No.3 was not present during the tender opening meeting. The record is also completely silent as to who instructed Respondent No.1 to open the bid of Respondent No.3 in their absence. All this is really undisputed. In this factual scenario, it would be important to refer a publication from the Chief Examiners' Organisation of the Central Vigilance Commission. This publication was published in view of the several pitfalls and lapses that were observed in awarding contracts etc. In light of this, the Central Vigilance Commission had directed that every Executive ought to go through this publication and avoid mistakes as enumerated therein. It was directed that the Executive adhere to the various circulars and instructions before making any decision, and the time-tested methods should never be given a go-bye in the name of urgency. Part I of this publication deals with common irregularities/lapses observed in award and execution of electrical, mechanical and other contracts, and the guidelines for improvement thereof. Clause 12 deals with opening of tenders. Clause 12.1 takes note of the fact that in some organisations, tenders are not opened in the presence of bidders or their representatives on the plea of maintaining absolute secrecy. The pitfalls of following this practise have been set out in the said clause. For ready reference, clauses 12.1 and 12.2 read thus :-

"12.1 In some organisations, the tenders are not opened in the presence of the bidders' representatives on the plea of maintaining absolute secrecy. Such a practise of not opening tenders in public and of not disclosing the rates quoted by all bidders to other firms is against the sanctity of the tendering system, and is a nontransparent method of handling tenders. The possibility of tampering and interpolation of offers, after opening of tenders, in such cases cannot be ruled out. Some organisations do not even maintain tender opening registers. The rates at times are not quoted both in figures and words, cuttings/over writings are not attested by bidders.

The opening of tenders in presence of the bidders' representatives needs to be scrupulously followed. While opening the tenders it needs to be ensured that each page of tender, particularly the price and important terms and conditions should be encircled and initialled with the date. Any cutting/overwriting should be encircled and initialled in red ink by the tender opening officer/committee. The tender opening officer/committee should also prepare an "on the spot statement" giving details of the quotations received and other particulars like the prices, taxes/duties, EMD, any rebates etc. as read out during the opening of tenders. A proper tender opening register in a printed format should be maintained containing information viz. date of opening including extensions, if any, names and signatures of all the persons present to witness the tender opening which should include the bidders representatives also.

12.2 In cases involving the two bid system, it has been noticed that after opening of the technical bids, the price bids, which are to be opened subsequently, are kept as loose envelopes. In such cases, the possibility of

tampering of bids prior to tender opening cannot be ruled out.

In order to make the system fool-proof, it needs to be ensured that the tender opening officer/committee should sign on the envelope containing the price bids and the due date of opening of price bids should be clearly mentioned on the envelopes and should again be placed in the tender box."

(emphasis supplied)

18. On a perusal of these clauses, it is clear that the Government and its instrumentalities have been asked to ensure that opening of tenders in the presence of bidders' representatives needs to be scrupulously followed. This is to ensure that there is no possibility of tampering and interpolation of offers after opening all the tenders. In the facts of the present case, it is not in dispute that the techno-commercial bid of the Petitioners was opened in the presence of the Petitioners and without opening the bid/tender of Respondent No.3. In fact, Respondent No.3's bid/tender was never opened in front of the Petitioners and neither was the same shown to them. When and what time the bid of Respondent No.3 was opened is not indicated in the original record produced for our perusal. In fact, on a perusal of the said original record and files, one can safely say that the same can be used as a perfect example of how one ought not to maintain the original records. This is more so when it comes to an instrumentality of the State. We must note that the Petitioners have time and again asked for seeing the bid of Respondent No.3 but the same was denied to them on the ground of confidentiality. Once the CVC has clearly stated that the bids have to be opened in the presence of the bidders and/or their representatives, and the same ought to be scrupulously followed, we fail to understand why the bid of Respondent No.3 was not shown to the Petitioners. This is more so in the facts of the present case, considering that Respondent No.3 was not even present at the time when its bid was opened by Respondent No.1 and had never ever objected to its bid being shown to the Petitioners on the alleged ground of confidentiality. We therefore find that Respondent No.1 refusing to show the bid of Respondent No.3 to the Petitioners, despite repeated demands, and in fact not even opening the said bid in the presence of the Petitioners, goes to the very root of the matter and would indicate that the entire tendering process has not been conducted in a fair and transparent manner as mandated by a catena of decisions of the Supreme Court and which have been referred to in *Siemens Aktiengesellschaft and Siemens Ltd. v. Delhi Metro Rail Corporation Ltd. & Ors.*, (2014) 11 SCC 288 (supra).

