(2002) 09 DEL CK 0190

In the Delhi High Court

Case No : CWP 4674 of 2002

P.E.S. Installation Pvt. Ltd.	APPELLANT
Vs	
Hospital Services Consultancy Corpn. India Ltd. and Others	RESPONDENT

Date of Decision : 25-09-2002

Acts Referred:
Constitution of India, 1950 — Article 14, 298

Citation : (2002) 09 DEL CK 0190

Hon'ble Judges : S.B. Sinha, C.J;A.K. Sikri, J

Bench : Division Bench

Advocate : Rajiv Nayar and Kamal Mehta, for the Appellant; Pinky Anand, Meenakshi Dogra and Shashi for Respondent No. 1 and Mukul Gupta, for the Respondent

Judgement

S.B. Sinha, C.J.—The petitioner is a company registered under the Indian Companies Act. It carries on business of supplying medical equipments.

2. A notice inviting tender was issued for supplying installation, testing, commissioning and handing over of medical manifold systems and associated work at Institute Rotary Cancer Hospital, All India Institute of Medical Sciences.

3. The petitioner is the sole authorised distributor for sale and services of Hill Rom products for northern India covering States of New Delhi, Madhya Pradesh, Uttar Pradesh, Himachal Pradesh, Punjab, Haryana and Rajasthan.

4. The first respondent herein is a Government of India Undertaking and works as a Consultant and Architect for mega hospitals and laboratories. The second respondent is Institute of Rotary Cancer Hospital at AIIMS and the third respondent - AIIMS is the parent body under whose aegis and in whose premises the respondent No. 2 exists. The first respondent herein had issued afore-mentioned notice inviting tender.

5. According to the petitioner, it had successfully commissioned the following projects:

Name of the contract Nature of contract Value

Escort Heart Institute New Delhi Supply, installation testing, commissioning of Central Medical Gas Pipeline System with Hill Rom and indigenous make 176 lacs.

Deen Dayal Upadhyay Hospital, Delhi Supply, installation testing, commissioning of Central Medical Gas Pipeline System with Hill Rom and indigenous make 107 lacs.

Sanjay Gandhi Memorial Hospital, Rewa, M.P. Supply, installation testing, commissioning of Central Medical Gas Pipeline System with Hill Rom and indigenous make 79 lacs.

Delhi Government Trauma Centre, Metcalf Road Supply, installation testing, commissioning of Central Medical Gas Pipeline System with Hill Rom and indigenous make 43 lacs.

Indira Gandhi Medical College, Shimla Supply, installation testing, commissioning of Central Medical Gas Pipeline System with Hill Rom and indigenous make 58 lacs.

G.T.B. Hospital, Delhi Supply, installation testing, commissioning of Central Medical Gas Pipeline System with Hill Rom and indigenous make 46 lacs.

6. It allegedly had executed or has been executing 75 projects. It had allegedly been awarded similar contracts by Sir Ganga Ram Hospital and Dr. B.L. Kapoor Memorial Hospital, Pusa Road, New Delhi.

7. The first respondent invited pre-qualification documents for participating in the tender for the afore-mentioned purposes on 1st March 2002.

8. The pre-qualification documents, consequent upon the notice inviting tender issued by the first respondent herein were purchased by seven parties up to 18th March 2002. A Tender Committee for the said matter was constituted on 22nd March 2002. The petitioner along with others submitted its application which was scrutinized. Two parties were allegedly held to be entitled to be pre-qualified on 26th July 2002 for issue of tender documents. The tender documents in terms of the recommendations by the Tender Scrutiny Committee were given on 9th July 2002 which were purchased by them on 10th July 2002 and on 31st July 2002.

9. The first respondent disqualified the petitioner and opened the techno-commercial bid and price bid as also made recommendations. The petitioner was disqualified, inter alia, on the ground that it failed to comply with paras 3.2(a) and 3.2(b) of the Conditions of Tender. The relevant terms and conditions of the tender are:

"3.2. The Applicant shall meet the following minimum criteria:

(a) Minimum average Annual turnover during last three financial years i.e. financial years i.e. 1998-99, 1999-2000, 2000-2001 for the works completed during the financial years should not be less than Rs. 425.00 lakhs. (Fill enclosed Annexure-1).

