

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

Judgment reserved on: 06.01.2012
% Judgment delivered on: 30.01.2012

+ WP(C) No. 5700/2011 & CM No. 11637/2011

CHEMRING COUNTERMEASURES LIMITED ...PETITIONER

VERSUS

UNION OF INDIA AND ORS. ...RESPONDENTS

Advocates who appeared in this case:

For the Petitioner: Mr.Ravi Shankar Prasad, Sr. Advocate with Mr. Trideep Pais and
Mr.Shivan Sharma, Advocates
For the Respondent: Mr.Amarjit Singh Chandhiok, ASG with Mr.Himanshu Bajaj,
Advocate for respondents 1 to 3.

CORAM :-

**HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J

1. The present writ petition seeks to challenge the decision of the official respondent, i.e., respondents 1 to 3 to select respondent nos. 4 and 5, for supply of expendables, used as counter measures, in defence aircrafts manned and operated by the Indian Air Force (in short IAF). The expendables, go by the technical name of 'Chaff' and 'Flares'. Chaff is an expendable used in an aircraft to deceive enemy radar, in a manner, that it is unable to assist enemy missile system to track the coordinates of an aircraft. On the other hand, a Flare creates a heat signature, similar to that of the aircraft in which it is fitted, whereby it propels an enemy missile to follow the 'Flare', as against the

aircraft from which it is expended. For the aforesaid purpose, an aircraft needs to be fitted with a Counter Measure Dispensing System (in short CMDS). Such CMDS, and the expendables described above, are often used even in sophisticated civilian aircrafts as well which, ferry Heads of State and important personnel of the Government of the day.

2. It is not in dispute that the petitioner before us, which is a company, based in United Kingdom, has been declared as the third lowest bidder (L-3), as against respondent no.5, which is the lowest bidder, i.e., L-1. The difference in the two bids is undisputedly Rs.22.09 crores. The petitioner, however, claims that it is aggrieved by the fact that the selection process which was adopted in this case for technical evaluation of respondent no.4 and 5 was flawed and, that it could have grave consequences for those flying such aircrafts as, it would in turn, directly impact their safety and security. The argument of the petitioner is that, the impugned decision of the official respondents, would impinge upon the national security and hence, requires a close scrutiny by the court.

3. We must state at the outset that it was these submissions made on behalf of the petitioner, that persuaded us to examine the record at great length whereupon, we had called upon the learned Additional Solicitor General (ASG) Mr.Chandhiok, representing the official respondents, as to whether *dehors* the terms of the Request For Proposal (in short RFP) obtaining in this case, it would be possible to get respondent no.5 to agree to a laboratory test/evaluation prior to the execution of the contract even though the RFP provides for a pre-dispatch inspection (in short PDI) of Chaff and Flares pursuant to the execution of the contract. A direction to this effect was passed in the presence of the learned senior counsel of the petitioner Mr.Ravi Shankar Prasad, on 22.12.2011. The matter was adjourned to 04.01.2012. On the said date, the learned ASG informed the court that he had instructions to state that

respondent no.5, had agreed to a laboratory test/evaluation of the expendables, at a stage, prior to the signing of the contract. We would have thought that the controversy would have come to an end at this juncture since, the ostensible anxiety was the safety of both the pilot and the aircraft. However, the learned senior counsel for the petitioner Mr. Ravi Shankar Prasad, contended that he had not given up the plea raised in the writ petition that respondent no.5 was neither the Original Equipment Manufacturer (in short OEM), nor were the supplies to be sourced through an OEM, who had in the past made supplies either to the IAF or, defence establishments of other countries using aircrafts similar to those operated by the I A F. We were of the view that this was a clear rethink on the part of the petitioner, quite contrary to the stand taken at hearing held on 22.12.2011. Nevertheless, to put the matter beyond doubt, we heard the petitioner on every other point, extensively.

4. Our discussion hereinafter is prefaced bearing in mind the fact that, ultimately the court has to depend upon the technical expertise of the personnel, in the Government of India, who are entrusted with the job at hand. The court, therefore, necessarily, in such like matters, confines its examination and scrutiny to the decision making process and not the merits of the matter. Therefore, whether or not the expendables in issue are suited to the needs of the IAF, is a matter to be examined by the user, which is the IAF in this case, and it is user's satisfaction, unless obtained for oblique reasons, which would have to be ordinarily respected.

Background

5. In the aforesaid circumstances it would be relevant to sketch out broad facts which have led to the institution of the writ petition. The IAF, which required to procure Chaffs and Flares (hereinafter collectively referred to as expendables) for its war waging reserves (in short WWRs), appears to have

approached the Defence Minister of India, for his approval to commence the process in that regard. The IAF, obtained the necessary approval, in this respect, on 25.07.2008.

