

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) 6933 OF 2008**

Reserved on : 29th January, 2009

Date of Decision : 12th February, 2009

INDOTECH GROUP Petitioner

Through : Mr.K.C.Mittal with Mr.Sumit
Babbar, Advs.

versus

UOI & ORS. Respondents

Through : Ms.Rajdipa Behura, Adv. for R-1
to R-4, Mr.Vivek Singh, Adv. for
R-5.
Ms.Indu Malhotra, Sr.Advocate
with Mr.Vikram Mehra, Adv.R-6.

% **CORAM:**

HON'BLE MR.JUSTICE MADAN B.LOKUR
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

- | | | |
|----|---|-----|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present writ petition under Article 226 of the Constitution of India seeks quashing of the tender dated 22nd February, 2008 and 15th April, 2008 for Flame Retardant Overalls (FR Overalls) on the ground that the qualifying terms and conditions imposed are unfair and unreasonable, and have the effect of restricting the participation in the tender of parties other than one to whom the benefit is sought to be extended, and further creating a monopoly in favour of the said firm.

2. The facts as are relevant for the determination of the present writ petition are as follows:-

- a) The pilots belonging to the Indian Air Force are authorized flying overall of certain specifications since independence.
- b) With the advent of the flame retardant cloth and fire protection items gaining importance, the need of FR Overalls as an essential life saving garment was deeply felt and the same was under development since the past two decades.
- c) As per the governing specification in November, 2003, an Open Tender Enquiry was issued for quantity 40 FR

Overall, including to the petitioner herein. These overalls as per the then specification [Aeromed – 96, Revised (50:50 FR: Viscose)] were not found suitable during user trials and, therefore, their procurement was not progressed.

- d) After series of trials, attempts and extensive research work of over two decades by Defence Research Development Organisation (DRDO) – Defence Biomedical and Electromedical Laboratory (DEBEL) in the Ministry of Defence (MoD), it was decided that FR Overalls made of 100% meta aramid fabric (Nomex) was extremely suitable for hot and humid tropical climatic conditions that exist in India. Director General of Aeronautical Quality Assurance (DGAQA), therefore, froze the specifications as Aeromed-96, Issue II vide which the yarn was stipulated as 98% Nomex Aramid Fibre + 2% Antistatic Fibre. Dupont Group of Companies (Dupont) is the manufacturer of brand Nomex ® Fibre which is used by leading Air forces in the world to manufacture FR overalls. M/s Aeronav Industrial Safety Appliances, a sole agent in India of the said Dupont Group, Respondent No.5 herein, as the only developed successful source of supply of FR Overalls with Nomex

fabric, were issued a tender on - “no cost, no commitment” basis for the supply of FR Overalls and the same after extensive field trials were found to be suitable and comfortable to the air- crew according to the Air Head Quarters, Respondent No.2 herein.

- e) As per MoD policy, FR Overalls were required to be procured from Respondent No.5. However, a decision was taken during the processing of the case that since a large number of vendors were involved in the initial development process, it would be appropriate if procurement was initiated on Limited Tender Enquiry (LTE) basis through registered, approved vendors for providing equal and fair opportunity to others for developing alternate source of supply.
- f) Accordingly, all the vendors were asked by the DGAQA, Respondent No.4 herein to submit their samples for evaluation by DRDO - DEBEL (MoD).
- g) However, none of the FR Overalls or fabrics submitted by other vendors were found to be of the desired quality and safety requirements. On the other hand, the specifications

of the Nomex ® fabric were found to be 100% fire resistant and best suited for the purpose.

h) Eventually, a Limited Tender Enquiry (LTE) for quantity 11,500 FR Overall was issued on the 22nd February, 2008.

In order to ensure that quality was 100% assured by use of Nomex ® fabric as well as multiple vendors could bid, the said Dupont was asked to support more than one registered vendor of DGAQA, to which the latter agreed.

i) It was inter alia provided in the LTE that the prospective vendors would be required to submit as per the governing specification:

(i) Raw Material Assurance and Concurrence

Certificate from principal manufacturer, M/s Dupont, USA or EI Dupont India Pvt. Ltd., Respondent No.6 herein, for basic fabric and trims, as per requirement of type approved specification No.DEBEL/47 and

(ii) Certificate of Quality Assurance/test reports

from principal manufacturer, namely, M/s Dupont, USA or EI Dupont India Pvt. Ltd. for basic fabrics and trims.

j) The Petitioner is aggrieved by the said impugned condition incorporated in the impugned tenders.