(b) The firm must have successfully completed at least one order of similar nature during the last five financial years involving oxygen gas manifold, nitrous oxide gas manifold system, gas terminal units, area alarm system etc. on turnkey basis of value not less than Rs. 128.00 lakhs (Copy of the order and completion certificate to be submitted). The date of completion to fall in last five financial years. The performance statement giving details of similar works executed during the last five years by the firm shall be submitted along with copies of orders/completion certificates. (Fill enclosed Annexure- II and enclose copies of order and completion certificates).

(c) The firm must be manufacturer or authorized representative of manufacturer of equipments like gas terminal outlets, area alarm system, multi movement pendants, fully automatic changeover control panel etc. conforming to International Standards / Specifications which should conform to CSA (Canada) / HTM-2022 (UK) /NFPA-99 (USA) / DIN (German) standards. Bids submitted by firms not meeting this requirement will not be considered. manufacturer authorization letter to be enclosed in case the bidder is an authorized representative.

3.5(b) A certificate from the firm''s bankers should be submitted that minimum equivalent to about four months (average) requirement of funds can be managed by bidder in case funds get delayed by employer. Where necessary, the Consultant (HSCC) on behalf of Employer will make inquiries with the Applicant''s bankers. (Fill enclosed Annexure-V).

3.7. The firm should have at least 5 years experience in the installation of medical gas pipe line system in India and should provide list of hospitals along with year of installation."

10. According to the petitioner, for the years 1998-99, 1999-2000 and 2000-2001, its annual turnover was an under:

"Application Form No. 3 Annexure-1

Annual Turnover

S. No. Year Annual Turnover in Indian Rupees (or equivalent to Indian rupees) as per audited balance sheet or CA Certificate

1. 1998-1999 Rs. 3,34,97,143.91

2. 1999-2000 Rs. 3,16,57,580.35

3. 2000-2001 Rs. 6,60,74,944.58

Average Annual Turnover: Over the past three years two Rs. 4,37,43,222.95 (Rupees Four crore thirty seven lac forty three thousand hundred twenty two & paise ninety five only)

Enclosed: CA Certificate ITC Certificate

11. The Chartered Accountant of the petitioner had also issued a certificate which is to the following effect:

"TO WHOM SO EVER IT MAY CONCERN

This is to certify that M/s. PES Installations Pvt. Ltd. 16, Paschim Vihar Extension, New Delhi had achieved a following under-mentioned turnover for three preceding financial years.

Financial Year

Total Turnover (Rs.)

1998-1999

Turnover in Indian Rs. 2,17,66,563.91

Turnover in foreign exchange through direct importation by the client amounting US $ 116110 converted to Rs. @ 43/- Appx. 49,92,730.00

GBP 97650 converted to Rs. @ 69/-Appx. 67,37,850.00 3,34,97,143.91p

1999-2000

Turnover in Indian Rs. 1,56,44,956.35

Turnover in foreign exchange through direct importation by the client amounting US $ 212536 converted to Rs. @ 45/- Appx. 95,64,120.00

GBP 3200 converted to Rs. @ 70/-Appx. 2,24,000.00

Frank 957616 concerted to Rs. @ 6.50 Appx. 62,24,504.00 3,16,57,580.35

2000-2001

Turnover in Indian Rs. 2,42,24.000.58

Turnover In Foreign through direct importation by the client amounting US $ 702660 converted to Rs. @ 47/-Appx. 3,30,25,020.00

GBP 129793 converted to Rs. @ 68 Appx. 88,25,924.00 6,60,74,944.58

The above mentioned figures have been verified by us from the audited balance sheets for the three years, bills of entry & other relevant documents/vouchers.

For Sehgal Arun & Associates

Chartered Accountants

Sd/-

Arun Sehgal

Partner

Membership No. 91547"

12. The petitioner, Therefore, contends that it had fulfilled the requisite eligibility criteria.

13. However, as regards non-fulfilment of the condition 3.2(b) vis-a-vis the project undertaken by the petitioner under the Escorts Hospital, it was averred by the respondents:

"It is submitted that the petitioner is trying to mislead this Hon''ble Court. The value of Rs. 176 lacs claimed by petitioner for Escorts Hospital was the project as executed by Hill Rom which is a totally different and independent legal entity and company of which the petitioner is only an agent on a commission basis. The work order dated 5.8.2000 was placed on Hill Rom. In the para under reply, the petitioner has itself stated that the contract was performed with Hill Rom and indigenous make. In order to qualify for the pre-qualification state, the applicant / tenderer "must have executed and successfully completed at least one order of similar nature during the last 5 financial years on turnkey basis of value not less than Rs. 128 lacs." Copy of the order and completion certificate to be supplied. Without prejudice to the fact that the petitioner has not executed the contract themselves on turnkey basis nor the work order has placed on the petitioner for the Escorts contract."