5.1 Accordingly, on 19.08.2009 a RFP was issued to eight (8) vendors. Five (5) out of the eight (8) vendors responded to the RFP and, consequently submitted their bids on 17.11.2009, in respect of the following products

(a) 1x1x8 chaffs; (b) 2x1x8 Flare; (c) 26 mm Chaff; (d) 26 mm Flare; and (e) 50 mm Chaff

5.2 The RFP, in the instant case, was crafted on a two bid system whereby, offers were to be evaluated at two stages. The first stage, concerned itself with technical evaluation, while in the second stage the commercial terms were required to be adjudged. Undoubtedly, a bidder would proceed to the second stage i.e., commercial stage only if it qualified the technical parameters.

5.3 It is important to bear in mind, that at this stage, the objections that the petitioner raised pertained to the technical qualification and/or what is alleged to be a flawed evaluation of the technical parameters by the official respondents vis-a-vis respondent nos. 4 & 5. As we go along with narrative it would become quite clear that the petitioners were not only aware of the technical parameters which had been stipulated qua the prospective bidders but also the identity of those bidders who had been cleared for the second stage post their clearance by the Technical Evaluation Committee (in short TEC); a decision with regard to which was taken on 17.11.2009, in the presence of representative of various bidders.

5.4 As a matter of fact a pre-bid meeting was convened of all prospective bidders wherein, representatives of vendors were given an opportunity to seek clarifications and raise queries with regard to provisions of the RFP. Minutes

of this meeting were recorded and, forwarded to each vendor for its reference and record.

6. It would be pertinent to note that technical evaluation had a sub-stage inbuilt into the evaluation process, which required an evaluation of the documentary proof attached by bidders, to establish that the products in issue, in this case the expendables, were technically suitable for use on aircrafts of Russian as well as Western make, operating in the IAF or, an aircraft of the same make operating in an Air Force of another country. Based on the evaluation of the documentary proof appended by a bidder, the matter was subjected to the scrutiny of TEC; which was the second sub-stage. It was only after the TEC evaluated and furnished a report that the short listed bidders could proceed to the second stage, which was, the commercial evaluation stage. This mechanism is incorporated in Clause 8(a) of the RFP. It would be important to note that out of the five (5) vendors two (2) vendors, namely, ROE Russia and M/s BDL Hyderabad were disqualified in the first sub-stage of the technical stage as they did not meet the qualitative requirements and the stipulations contained in the RFP. The TEC, thus, was required to examine the offers submitted by the remaining three vendors, which were, the petitioners, respondent no.4 & 5 in terms of Clause 8(b) of the RFP. Since, the aforementioned three (3) vendors qualified in the fitment trials, as per Clause 8(b) of the RFP, they were permitted to proceed to the second stage of evaluation which pertained to the commercial terms offered by each one of them. It would be pertinent to note, that the petitioners did not raise any issue at this stage of the evaluation, with regard to the expendables in issue, being put to flight trials, which subsequently became the burden of their submission both before the official respondents as well as before us.

7. It is in this context, pertinent to note that, it was only after TEC evaluation was made known on 17.11.2009, on opening of the technical bids,

that the matter was placed before the Competent Financial Authority (in short CFA).

7.1 At this stage as well, the vendors were given an opportunity to examine each of the bids prior to official respondents proceeding to the second stage of the bidding process, that is, evaluation of the commercial bids.

8. The commercial offers of the remaining three (3) vendors i.e., the petitioner, respondent nos. 4 & 5, were thus opened on 09.11.2010, in the presence of their representatives. Upon the offers being opened, it emerged that respondent no.5 was the lowest bidder (L-1), while respondent no.4 and the petitioner were the second lowest and the third bidders i.e., L-2 and L-3. As against the cost of proposal which was pegged at Rs.91.30 crores the commercial bids submitted by each of aforementioned bidders were as follows:-

The petitioner Rs.89.21 crores; Respondent no.4 Rs.79.44 crores
and Respondent no.5 Rs.67.12 crores.

9. It is at this point in time that the petitioner commenced its correspondence on the issue with the official respondents by flooding them with one representation after another. There was a representation made on the very next date i.e. 10.11.2001, followed by six (6) other representations dated: 12.11.2010, 24.12.2010, 23.2.2011, 11.4.2011, 19.6.2011 and 23.6.2011. The representations were followed by personal interviews with high ranking personnel in the IAF as well as officials in the Ministry of Defence (in short MOD). The sum and substance of the petitioner's representations was as follows:-

(i) Respondent nos. 4 & 5 were not the OEMs of the expendables proposed to be supplied to the IAF nor did they propose to source the expendables from

OEMs, who had supplied to Air Forces of other countries which operated aircrafts similar to the ones in use in the IAF.

