HON'BLE SRI JUSTICE S.V.BHATT

W.P.No.36095 OF 2014

ORDER:

The petitioners invoke the jurisdiction of this Court under Article 226 of the Constitution of India for:

(i) declaring the tender Conditions under Clause 1.13.1, 1.14 and 11.2 of Tender Enquiry No.ECIL/SPD/PUR/ PT/14-15/08-4554/01 dated 19.09.2014 issued by the 1st respondent as unjust, capricious and encroaching upon the constitutional rights of the petitioners under Article 14 and 19 (1) (g) of the Constitution of India;

(ii) declaring the action of the 1st respondent in not providing drawing No.0908-552269-3A in terms of Tender Enquiry No ECIL/SPD/PUR/PT/14-15/08-4554/01 dated 19.09.2014; and

(iii) declaring the action of the 1st respondent in not providing a copy of the procurement procedure manual to the 1st petitioner, as illegal and unconstitutional.

The circumstances relevant for disposal of the writ petition are that the 1st respondent floated Tender Enquiry No. ECIL/SPD/PUR/ PT/14-15/08-4554/01 dated 19.09.2014, for the manufacture and assembly of 4 lakh units of Safe and Arm Device (S.A.D). S.A.D, briefly explained, is a high precision product used by the Indian Army. S.A.D was developed by Fuchs Electronics, South Africa. It is stated through the devise the timing of explosion is guided and is considered to have tactical advantages. The procurement of S.A.D through enquiry dated 19.09.2014 by 1st respondent is for the Defence Ministry/Indian Army. The 1st respondent has issued the subject tender for manufacture and supply of 4 lakh numbers (Apprx) of S.A.D units. One of the conditions under challenge is that the tenderer/indigenous supplier is required to get quality certification of 200 Nos. of S.A.Ds manufactured by it, by Fuchs Electronics in South Africa.

The 1st respondent provides the designs/drawings and the manufacturers have to manufacture S.A.D units according to the procedure manual and get the sample units certified by Fuchs Electronics. Admittedly, for some time in the immediate past, the manufacturing of S.A.Ds has been entrusted to M/s Sandeep Metal Crafts, Nagpur. The subject tender has been issued to invite more participants in the tender process and expand supply base.

The petitioners are aggrieved by the following conditions, which are as follows:

> 1.13.1 All the vendors whose technical bids are to be scrutinized by TEC (Technical Evaluation Committee) and will be short listed for submission of NCNC (No cost No commitment) samples.
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> 1.14 200 Nos. samples on NCNC basis (No cost No commitment) shall be submitted for evaluation trials. Functional checking at ECIL and field testing trials and qualification test at REPUBLIC O F SOUTH AFRICA. Price bids of those qualified vendors in field evaluation/quality trails in RUPLIC OF SOUTH AFRICA on 52 caliber gun systems only will be opened. Bidders have to bear the cost of qualification in South Africa. 2 days' advance email notice will be given to all the qualified bidders as to the venue, date and time of opening price bids. No extension of date and time will be entertained.
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> Bidder should furnish an undertaking conforming their acceptance for providing required quantity of samples on NCNC basis for evaluation and qualification trails. Further to confirm their acceptance to bear the costs of evaluation and qualification trails in REPUBLIC OF SOUTH AFRICA.
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> 11.2 The warranty for the supplied goods shall be for a period of 24 months and shelf life of 15 years from the date of manufacture.

It is the further complaint of petitioners that the 1st respondent is not providing drawing No.0908-552269-3A in terms of condition

No.1.18 of tender enquiry dated 19.09.2014. The conditions incorporated in the tender enquiry are motivated and intended to exclude small entrepreneurs like 1st petitioner. These conditions are not part of the procurement procedure and the request of 1st petitioner for supply of copy of procurement procedure manual with a view to knowing the binding nature of these conditions is not accepted. The 1st respondent was not providing the manual to the petitioners. The case of 1st petitioner is that it is an established supplier of several items to ordnance factories and other establishments in India and abroad. The petitioner has established stores and is a reliable supplier of specialized items. On account of the impugned conditions, the 1st petitioner, a small scale industry, would be required to incur testing expenses of Rs. 2 core to supply 200 Nos. of S.A.Ds on NCNC basis for consideration of price bid and is arbitrary.