14. The contention of the petitioner, however, is that there was no occasion for the respondents not to take into consideration the value of the import as in the details of the works of similar nature in complexity. It was stated:

S. No. Name of the Contract Name of the Client Brief description of the contract Date of starting Date of completion as per contract Date of actual completion Value(in Rs. Lac.)

....

2. Escorts Heart Institute, New Delhi. Escorts Hearts Institute, New Delhi Supply, installation, testing & commissioning of Central Medical Gas Pipelines System & Ceiling Pendants, Bed Head Trunking System, Bed Head Panels etc. of Hill-Rom & indigenous make. 31.05.2000 30.01. 2001 25.02.2001 176 lac.

15. According to the petitioner as the contract was a turn-key project where for not only the civil works but also the equipments which were imported were to be installed, it had fulfilled the criteria of completion of the job of Rs. 128 lakhs. In support of the said contention, our attention has also been drawn to a letter dated 31st March 2000 issued by the Escorts Heart Institute and Research Centre in relation to the civil works, which is to the following effect:

"This is with reference to the Tenders for the subject systems submitted by you in response to our Consultant''s Notice Inviting Tenders and final negotiations held with the undersigned.

In this connection, we are pleased to issue you this letter of Intent for the

Medical Gases Manifold Room & Piping Work as per the following major terms and conditions:

1. Scope of work

The total cost of the project for the Tendered items, all inclusive shall be Rs. 53,12,820 (Rupees fifty three Lacs twelve thousand, eight hundred & twenty only) as per the break up given in the Annexure. Your contract shall cover all the built-up areas of the New Building (all phases) under construction & connections to our existing hospital. We have informed you that in our new multi-storeyed structure we are keeping provision for four more storeys. In case we get sanction for these extra four floors during the tenure of our contract with you, then the extra four floors shall have to be completed with the provisions of this contract and an extension of four months time shall be given.

The quantities given are indicative only. There can be changes in the quantities, at any stage of the project. Also you have negotiated the prices of imported & indigenous versions of various items and we shall have the option to choose either version.

Also since we are contemplating procurement of bed head equipment, which shall have outlet points, as part of the equipment, these shall get reduced.

16. It is stated that scope of the said work was required to be considered along with the order placed by the said Institute to M/s Hill Rom Company Inc., USA dated 5th August 2000 in terms whereof all the goods were to be supplied only through the petitioner. The said letter reads thus:

"Subject: Supply of (a) Medical Gas Pipeline System Along with its accessories O.T. Unit and Wards.

Supply of (b) Critical Care beds, Stretcher Along with Frames and Accessories.

Reference: Your Proforma No. HR/IND/PES/10119 date 28-07-2000.

Dear Sir,

1. Please supply through M/s. PES Installation Pvt. Ltd., New Delhi the items as per your proforma No. HR/IND/PES/10119 date 28-07-2000 for US $ 517,913-00 (cif) Stated above, copy of which is enclosed herewith at Appendix "A'' to this supply order.

2. Terms & Conditions applicable to this supply order and contained at Appendix "B" along with annexure-1.

3. Three copies of this order are furnished to you. Two copies are retained by you. The third copy be returned to this Institute duly stamped and signed by your authorized signatory as well as of M/s. PES Installation Pvt. Ltd., New Delhi which shall signify that you and your agents in India have;

- Acknowledged & accepted the above order;

- Accepted the terms & conditions stipulated at Appendix "B" and

- You shall execute the above supply order accordingly."

17. The petitioner further contends that in any event, as the said institute has granted a certificate in its favor on 9th March 2002 to the following effect, the same should have been considered to be conclusive in nature.

