* IN THE HIGH COURT OF DELHI AT NEW DELHI

**Reserved on: 09.05.2017**
**Pronounced on: 03.07.2017**

\+ **W.P.(C) 2912/2017 & C.M. APPL.12701-02/2017**

EMDIGITAL LIMITED ..... Petitioner

Through : Sh. Ravi Sikri, Sr. Advocate with Sh. Rakesh Taneja, Sh. Deepank and Ms. Divyangana, Advocates.

versus

UOI AND ANR. ..... Respondents

Through : Sh. Anurag Ahluwalia, CGSC, for UOI.
Sh. Arvind Nigam, Sr. Advocate with Sh. Rishi Anand, Sh. Karan Bharihoke, Sh. Karan Luthra, Ms. Vaishali Sharma and Sh. Mikhil Sharda, Advocates, for Respondent No.2.

**CORAM:**
**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**
**HON'BLE MR. JUSTICE YOGESH KHANNA**

**MR. JUSTICE S. RAVINDRA BHAT**

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1. The petitioner, a foreign company, is aggrieved by its ouster from the tender process, by the first respondent (the Union Government of India, hereafter "the Union") and the rejection of its bid, for procurement of 12.7 mm stabilized Remote Control Guns (hereafter referred to as "SRCGs") with ammunition and accessories and Transfer of Technology (hereinafter

referred to as "ToT") to Ordnance Factory Board.

2. The necessary facts are that a Request for Proposal (hereinafter referred to as "RFP") in respect of procurement of 12.7 mm stabilized SRCGs with ammunition and accessories to Ordnance Factory Board (hereafter "OFB") was issued on 24.10.2013 to M/s. EMDigital, U.K, i.e., the Petitioner; M/s. Elbit Systems, Israel (the second respondent "Elbit") and five other vendors. Techno-Commercial bids were received from the Petitioner, Elbit and M/s. OTO Melara, Italy. Subsequently, the equipment fielded by the Petitioner and M/s. Elbit Systems, Israel cleared Field Evaluation trials conducted from 25.03.2015 to 12.05.2015 following which the Staff Evaluation was conducted on 09.07.2015. In this process, the Petitioner and Elbit were determined as compliant to the RFP procedures. Thereafter, commercial bids of both the vendors were taken up for consideration. Clause 3 of the RFP stipulated as follows:

> *"The Government of India invites responses to this request only from Original Equipment Manufacturers (OEMs)/ System Integrators (SI). In addition, the technology partner(s) of the OEM/SI should not be debarred, banned, suspended or blacklisted by the Ministry of Defence. The end user of the equipment is the Indian Navy (IN) and Indian Coast Guard (ICG)."*

Another relevant condition, for the purpose of this case, is clause 14 of the RFP, which reads as follows:

> *"it may also be confirmed that there are no Government restrictions or limitations in the country of the supplier or countries from which subcomponents are being procured and/ or for the export of any part of the system being supplied including those required for the subsequent Licensed*

*Production, under this RFP."*

3. Defense procurement involves multiple steps that include field evaluations, staff evaluations, oversight by a technical committee, commercial negotiation, approval of competent and financial authorities, after which the contract is awarded, entered into and later post-award management of the contract is undergone. In the present case, neither the petitioner, nor Elbit were original equipment manufacturers (OEP) but were system integrators. After the products were examined and tested, the commercial bids of the petitioner and Elbit (who were determined to be compliant with the tender conditions) were opened on 11.04.2016. It was discerned that the second respondent (Elbit) was the lowest bidder. In these circumstances on 15.04.2016, the petitioner addressed a representation/complaint to the authorities in the Union, stating that Elbit should not be declared L1 or successful because its bid for the equipment lacked Congressional sanction from the country of origin of the product, i.e. the USA. The complaint *inter alia,* stated as follows:

> *"Equipment (SME) shall itself be designed SME*
>
> *iii. Under the U.S law (ITAR Part 123) it is a strict legal requirement to obtain relevant Congressional Notification and DSP-5/DSP-85 licenses for technology that originates from the USA.*
>
> *iv. Therefore, it is important to ascertain whether such US Government approvals have been submitted by Elbit Systems as supplied by OOW, in their Techno-Commercial bid.*
>
> *v. In the event the same has not been offered, the Technical Bid is liable to be considered as 'non-compliant' to the Terms and Conditions of the RFP and hence leads to disqualification (please refer Para 14 of RFP and Clauses of Add 'L')"*

A more detailed complaint was made to the Union, but repeating the same allegations with respect to lack of proper authorization from the US Federal Government on the part of the appellant, on 09.05.2016 and later, on 01.09.2016. It again referred to the same issue, in a letter dated 22.03.2017. The petitioner's complaint is that despite these vital factors, its plea that the second respondent's equipment cannot be imported into India, without proper authorization, was rejected and the latter's bid was held compliant.

4. Mr. Ravi Sikri, learned senior counsel, referred to the petitioners' letters and urged that the documents relied on by the Union only establish that the original manufacturer was shown as M/s. Ohio Ordnance Works and that in the absence of authorization by the proprietor of the technology and the product, export of the equipment, from the United States was illegal and, therefore, the second respondent's bid was not compliant with tender conditions.