19. If this was the only irregularity, with nothing more, it may not have persuaded us to interfere under Article 226 of the Constitution of India. Unfortunately, the matter does not stop here. Apart from the fact that there was a serious irregularity and impropriety as indicated earlier, there are several other irregularities committed by Respondent No.1 in opening the tender. Another serious irregularity committed by Respondent No.1 is that even though according to it, the tender of the Petitioners was not technically compliant as early as on

12th February, 2016, there is no explanation at all in the original records and files produced before us, as to why the Petitioners were informed about the rejection of their tender only by the letter dated 22nd June, 2016 and which was communicated to the Petitioners only on 30th June, 2016. The only explanation given for this by Ms Srivastav, and which is also the stand taken in the affidavit in reply, is that the Petitioners were aware that its techno-commercial bid was non-compliant as early as on 12th February, 2016 and Respondent No.1 issued the letter dated 22nd June, 2016 only because the Petitioners insisted on the same. We are afraid, we are unable to accept this submission for more than one reason. Firstly an instrumentality of the State like Respondent No.1, and in a matter like this, which involves procurement of vaccines through a public tender process, cannot take a stand that the Petitioners knew that their bid was non-compliant and therefore Respondent No.1 did not feel the need to reject the Petitioners' bid in writing. This is not how an instrumentality of the State is expected to behave and this is certainly not acting in a fair and transparent manner. What is also disturbing is that the original record produced for our perusal has the minutes of the meeting held on 12th February 2016. These minutes record that the Audit Officer of Respondent No.1, after opening the technical bids submitted by the two distributors of M/s PT. Bio-Farma, Indonesia, handed over the documents to the Committee for its appraisal. Neither do these minutes reflect that the bids of both the distributors were opened simultaneously and nor do we find from the record that the Committee called both the distributors at the time of verification and scrutiny of their documents. Even the Committee did not think it fit to call the Petitioner and Respondent No.3 when the bids were submitted to it. Further, these minutes do not record at what time the bids were opened. Further, even though the minutes of the meeting record that the Committee has unanimously declared that the documents submitted by the Petitioners were not in sync with the terms and conditions of the tender, the Committee did not deem it fit to record in the minutes to communicate this decision to the Petitioners immediately. In fact, in these minutes of the meeting there is no mention at all about communicating its decision to the Petitioners. What is also important to note is that according to Respondent No.1, a contract of supply has been entered into by it with Respondent No.3 on 9th March, 2016. What is curious is that this contract is not in the original file and records produced for our perusal. This would certainly create a suspicion that all these documents dated 12th February, 2016 and which are there in the original file could have been prepared much later only to justify entering into the contract with Respondent No.3. This entire action therefore is clearly not carried out in a manner which is fair and transparent as mandated by a catena of decisions of the Supreme Court and referred to by us earlier. Secondly, it is not in dispute that because the Petitioners were aggrieved by the way Respondent No.1 had conducted the opening of the tender, the Petitioners (by their letters dated 16th February, 2016 and 24th February, 2016) had complained to Respondent No.2 about the same and requested it to look into and investigate the subject tender. Thereafter, a meeting took place before Respondent No.2 when Respondent No.1

was asked to look into the grievances of the Petitioners, and if Respondent No.1 felt that the bid of the Petitioners was disqualified, then the same be communicated to them in writing along with the reasons for disqualification. What is important to note is that at this meeting, Respondent No.1 did not inform Respondent No.2 that the bid of the Petitioners was already rejected and the contract was already awarded to Respondent No.3. If according to Respondent No.1, the bid of the Petitioners was rejected on 12th February, 2016 itself, and nothing further needed to be done, the same could have been expressly brought to the notice of Respondent No.2 in the aforesaid meeting. The specific averments with reference to this meeting and what transpired therein, can be found at paragraph 21 of the Petition. Even though Respondent No.1 has filed an affidavit in reply dated 16th August, 2016, there is no denial of this meeting or what transpired therein.