"TO WHOMSOEVER IT MAY CONCERN

We hereby certify that M/s. PES Installations Pvt. Ltd., having their offices at 16, Paschim Vihar Extension, Rohtak Road, New Delhi-110063 has executed the total project of Medical Gases Pipeline Distribution System for Oxygen, Nitrous Oxide, Comb. Air (4 kg. & 7 kg.), Vacuum, AGSS, including Alarms, Valves Boxes, Head Wall Panels, Ceiling Pendants, Oxygen Flow-meters, Ward Vacuum Units, Theatre Vacuum Units, Speciality Beds, Stretcher, Over Bed Tables, Nurse Call System. The total value of Project is Rs. 4,00,000/- (Rupees four crore only) towards indigenous and imported components. The system is functional for the last more than a year and working satisfactorily."

18. Our attention has further been drawn to an authorization certificate issued by Hill Rom Company dated 20th July 2001 which is to the following effect:

"TO WHOSOEVER IT MAY CONCERN

July 20, 2001

Subject: General Authority letter

This is confirm that M/s. PES Installation Pvt. Ltd. with their offices at 16, Paschim Vihar Extension, Rohtak Road, New Delhi is our authorized distributor for the sales and services of Hill-Rom? products for the territory of North India covering the states of New Delhi, Madhya Pradesh, Uttar Pradesh, Himachal Pradesh, Punjab, Jammu & Kashmir, Haryana & Rajasthan.

PES Installation is also authorized to sign and quote on our behalf from time to time for the purpose of promoting our sales. PES Installation Pvt. Ltd. has satisfactory after sales service facilities to back up the servicing with essential spare parts.

This certificate is valid up to 31 July 2002 and shall be renewed on a yearly basis with mutual consent there after."

19. The petitioner, Therefore, contends that there is no reason as to why the export component of the contract shall not be taken into consideration for the afore-mentioned purposes.

20. Certificate of Escorts alone, according to Mr. Rajiv Nayar, learned senior counsel appearing on behalf of the petitioner, would be conclusive in such matters. The learned counsel would further contend that the action on the part of the first respondent was mala fide. It was submitted that the first respondent on

31st July 2002 could not have rejected the bid of the petitioner, opened a techno-commercial bid, financial bid as also made recommendations. In this connection, our attention has been drawn to the documents comprising Clause 15.3 of the instructions which is to the following effect:

"15.3 Price Bid of bidders whose offers (Techno commercial bid) are found technically and commercially substantially responsive to the Bid Documents will only be opened on a date of to be intimated later to these bidders."

21. It had further been submitted that the bids were required to be submitted in three different envelopes, as would appear from the following:

"12. Submission of Bids

12.1 Sealing and Marking of Bids:

The Bidders shall seal the Bid (being a separate bid for each group) in two envelopes duly marking the envelopes, separately as Techno commercial Bid (unpriced) and Price Bid and both these envelopes to be enclosed in another sealed envelope.

12.2. The inner and outer envelopes shall be:

(a) Addressal to General Manager, Hospital Services Plot No. E-6(A), Sector-1, Noida-201 301.

(b) Shall bear (the project name), the Press Tender Notice Reference, and the words "DO NOT OPEN BEFORE_____.

12.3. All the envelopes shall indicate the name and address of the Bidder.

12.4. If the envelopes are not sealed and marked as required in Para 12.2, the Purchaser will assume no responsibility for the Bid''s misplacement or premature opening."

22. Even in its letter dated 5th March 1999, the first respondent had intimated:

"Only the Techno-Commercial bid shall be opened in the presence of participating Bidders on dates mentioned above at 14.00 hrs. Based on Techno-Commercial evaluation, the Price Bid of such of those bidders, who are found technically and commercially eligible are only to be opened at a date to be intimated to them."

23. It was contended that having regard to the requirements aforementioned, both the bids could not have been opened in the same day. The idea, according to the learned counsel, would further be evident from the fact that after opening the techno-commercial bid, it is necessary to scrutinize the documents filed by the parties at great length and thus it was not possible for the said Committee to scrutinize the bid documents.

24. According to the petitioner, in its reply it had shown that it fulfills all the requisite criteria. Our attention in this connection has also been drawn to a letter

of the office of the Medical Superintendent in Deen Dayal Upadhayaya Hospital which is to the following effect:

"Subject: Installation of Central Gas Pipe Line System in DDU Hospital.