(ii) The expendables proposed to be supplied by respondents 4 & 5 ought to have been subjected to flight trials on aircrafts manned and operated by the IAF. Since, the petitioners products had been subjected to such flight trials their product was type approved and validated by the IAF and, therefore, by this rationale it was the only qualified supplier for the products in issue, i.e. the expendables. Consequently, respondents 4 & 5 ought to have been disqualified at the first sub-stage of the technical evaluation itself.

(iii) The respondent no. 4 & 5 has failed to comply with the provisions of Clause 13 of RFP read with paragraph 1.14.1 of the Defence Procurement Manual 2009 (in short DPM).

(iv) The aircrafts operated by the IAF has a unique CMDS (dispenser system) appended to their aircrafts, and since, the petitioner's product is the only tested product qua the said platform, therefore, logically respondent nos. 4 & 5 should have been excluded.

(v) The bid of respondent no.5 is violative of the provisions of paragraph 4.21.1 (f) of DPM. In other words, the stand taken in the representation was that the bids preferred by respondents 4 & 5, were neither substantially responsive nor technically, commercially and financially viable.

10. Evidently, the official respondents vide their letter of 16.06.2011 for the first time, responded, though rather late, to the petitioner's letter of 12.11.2010; wherein they stated that the procedure as prescribed in DPM had been followed scrupulously, and that, on evaluation the TEC had found the expendables offered, by respondents 4 & 5 were, in accord with, the provisions of the RFP. It was further averred, in the said communication that, at the pre-bid meeting of 22.10.2009, issues which had been raised by the petitioner in

the letter of 12.11.2010 were never brought up, and that, even during technical evaluation, when evidently, the representative of respondents had interacted with personnel of the IAF, no such issues were raised. The communication went on to state that, as a matter of fact, between the date of the opening of the technical bids and the commercial bids, the petitioner had failed to raise the issues which, it now sought to raise, post the opening of the commercial bids. The stand taken was that, the representation was belated, and thus, did not require consideration.

11. The petitioner, it appears to buy more time, addressed one more communication in regard to its grievance, which was subject matter of letter dated 01.7.2011.

12 The aforementioned communication was followed by the institution of the captioned writ petition. Notice in the writ petition was issued on 09.8.2011. What prevailed with the Court at the stage of issuance of notice was the submission of the petitioner's counsel that, based on its representations the award of tender had been put on hold, and that, the IAF, which is the user, had recommended re-tendering/trials of the products offered by respondents 4 & 5; a recommendation which was turned down, presumably, by the officials of MOD.

13. It is in this background and, in order to satisfy ourselves, we called upon the learned ASG, to produce the records pertaining to the case which was specifically directed to include the recommendations of the IAF (represented by respondent no.3) qua the technical qualifications of respondents 4 & 5. The matter was posted for hearing on 23.8.2011, when some part of the record, was seen by us. The learned ASG, took time to produce that part of the record which related to the representations made by the petitioner and the action taken pursuant thereto. The reason given to the court, by the learned ASG, for not

being able to produce the record at one go was that a part of the record had been dispatched to the MOD. The official respondents were also directed by us, to file a short affidavit in rebuttal. Opportunity was also accorded to the petitioner to file a rejoinder. The matter was posted for further proceedings on 28.9.2011. On the said date, an adjournment was sought by the petitioner which was not opposed by the official respondents. In the interregnum, the petitioner filed a rejoinder with additional documents appended to it. Importantly, no prior permission of the court was sought to file additional documents. On the next date of hearing, an adjournment was sought by the learned ASG. The matter thereafter came to be heard on 23.12.2011. The directions issued on that date, have been already adverted to by us, in the opening part of the judgment. The matter was thereafter listed on 4.1.2012 and 6.1.2012, whereupon judgment in the matter was reserved. It was, however, noticed by us, during the course of hearing, that the petitioner had filed an additional affidavit on 02.1.2012; once again without the permission of the court. We had two choices in the matter, one, to exclude the additional affidavit from the record of the case, and the second, to permit the official respondents to file a rejoinder in the matter. Looking to the width of the submissions advanced before us, and the importance of the matter, we permitted the official respondents to file an affidavit by way of rejoinder, to the averments made in the additional affidavit by the petitioner.