20. Another cause for concern is that the original record produced for our perusal, does not contain any document which does any detailed analysis of the technical bids submitted by the Petitioners and Respondent No.3. The only thing that can be found in the record is the comparative analysis sheet that has been prepared by the Officers of Respondent No.1. For ready reference, the said sheet (as appearing in the original record and files) is reproduced hereunder :-

Sub: Comparative Chart depicting the eligibility criteria as per the terms of the tender recently concluded for the procurement of bOPV bulk by HBPCL

21. As can be seen from the aforesaid comparative analysis sheet, the Petitioners have been marked as non-compliant/Negative in as many as seven conditions. We shall deal with each of them individually hereafter:-

(i) Condition (d) [which deals with the list of current buyers in India with quantities supplied for three consecutive years is marked in the negative for the Petitioners. Over here, we must observe that the Petitioners, in their bid, have furnished a list of customers (page 61 of the Petition) as well as the quantities supplied to Respondent No.1. However, due to the confidential nature of the data, the Petitioners had not mentioned the quantity supplied to each of its customers individually. In contrast, Respondent No.3 has also not furnished the break-up of the quantities supplied to each of its customers. Despite this, Respondent No.3's bid is shown as compliant whereas the Petitioner's bid has been shown as non-compliant.

(ii) As far as Condition (f) is concerned [which stipulates that the Company's turnover should be certified by a Chartered Accountant and should be in excess of Rs.100/- crores, the Petitioners' bid is marked as compliant along with the bid of Respondent No.3. However, what is important to note is that the Respondent No.3's bid is shown as compliant even though the turnover of Respondent No.3 has been submitted only for the years 2013 and 2014 and the same has not been certified by the Chartered Accountant as required by Condition (f). Despite this, for some inexplicable reason, we find that the bid of Respondent No.3 is

shown to be compliant with the aforesaid condition.

(iii) The next condition in which the Petitioner has been shown as non-compliant is Condition (g) [which deals with the detailed background of the bidder with the organisation brochure along with the overview of all human vaccines that are manufactured or marketed. As far as this condition is concerned, we find that the Petitioners have submitted their detailed profile as can be seen from pages 61 to 68 of the Petition. Despite this, the Petitioners have been declared as non-compliant of the aforesaid condition.

(iv) As far as the Condition (h) is concerned [relating to audited annual report of the bidders for the last three years, the Petitioners have been marked as noncompliant despite the fact that the Petitioners have submitted the audited annual reports of the last three years which can be seen from page 62 read with page 69 of the Petition. What is more important to note here is that Respondent No.3 has admittedly submitted its audited annual report only for two years instead of three years. Despite the fact that the bidders had to submit their audited annual reports for the last three years and this was not done by Respondent No.3, for no reasons that are coming forth, the bid of Respondent No.3 has yet been marked as compliant.

(v) Thereafter, the Petitioners have been marked as noncompliant with Condition (i) [which requires a list of WHO pre-qualified human vaccines which the bidder has supplied for the last three years. As far as this is concerned, we must mention here that the tender notice itself specifically invited tenders from distributors of PT. Bio-Farma, Indonesia. PT. Bio-Farma, Indonesia is a WHO pre-qualified bulk manufacturer. In these circumstances, Respondent No.1 was aware that both the bidders viz. the Petitioners and Respondent No.3 would be supplying the same WHO pre-qualified bulk drug manufactured by the said PT. Bio-Farma, Indonesia. From the record we find that the Petitioners have furnished the list of pre-qualified human vaccines which it had supplied in the last three years (page 62 of the Petition). Over and above this, the Petitioners have also submitted the Certificate issued by WHO to PT. Bio-Farma, Indonesia (page 94 of the Petition) as well as the Certificate of Pharmaceutical Product (COPP) [at page 95 of the Petition . Despite all these documents, the Petitioners have been marked as non-compliant with the aforesaid condition.