Sir,

Following the sanction of finance department, Govt. of NCT of Delhi, this hospital has awarded you the contract for installation of Central Gas Pipe Line System in DDU Hospital on terms & conditions already mutually agreed upon. However, no escalation in cost is being allowed by the finance department, Govt. of NCT of Delhi.

Therefore, you have to work on the rates already approved by the hospital (copy of the rates and material required is enclosed). Kindly, confirm the acceptance of the contract and incase it is acceptable, you may start the work immediately."

25. Ms. Pinky Anand, learned counsel for the respondents, on the other hand, would content that the actions on the part of respondent No. 1 being not arbitrary, this court should not exercise its power of judicial review in the matter. The learned counsel would submit that as regards the annual turnover for the last three years, from the note appended to the Annexure I, it would appear that the same were to be supported by the certificates.

26. The balance sheet filed by the petitioner was as under:

"PES INSTALLATION PVT. LTD.

EET AS ON YEAR

ENDING 31-3-89

Sources of Funds SCHEDULE CURRENT YR PREV YR

Share capital 592520.00 97260.00

Reserve & surplus 421362.55 484552.49

Secured loans A 25772.00 218356.55

Unsecured Loans B 50000.00 104000.00

1089654.55 904169.04

Application of funds

Fixed Assets C

Gross Block 2118462.40 1790734.00

Less: Depreciation 744127.00 -507066.00

1374335.40 1283668.00

ADD; current asset, loans & Advances D 2920612.62 2849207.89

4294948.02i 4132875.89

Less: current liabilities E -3205293.47 -3341126.19

1089654.55 791749.70

Investments   112419.34

1089654.55 904169.04

Auditor''s report

As per our separate report of even date"

27. Certificate by the Chartered Accountant was as under:

"PES INSTALLATION PVT. LTD.

PROFIT & LOSS ACCOUNT FOR THE YEAR

ENDING 31-3-89

PARTICULARS SCHEDULE CURRENT YR PREV YR

Sales   2213421.00 2317477.60

Job work Recd.   18790702.55 6924683.30

Other income F 762440.36 755968.26

(A) 21766563.91 9998129.16

Cost of Purchase G 11768458.01 5736478.81

Direct Exp. H 4604880.18 939995.57

Administration Exp. I 2783559.69 1841016.30

Selling & Distribution Exp. J 1713838.51 760570.86

Finance Exp. K 84948.46 123183.23

Depreciation   237061.00 240810.00

(B) 21192745.85 9642054.77

Net Profit (A-B) 573818.06 356074.39

Proposed Dividend @ 40 % 237008.00 NIL

Balance Profit TFD to P&L A/C -336810.06 356074.39

Auditor''s report

As per our separate report of even date"

"PES INSTALLATION PVT. LTD.

BALANCE SHEET AS ON YEAR

ENDING 31-3-2000

Sources or Funds Schedule Current Year Previous year

Share Capital A 592520.00 592520.00

Reserve & amp; Surplus   583812.83 421362.55

Secured loans B ___________ 25772.00

Unsecured loans C 50000.00 50000.00

Total 1226332.83 1039654.55

Application of funds

Fixed Assets D

Gross Block   2187669.40 2118462.40

Less: Depreciation   949170.00 744127.00

1238499.40 1374335.40

Add: Current assets, Loans & Advances E 4582775.59 2920612.62

5821274.99 4294948.02

Less: Current liabilities F 4594942.16 3205293.47

1226332.83 1089654.55

Investment

Total 1226332.83 1089654.55

Auditor''s report

As per our separate report of even date"

PES INSTALLATIONS PVT LTD

SCHEDULE OF FIXED ASSETS AS PER

COMPANIES ACT ATTACHED TO AND

FORMATTING OF THE BALANCE SHEET AS ON

31.3.2001

Particulars Rate (%) Cost as on 1.4.00 Gross Block Depreciation block Net Block

Addition Total as on 31.3.2000 Total as on 1.4.00 During The Year Total as on 31.3.01 as on 31.3.2001 As o 1.4.2000

Computer   168402.00   168402.00   127111.00   16516.00   143627   24775 41291

Furniture & Fixture 18.1% 356125.40 356125.40 131168.00 40717.00 171885 184240.4 224957.4