Clause 11.2 requires performance guarantee for two years and shelf life of 15 years. These requirements are curious and unwarranted. Further, these conditions are not warranted on proprietary and OEMs. S.A.D is a non-proprietary item of bidders and is, in fact, a proprietary item of 1st respondent. So, the condition of performance guarantee and shelf life are extraneous. On 06.10.2014, the petitioners requested for drawing No.0908-552269-3A. Through E-mail dated 16.10.2014, the 1st respondent replied that drawings at Sy.Nos.3 and 4 can be collected. The request of petitioner for supply of drawing No.1 has not been accepted. It is stated that at pre-bid meeting the said drawing was shown to the 1st petitioner's representative and copies were not provided. In the pre-bid meeting, the 1st respondent stated that the subject procurement is for Indian Army and the procurement is according to the procurement procedure manual of 1st respondent company. The procurement manual of 1st respondent is not available on E-portal. From these circumstances, it is stated that the imposition of impugned conditions are either to confer preferential treatment to a few tenderers or exclude similarly situated small scale units competent to prefer the tender obligations but not to fulfill these arbitrary conditions. The petitioners requested for postponing the last date for submission of bids till these documents are made available to 1st petitioner. The persuasive attempts of petitioners were of no avail with the 1st respondent and hence, the jurisdiction of this Court under Article 226 of the Constitution of India is invoked. The writ petition is filed without prejudice to the bid already submitted by the petitioners.

The petitioner raises several technical, factual and legal contentions against the three prayers referred to above.

The scope of judicial review against reasonableness of tender conditions and rights of tenderers are decided by authoritative pronouncements of the Hon'ble Supreme Court. The averments are not considered in great detail, but broadly stated the complaint against the 1st respondent is two fold viz., that the 1st respondent acted arbitrarily by incorporating the conditions and by reason or choice intending to exclude the 1st petitioner from participation in the subject E-tender.

The learned senior counsel appearing for the petitioners has reiterated these very contentions and placed reliance upon the decision of the Hon'ble Apex Court in **ASSOCIATION OF REGISTRATION OF PLATES v. UNION OF INDIA AND OTHERS,**[1] wherein, it was held thus:

> "In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering Authority is

found to be malicious and misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of a class of intending tenderer under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep out of field indigenous manufacturers. It is explained that on the date of formulation of scheme in rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

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The fifteen years contract period has also been supported by Union of Indian and State authorities. We find great substance in the submissions made on the data supplied as a justification for awarding contract for long period of 15 years. There would be a huge investment required towards the infrastructure by the selected manufacturer and the major return would be expected in initial period of two years although he would be bound down to render his services for future vehicles on periodically for a long period. Looking to the huge investment required and the nature of the job which is most sophisticated requiring network and infrastructure, a long term contract, if thought viable and feasible, cannot be faulted by the court. If there are two alternatives available of giving a short-term or a long-term contract, it is not for the court to suggest that the short-term contract should be given. On the subject of business management, expertise is available with the State authorities. The policy has been chalked out and the tender conditions have been formulated after joint

> deliberations of authorities of the State and the intending manufacturers. Contract providing technical expertise, financial capability and experience qualifications with a long term of 15 years would serve a dual purpose of attracting sound parties to stake their money in undertaking the job of supply and safeguard public interest by ensuring that for a long period the work of affixation of security plates would continue uninterrupted in fulfillment of the object of the scheme contained in rule 50. Our considered opinion, therefore, is that none of the impugned clauses in the tender conditions can be held to be arbitrary or discriminatory deserving its striking down as prayed for on behalf of the petitioners."

The 1st respondent in reply has stated that S.A.D units are developed by Fuchs Electronics, South Africa. The Defence Ministry indents S.A.D units for installation in weapon systems for Indian Army and the technical certification of sample units of S.A.D by Fuchs Electronics is a mandatory condition. M/s Sandeep Metal Crafts, Nagpur under certification from Fuchs Electronics has been supplying S.A.D units to defence/Indian Army.

In the year 2007, the petitioner supplied S.A.D units for certification and they were rejected by the technical evaluation committee. It is stated that the 1st respondent through the E-tender intends to encourage potential suppliers to manufacture and infuse healthy competition in indigenous manufacture of S.A.D units. The 1st respondent received twelve responses to the E-tender notice dated 19.09.2014. On 10.11.2014, pre-bid meeting was held with the tenderers. The doubts of all participants have been clarified and the minutes of meeting dated 19.11.2014 have been circulated. The conditions are accepted by all the tenderers, except the petitioners. The Ministry of Defence is the end user of S.A.D units. The sensitivity or importance of S.A.D units is not highlighted in this order than actually required. The subject tender runs into several crores of rupees and the conditions imposed are commensurate to the value of final contract granted to successful tenderers, reasonable and valid. The 1st petitioner in fear of rejection of its technical bid is challenging these conditions complaining against non-supply of drawings etc. As a matter of record, it is contended that the other tenderers have accepted the terms and filed the bids. The petitioners cannot spell terms and conditions for incorporation in a tender document. The petitioners are not compelled to bid in the tender process. The policy of Central Government is to broaden the sources of potential suppliers of specialized items. The conditions, more particularly technical standards, are fixed by the Ministry of Defence and not by the 1st respondent. The 1st respondent is under contractual obligation with Ministry of Defence to supply the product according to the technical standards of end user/Indian Army. Therefore, the 1st respondent carried forward the agreed conditions and incorporated in E-tender. It is replied that the shelf life of 15 years will not have adverse impact once the material is accepted by Fuchs Electronics and further, this clause is made applicable to all the companies. The procurement manual is an internal document. The conditions of subject tender are evaluated from the perspective of buyers requirement, but not supplier's ability to perform. The 1st petitioner, being a supplier to defence companies, is presumed to have knowledge of these procedures. In the year 2007, the petitioners submitted 500 units of S.A.D for technical evaluation and these units were rejected. As already noted, the certification of sample units by the developer of the product in South Africa is one of the conditions of supply by the 1st respondent, imposed by its buyer/Indian Army. Having regard to the sensitivity and volume of contract, it is justified that field test will have to be carried out by Fuchs Electronics in South Africa.