(vi) The next condition where the Petitioners have been marked as non-compliant, is Condition (j) [which stipulates that the bidder should be able generate business for Respondent No.1 of a minimum of 70 million doses. As far as this condition is concerned, we find that the Petitioners (at page 62 of the Petition) have categorically stated that they would supply 70 million doses of the said bOPV as required by Respondent No.1. Despite this, and without assigning any reasons, the Petitioners' bid has been marked as non-compliant. What is also important to note here is that in the observations made in the said comparative analysis sheet against the bid of Respondent No.3, Respondent No.1 has stated "Clarity for buyback". However, the record and files produced before

us do not indicate any such subsequent clarification given by Respondent No.3. Despite this, Respondent No.3's bid is marked as compliant.

(vii) Thereafter, comes condition (k) [which deals with having experience for more than 15 years . Here too, the Petitioners have been marked as non-compliant despite the fact that the Petitioners have submitted a Certificate from M/s PT. Bio-Farma, Indonesia (page 62 read with the certificate at page 70 of the Petition) certifying that the Petitioners have been associated with PT. Bio-Farma, Indonesia since year 2000 as their marketing agent, for marketing in India, vaccines manufactured by them. In contrast, Respondent No.3 (in their techno-commercial bid), have merely stated that the Company has been incorporated in 2001, without furnishing any details or producing any Certificate. In fact, the same does not even disclose whether Respondent No.3 was in the business of supply of the said bOPV since its inception in 2001. Despite this, the Petitioners have been marked as non-compliant and Respondent No.3 has been marked as compliant with the aforesaid condition.

22. When all these facts are seen together and cumulatively, it a cause for grave concern as to how the tender, and the subsequent award of the contract (to Respondent No.3), has been conducted by Respondent No.1. To our mind, this entire process is anything but fair and transparent. It certainly does not inspire any confidence. When we noticed all this, we put it to Ms. Srivastav whether Respondent No.1 was willing to float a fresh tender for procurement of the said bOPV. However, for reasons best known to Respondent No.1, they insisted, without any real basis, that no irregularity has been committed, either in the tendering process, or the award of the contract to Respondent No.3. It is in view of this stand taken by Respondent No.1, that we have been constrained to analyse in detail the actions of Respondents No.1 for procurement of the said bOPV by a public tender process.

23. In view of the foregoing discussion, the tender dated 20th January 2016 (Exh."C" to the Petition) floated for procurement of Bivalent Oral Polio Vaccine Bulk (bOPV) manufactured by a Company called PT. Bio-Farma, Indonesia, is quashed and set aside. Consequently, the letter dated 22nd June, 2016 issued by Respondent No.1 rejecting the techno-commercial bid of the Petitioners is also quashed and set aside. In addition thereto, the contract/tender/bid awarded to Respondent No.3 (pursuant to the aforesaid tender dated 20th January, 2016) is also hereby quashed and set aside. However, considering the fact that Respondent No.1 is procuring the said bOPV from Respondent No.3 and which procurement is in public interest, we do not wish to stop the supply of the said bOPV by Respondent No.3 to Respondent No.1, whilst a fresh tender is floated for the said purpose. In these circumstances, we direct the State Government, and through the Department of Public Health, to float a fresh tender for the procurement of the said bOPV within a period of eight weeks from today, and on such terms and conditions as it may deem fit and complete the entire process within a period of eight weeks thereafter. This tender shall be floated in

accordance with the CVC guidelines and in accordance with law. In the interregnum, and in order to ensure that the supply of the said bOPV is not interrupted, Respondent No.3, for this period of 16 weeks, shall continue to supply the said bOPV to Respondent No.1. We clarify that merely by allowing Respondent No.3 to continue to supply the said bOPV to Respondent No.1 during the aforesaid period, will not create any equities either in favour of Respondent No.1 or Respondent No.3. The procurement of the said bOPV shall be done only by floating a tender and in the terms indicated here-in-above. Rule is made absolute in the aforesaid terms. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

24. At this stage, the learned advocate appearing for Respondent No. 1 seeks a stay of this order so that it can decide on the future course of action including challenging this judgment and order in a Higher Court. That request is opposed by the learned counsel for the Petitioner.

25. Having heard both counsel on this limited point, we are of the view that by giving the directions which we have issued in the foregoing paragraphs and clarified in open Court, we had adequately protected the interest of Respondent No.1. We are really surprised that Respondent No.1 seeks to obtain a stay of this order so as to override the larger public interest when the law mandates procurement only through a transparent and fair process of public tender. In these circumstances, the request is refused.