Cellular phone 13.91% 41000.00 41000.00 15047.00 3610.00 18657 22343 25953

Car Lancer 887806.00 887806.00 887806.00 19154.00 19154 868652

Car Ceilo 25.89% 540060.00 540060.00 377149.00 42178.00 419327 120733 162911

Car Maruti 25.89% 221425.00 221425.00 154632.00 17293.00 171925 49500 66793

Fax machine 13.91 % 24000.00 24000.00 8865.00 2105.00 10970 13030 15135

Invertor 13.91% 36000.00 36000.00 16357.00 2732.00 19089 16911 19643

Office equipment 13.91% 24210.00 384.00 24594.00 7564.00 2369.00 9933 14661 16646

Pager 13.91% 19980.00 19980.00 8857.00 f1547.00 10404 9576 11123

Office 5% 573842.00 573842.00 87764.00 24304.00 112068 481774 486078

Water dispenser 13.91% 9650.00 9650.00 4135.00 767.00 4902 4748 5515

Plot 120500.00 120500.00 120500 120500

Telephone 13.91% 9000.00 9000.00 3258.00 799.00 4057 4943 5742

Cycle 13.91% 1420.00 1420.00 198.00 170.00 368 1052 1222

Fan 13.91% 10145.00 10145.00 2626.00 1046.00 3672 6473 7519

4Generator set 13.91% 31910.00 31910.00 4439.00 3821.00 8260 23650 27471

2187669.40 888190.00 3075859.40% 1836976.00 174128.00 1128298 1947561 1238499

28. It was, Therefore, contended that the petitioner did not fulfill the criteria that it had completed a project of Rs. 462 lakhs, as their annual turnover was limited to Rs. 205 to 227 lakhs.

29. According to the learned counsel, no other document could be taken into consideration for the afore-mentioned purpose. It was further submitted that from the letter dated 31st Marc 2000 issued by the Escorts Heart Institute and Research Centre, it would appear that the petitioner only carried out a project of

Rs. 53,12,820/- Only. Having regard to the fact that offer for supply of goods of US$ 517,913.00 was placed on Hill Rom Company and not upon the petitioner, the same could not have been taken into consideration for the purpose of reckoning the quantum of work done by the petitioner. Supply contract, Ms. Anand would contend, cannot be a part of the project.

30. The learned counsel would submit that the Tender Screening Committee recommended the lowest bidder but having regard to the fact that the matter is pending before this court, no work order has been issued.

31. According to the learned counsel, the question as to whether the recommendations of the first respondent would be accepted or not, the final say Therefore is only with the third respondent herein. In a case of this nature the learned counsel would contend that the tenderers were bound to scrupulously comply with the terms and conditions of the tender. In support of the said contention, reliance has been placed on West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, .

32. It is not in dispute that Clause 3.2 of the Invitation for pre-qualification must be read as a whole. Whereas Clause 3.2(a) and 3.2(b) provide for essential minimum criteria and the modalities are stated in Clause 3.2(c) thereof, in terms of Sub-clause (a) of Clause 3.2, minimum average annual turnover during the last three financial year is not required to be less than Rs. 425 lacs.

33. From the certificates issued by the Chartered Accountants as also the Income Tax Clearance Certificate, it would appear that the petitioners average annual turnover for the aforementioned years were Rs. 4,37,43,222.95; ITC certificate has also been enclosed by the petitioner. What the respondents appears to have done was to exclude the turnover in foreign exchange to direct importation by the petitioner in all these three years without assigning any sufficient or cogent reasons. If a clarification was necessary in this behalf the same should have been called for, but the said issue has been raised for the first time in the counter affidavit and not at any stage prior thereto. Similarly, in relation to the fulfillment of the criteria of Sub-clause (b) of Clause 3.2, the petitioner had been able to show that whereas the amount of civil contract performed by it, which is considered to be an indigenous item amounting to Rs. 53,12,820/-, the amount which had been the subject matter of import was to the extent of US $ 517913.00 was not taken into consideration.

34. It may be true that the Escorts Heart Institute and Research Centre placed an order for supply of articles directly to M/s Hill Rom Company Inc. but even such an order had been placed through the petitioner. The petitioner had contended that the project was a turnkey one and in that view of the matter, the respondents could not have, without asking the petitioner to explain to its stand in relation thereto, taken a unilateral decision to the effect that the import element should be excluded only because an order for supply thereof was placed before M/s Hill Rom Company Inc. and not upon the petitioner.