The 1st respondent asserts to have provided the required drawings to all the bidders/companies. The drawings under reply are made available to the technically qualified bidders. For reasons best known to the petitioners, still these aspects are made issue at this stage. The conditions assailed in the writ petition are imperative for supply and these conditions cannot be relaxed and enable petitioners' participation. The units supplied to Indian Army without certification by Fuchs Electronics will not be accepted by the Ministry of Defence. The petitioner's supply of S.A.D in such a case is in futility. The 1st respondent prays the Court not to grant any concession to petitioners on any of the writ prayers. The 1st respondent prays for dismissal of the writ petition.

The 1st respondent through additional set of papers placed before the Court a few office orders which have bearing on the issue. The 1st respondent by referring to office order dated 02.09.2014 contends that the E-tender is approved with the conditions now assailed in the writ petition and the same cannot be negotiated at this stage, for if there is any omission in incorporating these conditions, one can take exception to the procedure.

The learned standing counsel places strong reliance upon the decisions reported in **MICHIGAN RUBBER (INDIA) LIMITED v. STATE OF KARNATAKA AND OTHERS**[2], **MEERUT DEVELOPMENT AUTHORITY v. ASSOCIATION OF MANAGEMENT STUDIES AND ANOTHER**[3], **AND U.P.AVAS EVAM VIKAS PARISHAD V. OM PRAKASH SHARMA**[4] for the proposition that the judicial review of conditions is impermissible in the fact situation, no arbitrariness is established and the 1st petitioner being a player/participant cannot stipulate the condition or claim exemption**.** The relevant paragraphs relied upon by the standing counsel are as follows:

In **MICHIGAN RUBBER (INDIA) LIMITED**'s case (2 supra), the Apex Court held as follows:

a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

A Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and
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> (ii) Whether the public interest is affected. If the

answers to the above questions are in negative, then there should be no interference under Article 226."

"The Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with 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 Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with 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. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding prequalification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

In **MEERUT DEVELOPMENT AUTHORITY's** case (3 supra), the Apex Court held thus:

"A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. **The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract**. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the biding process.

The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. **No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.**"

(Emphasis added)

In **OM PRAKASH SHARMA**'s case (4 supra), the Apex Court held thus:

"The bidder who has participated in the tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda."

From the above averments and submissions, the following points arise for consideration:

i) Whether condition Nos.1.13.1, 1.14 and 11.2 of Tender Enquiry are arbitrary, capricious and unconstitutional?

ii) Whether the non-supply of drawing No.0908-552269-3A has denied reasonable opportunity to the petitioner and whether the respondents are under obligation to make available drawing No.0908-552269-3A?

iii) Whether the 1st petitioner is entitled for supply of a copy of procurement manual of 1st respondent? and

iv) To what relief ?

POINTS (i) TO (iv):

The E-tender dated 19.09.2014 is issued by the 1st respondent for manufacture and supply of 4 lakh units of S.A.D. The admitted case of parties is that S.A.D unit is manufactured and supplied for end use of the Indian Army. S.A.D was developed by Fuchs Electronics, South Africa. From the material available on record, it appears that either under a technical collaboration or extension of know-how or knowledge base, the Indian Army is employing S.A.D units in the weapon systems. It is admitted by the parties that S.A.D units have critical value weapon usage. Till the issue of subject E-tender, S.A.D units have been procured from M/s Sandeep Metal Crafts, Nagpur under certification from Fuchs Electronics. With a view to broadening the indigenous source or supply base, the tender notice has been issued and twelve responses are received. The tenderers are to obtain technical certification from Fuchs Electronics, South Africa.