Submissions of Counsels

14. On behalf of respondents, arguments were advanced by Mr.Ravi Shankar Prasad assisted by Mr.Trideep Pais, while on behalf of official respondents submissions were made by Mr.A.S.Chandhiok, the learned ASG assisted by Mr.Himanshu Bajaj.

15. Shorn of unnecessary details, the submissions made on behalf of petitioner by Mr.Ravi Shankar Prasad were in a nutshell as follows :-

15.1 First, that the respondent nos. 4 & 5 should not have got through the initial sub-stage of technical evaluation round, inasmuch as, both bidders had failed to append the necessary documentary proof as required under Clause 8(a) of the RPF. It was submitted that respondents nos. 4 & 5 were required to submit such documentary proof, which would, have established that the product offered by them was suitable for aircrafts manned and operated by the IAF, which were of, Russian and Western origin. The two types of aircrafts spoken of were MIG-29 of Russian origin and, the Mirage which, is of French origin. It was contended that both respondent nos. 4 & 5 could not be regarded as OEMs, as they did not comply with the provisions of Clauses 8(a) and 13 of the RPF read with paragraph 1.4.14 of the DPM. It was submitted that a conjoint reading of the aforesaid provisions would show that for a bidder to qualify, it would either have to be an OEM, in its own right or, one who was manufacturing under a licence accorded by an OEM; with a certificate to that effect issued by an OEM in favour of the licensee. Since, respondents 4 & 5 had neither, they ought to have been disqualified at the preliminary stage itself.

15.2. Second, Mr. Prasad assailed the provisions of the DPM and, the provisions of the RPF floated in the instant case, on the ground that they contemplated only documentary evaluation to know as to whether the bidder was an OEM by seeking attachment of an OEM Certificate with the bid. The provisions for PDI were triggered post selection, that is, after documentary evaluation and hence, did not secure the interest of the IAF.

15.3. It is in the aforementioned context, that Mr.Prasad insisted, that the expendables being, as per the IFA (Air Force Manual 2008) “*air borne stores*” they had to be certified and approved for air worthiness before use on

military aircrafts. It was submitted that airborne stores could only be procured from approved sources before they could be used on an aircraft. The agency, which could certify air worthiness, was the Centre For Military Air Worthiness and Certification (CEMILAC), Bangalore under Defence Research and Development Organisation (DRDO), MOD, GOI. Taking this argument further, Mr. Prasad contended that, flight trials of the expendables was called for, which had not been conducted in the instant case.

15.4 Mr. Prasad further submitted that since, the petitioner had supplied expendables to the IAF, on at least on three occasions, in the past, and its products had been tested by the IAF, the official respondents ought to have necessarily come to the conclusion that, as amongst the vendors who had bid for the product in issue, it was the only one which was offering the product which had the type approval and validation of the IAF.

15.5. Since the bids of respondent nos. 4 & 5 were not technically compliant they ought to have been rejected.

15.6 The provisions of the DPM prohibited post-selection laboratory test, in the nature of PDI's. In other words, in the absence of an OEM certificate in favour of respondent nos. 4 & 5, the deliberations carried out post-selection, could not justify their selection.

15.7 On the issue of delay in approaching the court, it was contended that after the technical bid was opened on 9.11.2010, several representations were sent to the official respondents which did not elicit any response from them, except for a communication of 16.6.2011. It was stated that even this communication of respondent was cryptic, and did not, deal with the issues raised in the representations of the petitioner.

15.8 That, the petitioner's representation had merit, is supported by the fact that the Chief of Air Staff (in short CAS) in February, 2011 had recommended

flight trials and re-tendering. This decision of the CAS, was not followed through; instead a review was ordered, only to further the cause of respondent nos.4 & 5.

16 On the other hand, on behalf of respondents Mr.Chandhiok and Mr.Bajaj submitted that the institution of the petition was mischievously timed, inasmuch as, the objections with regard to the suitability of the product offered by respondent nos. 4 & 5 for the purposes of IAF had been raised only after the petitioner came to know that it was not the lowest bidder. The delay in executing the present tender could impinge on the WWR's of the IAF, as the stock had reached critical levels. It was submitted that because there were representations by the petitioner at one stage, the CAS had recommended flight trials of the product in issue, but the said decision was reviewed after fresh inputs had been obtained from experts, which included, the report of the High Energy Materials Research Laboratory, Pune (HEMRL), which is an organisation working under the aegis of DRDO having expertise in explosives. The said organization had conclusively established that flight trials were not required as they were time consuming, laborious and costly. As a matter of fact, the report established that, the QR's envisaged in the RFP, could be best established under laboratory conditions. It was submitted that on a further deliberation experts had come to a conclusion that: the technical evaluation of the vendors, in particular respondent nos. 4 & 5 had been carried out in consonance with the provisions of RFP and DPM; the argument that aircrafts operated by IAF had a unique dispenser was misleading as, it did not affect the performance of the expendables; the petitioner was not the only OEM, there are other vendors, who are OEMs and possess sourcing certificate of items bought of such OEMs. Therefore, in this context a decision was taken to pursue procurement of expendables without issuance of a fresh RFP containing a flight trial clause. The said decision had the concurrence of the CAS and the