35. From the certificates of Escorts Heart Institute and Research Institute, it is evident that the said Hospital considered the entire project to be an integrated one, and they put the value thereof at Rs. 4 crores. Accordingly, the said project comprised of indigenous and imported components. Once both the components were taken to be one by the Hospital concerned, ex facie the petitioner had fulfilled the pre-conditions thereof. Furthermore, from the General Authority letter dated 20.07.2001 issued by M/s Hill Rom Company Inc. the petitioner has been able to show that it is the authorized distributor of M/s Hill Rom Company Inc.

36. Sub-clause (c) of Clause 3.2 specifies the modalities as to how the mandatory requirements of Sub-clauses (a) and (c) thereof were to be taken into consideration. The firm is either to be a manufacturer or authorized representative of the manufacturer of equipments. Once the authorized representative of the manufacturer of equipment becomes also entitled to participate in the tender process, there cannot be any doubt that by reason thereof a legal fiction has been created to the effect that even an authorized representative of the manufacturer of equipment would be deemed to be manufacturer for the said purpose. Unfortunately this aspect of the matter has not been considered by the respondents at all.

37. It may be true as has been submitted by Ms. Pinki Anand that the average annual turnover was to be supported by audited balance sheets and ITC certificates. The petitioner had also been issued a certificate of its Chartered Accountant, which is dated 22.03.2002. It may be for the purpose of Income Tax assessment, the transaction as the authorised representative of MI, Hill Rom & Co might have been taken into consideration separately, but the same would not mean that the petitioner does not fulfill the essential conditions of contract.

38. It is a well-settled principle of law that ''Notice'' cannot prevail over the main provision. ''Notice'' is an explanatory in nature. Thus, it does not restrict the main provision and in that view of the matter, only because for the purpose of accounting the petitioner had been maintaining separate accounts, the same by itself cannot be a ground to hold that the petitioner does not fulfill the conditions thereof.

39. Furthermore, had the authorities of the respondents thought that the petitioner is disqualified on the basis of the documents supplied by the petitioner, there was evidently no reason as to why it thought for seeking further clarifications. When clarifications in relation to other matters had been sought for the respondent No. 1 from the petitioner, it could have followed the same procedure in this case also.

40. We, however, do not mean to lay down a law that only because certain clarifications had been asked for, the petitioner is not required to fulfilll the essential criteria. The respondents are also bound by the procedure stipulated in the tender process. In any event, the present contract also admittedly involves

some element of import of some articles from the foreign companies.

41. Clause 15.3 of Bid Document of Invitation of Bid merely postulates that the price bids of bidders whose offers (Techno-commercial bid) are found technically and commercially substantially responsive to the Bid Document would be opened at different points of time. On 31.07.2000 the petitioner was disqualified by the respondent No. 1. The recommendations were made on the same date of the opening commercial bid and financial bid on the same date. After the bidder pass the test of pre-qualification, the commercial bid and the financial bid ought to have been opened on different dates, when particularly a provision for time has expressly been made in the tender documents that having regard to the complexity of the problem, the documents were required be scrutinized thoroughly.

42. Such an indecent haste amounts to malice on the part of the concerned authority.

43. In Dr. S.P. Kapoor v. State of Himachal Pradesh and Ors. AIR 1981 SC 2181, it was held:-

"It is seen from what has been stated above and it is also admitted by the Himachal Pradesh Government that the selection of the Deputy Directors and the Director of Health Services from amongst the Deputy Directors had been made by the Departmental Promotion Committee on 3-11-1979 itself and that even the order of appointment had been issued on the same day with the approval of the Governor of Himachal Pradesh. Though before the High Court it does not appear that Dr. Jiwan Lal had alleged any mala fides to anybody he has alleged in the SLP that the constitution of the Departmental Promotion Committee and the process of selection and appointment were obviously mala fide and that they were appointed on the date on which Mr. Yadav, the regular Secretary, Health and Family Welfare Department, was on leave and that this haste suggests that he would not have agreed to carry out the political wish of the then Chief Minister in making the appointments in the post haste manner. Though it is not possible to accept the belated contention that there was any mala fides on the part of the then Chief Minister in the matter of constitution of the Departmental Promotion Committee with his Principal Secretary as one of its members in the place of the regular Secretary, Health and Family Welfare, we are of the opinion that there is room for suspecting the reason why the whole thing was completed in haste on 3-11-1979 after the preparation of the final seniority list on 2-11-1979, in the light of the admitted position that the Deputy Directors and Directors of Health Services, Himachal Pradesh were holding ad hoc appointments from 1973. The matter was not such as could not have been put off by a few days. Such rush is not usual in any State Government. The post-haste manner in which these things have been done on 3-11-1979 suggests that some higher-up was interested in pushing through the matter hastily when the regular Secretary, Health and Family Welfare was on leave. Therefore, we are of the opinion that the matter requires to be considered afresh."