3. Correspondence ensued between the Petitioner and Respondent No.2 whereby the Petitioner stated that it had taken up with Respondent No.6 the issue of the requisite certificate, whilst objecting to the impugned condition as giving room to monopolistic and restrictive trade activities.

4. Eventually, vide letter dated 26th March, 2008, the petitioner submitted its technical bid, wherein in respect of the special conditions regarding material assurance from Dupont or Respondent No.6 for basic fabrics and trims, the petitioner stated that the Concurrence Certificates as per tender terms were attached. It was further stated in the said communication that the certificate from the manufacturer of the active specification was duly enclosed along with the technical bid. However, the Technical Evaluation Committee found that the compliance of the Tender Enquiry (TE) specification had not been made by the petitioner and in fact the Raw Material Assurance and Concurrence Certificate as required by the special conditions of Tender Enquiry had not been submitted. On this ground the tender bid of the Petitioner was rejected by the Respondent.

5. Learned Counsel Mr.K.C.Mittal, appearing on behalf of the petitioner made a solitary submission. Counsel urged that the impugned condition was unfair, unreasonable and restrictive and that it created a monopoly in favour of Respondent No.5, the sole supplier of the fabric required in the manufacture of the FR Overall. It was also urged that a single party/source will bag all the future orders for FR Overalls if the impugned condition remains.

6. On behalf of the Respondents on the other hand, it was urged that on the representations received on behalf of a number of vendors including the petitioner, an opportunity was granted to them to produce comparable, if not better material and that a generic name should be specified along with the brand name. However, it was pertinent to note that the petitioner had till date not submitted equivalent or better material to Respondent Nos. 1 to 4 for testing/trials.

7. The Respondents submitted that a detailed comparative study of scientific tests carried out on Nomex fabric and Kermel fabric (used earlier for FR Overall) was conducted which brought out the advantage of Nomex fabric over Kermel.

8. It was also submitted that it was not sufficient that the concerned fabric was merely flame retardant but in addition the fabric would be required to exhibit thermal stability and integrity on being exposed to

high intensity heat flux as in the case of air craft accidents/crashes. In order to meet this requirement and enhance the safety, Nomex fabric was selected based on studies carried out by DEBEL on characteristics of thermal stability and evaluation of complete and FR characteristics.

9. It was further submitted that the impugned condition had been incorporated in the specification to the tender, to preclude the use of sub-standard material by any other manufacturer, as the raw material being of imported nature was manufactured by Dupont, and its subsidiary Company Respondent No.6 being a legally registered entity in the country, would be accountable for the conformity of the correct material supply. This requirement would also eliminate any defects in material supply for the future.

10. It was finally urged that the complaints in this behalf given by vendors earlier were scrutinized and closed by the CVC.

11. We have given our careful consideration to the submissions made at the Bar. The scope of judicial review of administrative action has been examined by the Supreme Court in a large number of cases in the past decade or so. In **Tata Cellular vs. Union of India** (1994) 6 SCC 651, the Court reviewed the entire case law on the subject and laid down the following principles for application to cases involving judicial review in contractual matters.

“94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) **The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.**
(emphasis ours)
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. **More often than not, such decisions are made qualitatively by experts.** *(emphasis ours)*
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle

of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

12. To the same effect is the decision of the Supreme Court in **Directorate of Education and Ors. vs. Educomp datamatics Limited & Ors.** 2004(4) SCC 19. The Court in that case was examining a tender notice which stipulated a turnover of Rs.20 Crores as a condition of eligibility and held that the Government must have a freehand in stipulating the terms of the tender and that it must have reasonable play in the joints as a concomitant necessary for an administrative body in administrative sphere. The Court observed:-

“12. it has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias, it is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been

fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

13. In Raunaq International Ltd. vs. I.V.R. Construction Ltd. and

Ors. (1999) 1 SCC 492, the Supreme Court observed:

“...17. Normally before such a project is undertaken, a detailed consideration of the need, viability, financing and cost-effectiveness of the proposed project and offers received takes place at various levels in the Government. If there is a good reason why the project should not be undertaken, then the time to object is at the time when the same is under consideration and before a final decision is taken to undertake the project. If breach of law in the execution of the project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities including the court must be raised. We would expect that if such objection or material is placed before the Government, the same would be considered before a final decision is taken. It is common experience that considerable time is spent by the authorities concerned before a final decision is taken regarding the execution of a public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the court may intervene. Even so, the Court should be moved at the earliest possible opportunity. Belated petitions should not be entertained.”