MOD. The Military Attache of the Government of India had visited the sites of respondent nos. 4 & 5. The contention of the petitioner that it was the sole supplier of the product in issue, was incorrect, as respondent no.5 had supplied the product in issue to Hindustan Aeronautical Ltd. (HAL), at Bengaluru. Furthermore, the Indian Navy had bought similar products from different suppliers. The IAF itself had procured such like products from IMI, ROE TRACOR and other vendors.

17. It was further contended that respondent nos. 4 & 5 had the necessary documentation pertaining to the OEM certificates/sourcing certificates of the products in issue, in accordance with the provisions of RFP. In this regard, reliance was placed on the provision of RFP. It was submitted that the submission of petitioner that there should have been flight trial was misconceived. The RFP did not contemplate any such test. This apart, the petitioner itself had made supplies against a contract dated 17.4.2000, without any flight trials.

17.1. It was contended that the argument of the petitioner that it was the only bidder, who could supply type approved and a validated product was factually incorrect, as the IAF had neither type approved nor validated the product of the petitioner as contended by it. Therefore, according to the official respondents this argument could not be used to contend that the other vendors ought to have been excluded from the race, in a manner of speaking. On the contrary, it was contended that petitioner's group company by the name M/s Alloy Surface had supplied three items to the IAF against a contract dated 01.3.2011, which they had bought from respondent no.5, and that, in this contract it had been declared that their sub-contractor (respondent No.5) was an OEM. It was submitted that the products in issue, were not *airborne* products as described in IFA (Air Force Manual, 2008), and did not, therefore, necessitate flight trials. It was submitted that flight trials were prohibitively expensive, and as it

now transpires did not add much value to the evaluation of an expendable, which is, a consumable. This, it was stated, was on account of the fact that, for various operational reasons the procurer could not test the products in issue, over a wide range of aircrafts which could include fighter planes as well as transport planes and helicopters. The entire fleet of IAF comprises of more than two dozen types of aircrafts. The procurer, as a matter of fact, for operational reasons would not like to reveal the make of the aircraft in which expendables would be used. Furthermore, as indicated above, the flight trial had its own handicaps inasmuch as there were various parameters which could not gauged and studied with exactitude in flight trials which included parameters such as ejection velocity, burn time, IR output, operating temperature, exposure temperature.

17.2. The learned counsel submitted that respondent no.5, which was declared as the L-1, in this case, had obtained a certification from an organization by the name of Zevata, which was an OEM. This certification met with the requirements of Clause 9(b) of the RFP.

17.3 It was further submitted that the arguments of the petitioner were without merit and were tailored to perpetuate monopoly in its favour. The price difference between the bid of L-1 and L-3, was nearly, Rs. 22 crores. The public interest was thus best served, both from, the financial as well as the technical requirement if, the IAF was allowed to execute a contract with respondent no.5. The learned counsel for the official respondents, doubted the veracity of the authority conferred on the affiant whose, affidavit had been appended to the writ petition. The objections in this regard was pivoted on the fact that the copy of Board of Director's resolution dated 21.5.2011 neither bore the seal of the petitioner nor, did it bear the signature of the Company Secretary. It was submitted that the affiant, one Wing Commander Mr. Samarendra Hota, had entered appearance on behalf of other Corporate

Entities/Vendors in the past, and that, he had recently set up his own organization by the name of Unique Aviations.

18 In rejoinder the learned counsel for the petitioner more or less reiterated their submissions made in the opening. It was contended that Zevata was not OEM compliant, and that Zevata itself had never supplied either to IAF or to any other Air Force having similar requirements. It was contended that Zevata is a Czech entity, and its products complied with NATO specifications. The NATO specifications were not in tandem with the Indian specifications, with regard to, the product in issue. It was further contended that the Military Attache of India had visited the facility of respondent no.5, and not that of the purported OEM i.e., Zevata, and hence, this factor was irrelevant in the evaluation of the respondent no.5.