44. In Prestress India Corporation Vs. U.P. State Electricity Board and Others, , it was held:-

"2. The appellant-company has come up before this Court against the judgment and order passed by High Court allowing partial relief, i.e. directing the respondents to place forthwith with the petitioner an order for supply of 25,000 PCC Poles instead of 50,000 PCC Poles for which the tender was submitted, though the High Court held that the respondent Board acted in an arbitrary and discriminatory manner in excluding from consideration the tender of the appellant. Against this judgment and order the opposite party also filed a SLP which was dismissed by this Court by an order dated October 29, 1987 (Annexure ''I'' to this appeal). It has been urged on behalf of the opposite parties that if the order of the Central Store Purchase (sic. Committee of the) Board is illegal, discriminatory and bad, the High Court can quash the same and issue a writ of mandamus directing the Board to consider the tender of the petitioner but it cannot direct the Board to place orders for supply of PCC Poles according to the tender submitted by the petitioner. It has also been urged that it is for the Board to consider and decide regarding the acceptance of the tender and the quantum of PCC Poles to be supplied by the tenderer concerned. It has, Therefore, been supplied that the impugned judgment and order passed by the High Court should be quashed and set aside. It has also been contended in this connection that this Court can mould the relief as appears appropriate. These submissions have no merit inasmuch as the SLP filed on behalf of the respondents has already been dismissed by this Court and thereby the order of the High Court directing placing order with regard to 25,000 PC Poles is upheld. Moreover, the High Court has come to the following finding:

The Board dealt with the petitioner''s case rather discriminately when compared in the context of the attitude and manner in which some others or at least one tenderer was dealt with. Accordingly, the action of the Board has to be held unreasonable, unfair and suffering from vice of arbitrariness. The action in completely excluding the petitioner from this tender was clearly not in advancement of public interest.

3. In view of this finding the direction given by the High Court for placing an order for supply of only 50 per cent of the PCC Poles to the appellant company is unwarranted."

45. In Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , it was held:-

"17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any strait-jacket formula. It has to be examined in each particular case. Mr. Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a statute. We are of the opinion that that would depend upon the factual matrix.

18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or vocative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to amend to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

46. The decision of the Apex Court in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, is not apposite. In that case, the mistake committed by the tenderer was accepted. They intended to correct the said mistake, which was not permissible. It was in the aforementioned factual backdrop the Apex Court held:-

"24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international completive 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 fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favoritism which are totally opposed to the rue of law and our constitutional values.

31. The submission that remains to be considered is that as the price bid of Respondents 1 to 43 is lesser by 40 crores and 80 crores than that of Respondents 11 and 10 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 the 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 beast of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favoritism 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 with the 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 stand without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it (sic they) cannot be directed to be considered along with the other bids on the sole ground of being the lowest."

47. Each decision as is well known must be considered on the factual matrix involved therein. A little difference in facts or an additional fact, may make a lot of difference in arriving at a different decision. (See The Regional Manager and Another Vs. Pawan Kumar Dubey,

48. Further in Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , it was held:-

"19. Courts should not place reliance on decisions without discussion as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid''s theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton 1951 AC 73 Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willies, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

The Home Office v. Dorset Yacht Co. 1970 (2) AER 294 Lord Reid said, "Lord Atkin''s speech..... is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board, (1972) 2 WLR 537 Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

20. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, Therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

xxx xxx xxx xxx "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

49. For the reasons aforementioned, we are of the opinion that the respondent No. 1 committed an illegality in holding that the petitioner is not entitled to be considered for techno-commercial bid. The respondents are, Therefore, directed to give an opportunity to the petitioner to participate in the tender process. It may for the aforementioned purpose take any measure, which would be fair and equitable to all the parties.

50. This writ petition is allowed with the aforementioned observations and directions without any order as to costs.