14. Let us now examine the conditions sought to be assailed by the Petitioners in the present writ petition in the light of the above authoritative pronouncements of the Apex Court. In the present case it is seen that after a series of trials and extensive research of over two decades by experts in the field such as DRDO, DGAQA and DEBEL, it was decided that a specific fibre and yarn were extremely suitable for

conditions that exist in India. Thereafter, opportunity was granted to a number of vendors including the Petitioner to produce comparable if not better material. As far as the fabric used by the Petitioner in the earlier tender, namely Kermel was concerned, a detailed comparative study was conducted by the experts which brought out the advantage of the preferred Nomex fabric over Kermel. Even otherwise, during user trial the Kermel fabric was found to be not suitable and the procurement of FR Overalls made of the same was not progressed further. Therefore, all the objections raised by various vendors including the Petitioner were duly considered by the official Respondents and opportunity given to produce better fabric. Once FR Overalls made of Nomex were frozen as the governing specification after extensive field trials, instead of placing the order on the manufacturer thereof, the official Respondents invited all the vendors to participate in order to provide equal and fair opportunity and so as to develop alternate source of supply. However, the Petitioner did not come up with any yarn or fabric despite the opportunity given. It is further seen that even thereafter Dupont was asked to provide support to multiple vendors for the LTE and all the approved suppliers/vendors were apprised in this behalf and asked to obtain Raw Material Assurance and Concurrence Certificate as well as Certificate of Quality Assurance from the principal manufacturer of the fabric and trims of the governing

specification. In this respect it is observed that not only did the Petitioner never approach Dupont or Respondent No.6 for the requisite certificates, but at the same time it misrepresented to Respondent No. 1 to 4 vide its covering letter dated 26th March, 2008 that it had attached with its bid the support letter as required, when in fact it had not done so. Not only that, the Petitioner further failed to disclose and suppressed from this Court in the writ petition that it had so wrongfully misrepresented and that it had in fact not complied with the conditions stipulated in the impugned tender. The Petitioner is not entitled to discretionary relief under Article 226 of the Constitution of India on this ground alone.

15. In our opinion the Court does not sit in appeal over the merit of terms and conditions of the tender, which determination ought to be left to the experts in the field. Decisions in the present case have been made qualitatively by experts. The Court in our view does not correct the administrative decision as that would amount to review without the necessary expertise rendering it fallible. The state is free to fix its own terms and conditions for invitation of tenders which are not open to judicial scrutiny unless they are found to be vitiated by mala fides, unreasonableness and arbitrariness. Further, in the present case, the Petitioner did not challenge the impugned condition in Court at the time of the tendering process which commenced in February 2008 and instead

participated in the same. It was only when the Petitioner was not selected in the bid process that the Petitioner belatedly challenged the tender conditions as well as the awarding of the same in the month of September 2008. Belated petitions cannot be entertained. The Petitioner cannot now be allowed to challenge the tender conditions as its writ petition is barred by laches that are totally unexplained. Valuable rights have accrued in favour of the successful bidders by the award of the tender and the resultant supplies of the FR overalls to the extent of over 8000 pieces out of the total 11,500 tendered for. Furthermore, the Petitioner did not join M/s. Tan Enterprises, a successful bidder, as a party to the present writ petition, even though it seeks setting aside of the impugned tender, thereby prejudicially and directly affecting the rights of the said successful bidder. Even otherwise, when a writ petition is filed challenging the award of a contract by a public authority, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. In our view there is no public interest involved in stopping the supply under the tender. Furthermore in our view there is no arbitrariness, discrimination or mala fide in the subject tender and all the aspects and objections to the terms thereof have already been considered and rejected by the CVC. We find no infirmity in the impugned conditions to warrant interference.

16. In the circumstances aforesaid, the writ petition is dismissed as being devoid of merit. The Petitioner shall however pay costs of Rs.50,000/- to the Respondents, which shall be deposited in this Court within a period of 4 weeks from today.

17. List on 18th March, 2009 for compliance.

SIDDHARTH MRIDUL, J

MADAN B. LOKUR, J

February 12, 2009
bp