Reasons

19 We have learned counsel for the parties and perused the record of the case, in particular, the official records pertaining to the tender in issue. What has emerged on perusal of the record is as follows:-

- (i) The RFP, in the instant case, did not contemplate evaluation of the product sought to be procured i.e., the expendables by subjecting them to flight trials.
- (ii) The technical evaluation was split into two stages: the first stage required determination of suitability of product offered by the bidder based on documentary proof. The documentary proof was required to establish that the product offered had been used on aircrafts of both Russian and Western origin, which were operated and manned either by the IAF or, by an Air Force of another country. The second sub-stage, in the technical evaluation, was required to be made by the TEC, comprising of experts drawn from six (6) different departments of the IAF.

(iii) It was only upon, a bidder, coming through the first sub-stage of the evaluation that, it got a look-in, by the TEC.

(iv) It was only these bidders, which were found technically compliant; proceeded to the commercial bid stage. The requirement of the RFP was that, technically compliant bidders, which were recommended by TEC, were required to submit samples for fitment checks, which were, to be provided on a “*no-commitment*” and “*no cost*” basis. The samples were to be provided within a period of forty five (45) days and a commercial evaluation, was required to be completed within four months (4) of deadline fixed for submission of samples. The TEC, was required to put up the fitment evaluation report for approval of CFA.

(vi) Only those commercial bids were required to be opened, which were found technically compliant.

(vii) The aforementioned two stage bidding system is engrafted in Clause 8(a) and (b) of RFP.

20. The argument of the petitioner that respondent nos. 4 & 5 had been cleared through first sub-stage of technical evaluation round, without the requisite documentary proof, is required to be examined in the light of the relevant provisions of the RFP. In this regard, we would like to extract, clause 9(b) and 13 of the RFP:-

9(b). In case the bidder is not the OEM, the agreement certificate with the OEM sourcing the contracted items is mandatory.

13. OEM Certificate: In case the Bidder is not the OEM, the agreement certificate with the OEM for sourcing the spares shall be mandatory. However, where OEMs do not exist, minor aggregates and spares can be sourced from authorized vendors subject to quality certification.

20.1 Before we proceed further we would like to refer to the provisions of paragraph 1.4.14 of the DPM, on which, great stress has been laid by the petitioner. For the sake of convenience, it is also extracted hereinafter:-

1.4.14 Original Equipment Manufacturer (OEM) : The original equipment manufacturer which is the only firm manufacturing the specified item/equipment of a specific make, as distinguished from the stockists/distributors or suppliers of such items/equipment and no other manufacturer exists for that equipment.

20.2 A conjoint reading of the said clauses would show that the bidder/supplier could either be an OEM or, it could append an agreement certificate of the OEM, from whom it proposes to source the contracted item. In the instant case, the record shows that respondent no.5 had appended a “*agreement certificate*” of Zevata; a Czech entity which claims to be an OEM of the product offered by respondent no.5. The argument of the petitioner based on Clause 1.4.14 of the DPM, is that, OEM for each product is unique, in that, there cannot be more than one OEM of a specified item which is of a specified make. This argument of the petitioner is pivoted on the fact that, in the past it has supplied expendables to the IAF, and given the unique combination of the CMDS fitted on to the aircrafts manned and operated by the IAF, its expendables are the only ones which are suited to the needs of its user i.e., the IAF. This argument proceeds on the basis that even though the expendables used in Russian and French aircrafts are cylindrical in shape, the CMDS system fitted on the Mirage and MIG-27 aircrafts operated by the IAF, are such that, it requires expendables which are rectangular and/or square shaped.

20.3 Therefore, the submission of the petitioner requires appreciation from the two angles: one, whether respondent no.5 has appended a OEM certificate with its bid. Second, whether OEM certificate could pass muster of the

provision of the RFP read with the provision of the DPM. As regards the first aspect, we have no doubt that the certificate provided by Zevata comes within the purview of provision of Clause 9(b) of RFP. The second issue, as to whether the equipment supplied by Zevata to respondent no.5 would work on an IAF platform, is an aspect which is best answered by the user. The IAF, in its response has said that the CMDS system does not in any way inhibit the usage of the expendables offered by respondent no.5. They are in fact satisfied with the documentary proof, in the form of, OEM certificate provided by Zevata in that regard. As a matter of fact the IAF claims that the Military Attache of the GOI has visited the facility of respondent no.5 to address this aspect of the matter. We have no basis to assume that, in this exercise, the product which is proposed to be sourced through Zevata by respondent no.5 was in fact not put to examination and scrutiny. Therefore, the argument, in this context, made on behalf of petitioner that the visit by Military Attache was not to facility of Zevata is baseless in our view.