The E-tender now gives opportunity to eligible industrial units of participation and consideration of its technical ability to manufacture S.A.D units. It is stated that the value of prospective contracts will be several hundreds of crores. The 1st respondent , it is contended, having regard to the value of the final contract entered into with the successful parties, incorporated condition No.1.13.1 viz., submission of No Cost No Commitment sample is to be provided by the bidders. The condition in scheme of the subject tender is to provide opportunity to competent and financially viable units to compete in the tender process. The participant/bidder must satisfactorily establish that it can manufacture and supply S.A.Ds according to the requirements of the original developer and the end user. A decision is taken to insist upon supply of No Cost No Commitment samples by all the tenderers. Further, in the fitness of these circumstances, the certification by the original developer in South Africa is an important tender condition. The submission of learned senior counsel on undertaking certification in South Africa is that climatic conditions in South Africa are different from sub-continent and these conditions are imposed only to prevent small scale industries from participating in the tender process. The small scale industry cannot bear such huge expenditure. The contention of learned senior counsel is noted only to be rejected. For in a matter involving high safety and security, it is inconceivable to even consider that the persons fully trained in the field and vested with the responsibility of procurement of the sensitive and specialized items without regard to the climatic conditions of South Africa and sub-continent would prefer to get the certification done at developer's place in South Africa. Further, *prima facie* it appears as time consuming and impracticable to expect Fuchs Electronics to deploy the men and equipment for certification of sample units in India, this Court does not consider the condition viz., certification by Fuchs Electronics in South Africa as an onerous condition. Further, the Ministry of Defence through the 1st respondent is encouraging indigenous source suppliers. Admittedly, Fuchs Electronics being the developer of S.A.D under a tie up, the Defence Ministry is procuring the S.A.D units through 1st respondent. The bidders are to manufacture S.A.D units as per drawings and exacting quality requirements. The bidders for all purposes use their manufacturing facilities and make S.A.Ds. The tender, in effect, provides business opportunity to indigenous manufacturers without financial implication on R & D. The NCNC condition is reasonable, having regard to the nature of procurement, its value etc. If the samples are procured at the expense and cost of either the Ministry of Defence or the

1st respondent, it virtually amounts to providing every facility for technical clarification. Such condition by itself cannot be inferred as arbitrary and intended to exclude a particular class of units.
As already noted, the said condition certainly encourages the competent and capable units to participate. If the condition is held as arbitrary, as contended by the petitioner, then the

1st respondent would be providing every detail/material for technical participation. Expansion of source supply is advantageous and the entrepreneurs with the ability and skill, more particularly with confidence must be in a position to invest the required sum for making available 200 units of S.A.D for certification by Fuchs Electronics in South Africa. The investment on sample units in the opinion of this Court by any of the applicants cannot be treated as extraneous or cumbersome. On the contrary, such a condition while imposing responsibility obviates participation by incompetent bidders with no skill/no finance.

Further, by way of reply, it is stated that these conditions are incorporated as per the instructions of the Ministry of Defence. The 1st respondent is entrusted the responsibility of procurement by defence. The 1st respondent is justified in incorporating the very same conditions insisted by the Ministry of Defence in E-tender.
In my opinion, no exception can be taken to these conditions.

As regards drawings, it is satisfactorily explained that drawing No.1 is not required at the present stage of bidding and after the technical bids are cleared, drawing No.1 will be made available to the eligible persons. In the opinion of this Court, these objections are raised after participating in the bid process. The 1st petitioner claims to be an established supplier to defence establishments in India and abroad. The 1st petitioner claims to be supplying various items to different organizations, including the defence. This Court is unable to appreciate the complaint against non-supply of copy of procurement manual. The 1st respondent has to impose the terms and conditions depending upon the work/nature of goods obtained through tender process. The comparison with manual is not contextual and the submission is untenable. The number of other participants is indication that the petitioners are insisting upon the supply of more documents and drawings than required for effective bidding.

In the present scenario or policy in defence procurements, it is required that all concerned go the next generation of indigenization of weapons manufacturing. The department with a view to infusing strength, tactical know-how etc., if insists upon supply of 200 Nos. of S.A.D units on NCNC basis, in the opinion of this Court, that by itself would not render that condition arbitrary and illegal.

The petitioner cannot participate in a tender process on its terms and conditions, but must be inclined to file the bid by being compliant to the terms and conditions in the bid document. The 1st petitioner being a player cannot set rules of the game. The decisions referred to above authoritatively establish that the tenderer cannot insist upon terms and conditions to suit its convenience or capacity. By applying the ratio laid down in the cases relied upon by the 1st respondent to the facts of the case, it is held that the petitioners are not entitled to any of the prayers. The points are answered accordingly.

I see no illegality or irregularity in the impugned tender conditions and the writ petition is liable to dismissed.

The writ petition is, accordingly, dismissed with costs quantified at Rs.10,000/- (Rupees ten thousand only) payable to 1st respondent.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

S.V.BHATT, J

6th March, 2015

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[1] (2005) 1 SCC 679

[2] (2012) 8 SCC 216

[3] (2009) 6 SCC 171

[4] (2013) 5 SCC 182