20.4 The next question is, whether the products offered by the vendors, in particular, respondent nos. 4 & 5 ought to have been subjected to flight trials. There is no dispute that the provisions of RFP do not provide for flight trials. The record shows that because several representations were made on behalf of petitioner, the CAS at one stage had recommended flight trials after, the TEC had already cleared the petitioner along with respondent nos. 4 & 5 to the second stage of bidding process, i.e, the commercial bid stage. In view of this noting on the file, of the CAS, the matter was examined, once again closely by the experts at hand.

20.5 In the review, carried out the pros and cons of flight trials were considered. The aspect which weighed against flight trial were broadly as follows:-

- (i) The RFP did not provide for flight trial of expendables. This was

for the reason that they were considered as, commercial items available off the shelf. Since, the QRs in respect of expendables had not changed since the last procurement there was no provision made for flight trials in the RFP.

- (ii) The procurement made on earlier occasions, by the IAF, had also been sample tested in a laboratory atmosphere.

20.6 On the other hand, the arguments put forth for flight trials were: If the expendable were field tested, being an item which is going to be in use for at least next eight years, then the claims and counter claims of vendors during the procurement process could be nullified. In the absence of flight trials the issue would remain open ended.

20.7 The aforesaid pros and cons after being duly considered resulted in a conclusion that to protect the long term interest of IAF, the current procurement process with the L-1 vendor should continue and, a contract accordingly, be executed with the inclusion of a PDI clause. An additional safeguard in the form of a performance bank guarantee was also recommended. It was further decided that the PDI should be followed by fitment and evaluation trials, on IAF aircrafts, in India.

20.8 Apparently this aspect had been conveyed to the L-1 vendor, which had given its confirmation with regard to the same. A further recommendation was made in tune with the existing provision in the RFP, that no advance payment should be made.

20.9 A caveat was also added that in case during PDI, should the lab test/evaluation of the expendables show inconsistent performance or, result in a failure, then the IAF should have the option to foreclose the contract and re-issue the RFP.

20.10 It appears that the latter option prevailed as, amongst other aspects, a note had been made of the criticality and the current stock position of the expendables available with the IAF.

20.11 Having regard to the above, the CAS gave his approval to the procurement of the expendables under the existing RFA.

20.12 Apart from the above, we may also note that the issue with regard to flight trials was subject matter of the study by HEMRL, Pune in 2004 which concluded that it was possible to assess the performance of flare by taking into account the burn time and IR intensity and therefore, the alternative methodology of flight trials of expendables by dispensing the flare via an aircraft, which is logged on by a heat seeking missile installed on the chase aircraft; was a method which was time consuming, laborious and costly. The record also shows that purchases made of expendables by IAF in the past were not, apparently, subjected to flight trials. Furthermore, the RFP issued in 2001 also did not envisage flight trials. However, flight trials were evidently conducted on a limited range of aircrafts in 2002 and 2007. These trials had to be conducted over a period ranging from one to two years. Taking these factors into account the view of the user, that is, the IAF appears to veer to the conclusion that if flight trials were conducted in respect of the present procurement then, the cost implication would run into several crores; apart from the delay involved. This cost is also estimated based on available data of past trials.

20.13 Having examined the record, we find that there is adequate justification in the respondent continuing with the procurement under the present RFP, without flight trials.

21 The argument of the petitioner that under the provisions of IFA (Air Force Manual 2008) the expendable being airborne products, there was a mandatory requirement, to subject the products offered by respondent nos. 4 & 5 to flight trials is, in our view, totally misconceived. The reason for this is that IFA (Air Force Manual 2008), is a Manual, issued by Controller General of Defence Accounts. We have great doubts as to whether the provisions of said manual would have applicability to the RFP in issue. The definition of

airborne stores on which reliance has been placed by the learned Senior counsel for the petitioner is extracted hereinbelow:-

Airborne Stores – Airborne stores include all items of equipment, material etc., used in the development/production/maintenance of aircraft, aero-engines, systems, equipment, flying clothing etc. All airborne items are to be certified and approved for airworthiness before use on military aircraft. Airborne stores, procured only from approved sources are to be used on aircraft.

21.1 A perusal of the definition of airborne would show that, expendables which are in the nature of consumables, do not appear to be covered by the said definition. However, for the sake of argument even if it was assumed that the expendables come within the definition of an airborne store, it only requires that before an airborne item is used on a military aircraft, it should be certified and approved for air worthiness and that they should be procured from approved sources. We have not been shown any other provision of IFA (Air Force Manual 2008) except the ‘glossary of terms’, to enable us to fathom the manner of certification and approval. If, we were to read the definition of airborne stores along with the provisions of Clause 9(b) of the RFP, the OEM certificate should, in our view, suffice. Furthermore, in our view, the difficulty with this argument of the petitioner is that in order to support its submissions it seeks to latch on to and/or invoke provisions of the aforesaid defence manual of which, other bidders may or may not have knowledge, rendering the selection process unviable and unfair from their point of view, apart from the fact that they are outside the purview of the RFP. In any event, on account of the manner in which the events have transpired, there is on record, a validation of the stand of the IAF that the efficacy of the Product in issue i.e, the expendables can be best ascertained in laboratory conditions. We have no doubt that the TEC, would have complied with the provision Clause 8(b) of the RFP. Therefore, having regard to the manner in which, the issue of flight trials of the products in issue, had been internally debated within the IAF, the

allegation that the reversal of the view of CAS as held by him in February, 2011 was contrived or motivated, is completely baseless. The record shows, as observed by us hereinabove, that after the CAS had expressed a view in February, 2011 that flight trials should be conducted, the decision whether or not to proceed ahead with the current RFP was subjected to a rigorous review. On a review of the decision, the concerned authorities, came to a conclusion that the operational efficacy of the product could be tested under laboratory conditions, and therefore, procurement of the expendables should continue under the instant RFP. This decision, as indicated above had the approval of the CAS as well.

22. As mentioned in the earlier part of our judgment that, while exercising powers under Article 226 of the Constitution of India, the scope of enquiry cannot exceed the periphery of the decision making process. Therefore, the onus, with regard to whether the product-in-issue, is suitable for the needs of the user, that is, the IAF will have to be borne by the IAF. Unless mala fides are alleged, and established, the court would stop short of enquiring any further into the merits and de-merits of the operational efficacy of the product sought to be procured under the RFP.

23. It is in this background that we had issued a limited notice, in the writ petition, by confining it to the official respondents. Looking at the seriousness of the objections raised in the first instance by the petitioner, we had called for the record, despite a preliminary objection being raised with regard to the legal authority of the affiant, whose affidavit has been appended to the writ petition. The petitioner undoubtedly has not filed the original certified copy of the Board of Director's resolution of the petitioner company purportedly, conferring an authority on the affiant to institute the present petition. The copy appended to the writ petition shows that it does not bear the seal of the petitioner. There is, in fact, an absence of signatures even of the

Company Secretary. The copy of the Board of Director's resolution, evidently, bears the signatures of only, the Chairman of the petitioner. We would have ordinarily returned the petition on this preliminary ground till such time the said defect was cured. However, since the averments in the writ petition otherwise raised serious issues, we examined the matter in great detail. The perusal of the record has persuaded us to hold that the challenge to the RFP, is without merit.

24 Furthermore, the challenge on the ground of the absence of a provision in the RFP, with regard to flight trials, which was sought to be projected as being flawed, though it was available as far back as in, August, 2009; was not only substantially delayed but is also mischievous in more than one way; a fact which is apparent from the following two events which transpired post issuance of the RFP. Firstly, in the pre-bid meeting of 22.10.2009, the petitioner chose not to raise any issue as regards the provisions of the RFP with the official respondents. Even though the identity of the other two eligible vendors was known since 17.11.2009, the petitioner did not raise any objection with regard to respondent nos. 4 & 5 being technically ineligible, till after, the opening of the commercial bids on 9.11.2010. Secondly, the petitioner having known the particulars of the bidders only indulged in flooding the official respondents with representations and waited till August, 2011, before it took a decision to agitate the matter in court. In matters involving challenge to a tender, the aggrieved party is required to necessarily display the requisite alacrity, once a cause of action arises in its favour. Delay, in such like matters, is a deleterious to public interest. The court, would be well empowered, to dismiss petitions fraught with delay, at the very threshold. This was one of the reasons that inhibited us from passing any interim order in the case. An examination of the case, on merits, has only fortified our belief that the said decision was the correct one to take, in the instant case.

25. In this case we are left with the impression that the mode and manner of challenge is tailored to perpetuate monopoly in the petitioner and stymie the entire procurement process. Thus, for the foregoing reasons, we are of the view that petition deserves to be dismissed with cost. It is ordered accordingly.

26. At the hearing held on 04.01.2012, we had directed learned counsel for the parties to file their actual bill of costs and fees. Since, petitioner has failed in its challenge to the RFP, it is directed that the cost in the sum of Rs. 1,56,000/- be deposited in the Air Force Wives Welfare Association Fund within a period of ten days from today. The Registry, shall ensure compliance of our directions in this regard. The matter be listed before the Registrar for compliance on 10.02.2012.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

JANUARY 30, 2012

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