5. It is argued by the petitioner that authorizations received by the second respondent - Elbit were for the purposes of testing the equipment and that too in Israel, and that the original manufacturer of the equipment, which has proprietary claim over these guns, never permitted the export. Learned counsel sought to rely upon the provisions of US Law, particularly the ITAR, i.e. Regulations and the Arms Export Control Act, to say that in the absence of specific congressional authorization, the kind of and the manner of export, resorted to by Elbit, the second respondent in this case, does not fall within the tender specifications and the RFP. It is stated that having regard to the nature of the guns that are to be imported by the Indian Navy, the mere circumstance that they were successfully field-tested and on foreign

soil, i.e., in Israel, itself cannot be the determinative factor. Rather the condition which the petitioners as participants as well as the respondents and other bidders, and most importantly the Union of India, were required to adhere to, was the legal one i.e. that the country of origin where the manufacturer is situated or located, should permit the export.

6. It was contended that the absence of authorization in the present case would mean not only that the tender by Elbit is non-complaint but also that the guns sought to be imported are prohibited. This will impeach upon the national security and furthermore upon the reputation of the Indian government. Flagging this as a very important consideration that should have been taken into account by the Union, Mr. Sikri urged that this Court should intervene and hold that the second respondent's bid was absolutely non-compliant having regard to the US Arms Export Control Act enacted by the US Government. In this regard, learned senior counsel relied upon various provisions of the ITAR as well as the Arms Export Control Act.

7. Counsel for the Union argued that the petition is highly belated. It was submitted that the petitioner's bid as well as that of the second respondent were thoroughly subjected to scrutiny at every level of the tender evaluation process. These included not only physically testing the guns in the field and the technical evaluation but also a close examination of the documentation. What is apparent from the record, submitted counsel for the Union, is that M/s. Ohio Ordnance Works is the sub-licensee of the second respondent that was tasked with the job of obtaining the relevant authorizations. According to ITAR and the US Law, there is no requirement that for the purpose of participation in a tender process, the final authorization to supply in the

eventuality of the tender being accepted, is necessary. In this regard, counsel relied upon various authorizations of the US Government, numbering three, which permitted the export of guns for the purposes of testing to Israel, the export of manuals to the Indian Govt. as well as the export of other documents, necessary to acquaint Indian authorities with maintenance etc. These, it was stated, were procured as they were necessary, under the ITAR.

8. Taking serious objection to the present proceedings, it was argued that the petitioner itself is a foreign company and based in UK offering guns of a Polish manufacturer. Having been considered not successful, its ability to question a tender process on the ground of national security concerns of the Indian Government, strain credulity. It was submitted that in any event in order to allay any apprehensions, the Indian Government through diplomatic and consular channels, sought specific replies to queries with respect to the contract and guns supplied which was the subject matter of the tender, from the US government. Learned counsel submitted the letters and the replies to the queries of the Indian Government in a sealed cover and stated that a perusal of these would establish beyond any doubt, that the supply which is the subject matter of the tender, through the product offered by the second respondent, Elbit, is not prohibited and that all due care in this regard would be taken.

9. The Union, in its counter affidavit states that after receiving the petitioner's letter of 15.04.2016, a thorough review was undertaken. It further asserts as follows:

> *"it was observed that certain clarifications are require to be sought from both the vendors particularly with respect to*

*supply of non-standard equipment i.e., plant and machinery as per Para 1 (g) (xxvii) of Appendix 'L' of RFP and provisioning of Itemised Price List. Thereafter, based on directives of CNC, the clarifications with respect to RFP requirements including supply of non-standard equipment for manufacture of ammunition and IM kits for SRCG were forwarded in the form of queries to both the vendors on 21.09.2016. It is further submitted that the response from both the vendors was received.*

*19. It is submitted that after receiving the response of Petitioner and Respondent No.2. It is further submitted that the CNC after due consideration of compliance of both the vendors i.e..Petitioner and Respondent No. 2 to RFP stipulations, has concluded on 10.02.2017 that both are compliant and their bids are responsive and Respondent No. 2 emerged as the lowest bidder.*

*20. It is further submitted that on completion of a thorough examination of technical and commercial bids of M/s Elbit Systems i.e.. Respondent No. 2 it was established that M/s Elbit Systems is compliant to all aspects of transfer of technology as per RFP."*

10. The Union further asserts on the question of authorization as follows:

*"It is submitted that the Techno-Commercial bids of both the firms i.e. M/s Elbit Systems, Israel (Respondent No.2) and M/s EMDigital, UK (Petitioner) were found compliant at all stages of Technical Evaluation, Field Trials and Staff Evaluation. It is further submitted that separately a thorough assessment was undertaken by an independent committee i.e., Technical Oversight Committee (hereinafter referred to as "TOC") which concluded that all procedure as stipulated in the Defence Procurement Procedure-2013 have been adhered to with respect to the procurement process in the instant case. It is further submitted that Respondent No. 2 has provided supporting documents with respect to export of unclassified defence articles related to technical data and defence services for .50 Caliber (12.7 mm) M2HB through their technology*

*partner for gun i.e., M/s Ohio Ordnance Works, USA. It is further submitted that M/s Ohio Ordnance Works, USA has been listed as a manufacturer and accorded license by the relevant authority of the US Government, it is further submitted that subsequent to receipt of complaint from Petitioner i.e., M/s EMDigital. UK, it has been ascertained that M/s Ohio Ordnance Works, USA has the necessary licenses in place to respond to requests for information, although it will require additional export licenses for the export and associated technology transfer. It is further submitted that the Vendor of the Gun i.e., M/s Ohio Ordnance Works, USA has also provided a certificate specifying that the relevant authority in the US Government has clarified that there are no restrictions on getting requisite approvals for export to India. It is further submitted that post conclusion of the contract, the export clearance certificates are provided by the vendors in accordance with Article 2.2 of the Standard Contract Document of Defence Procurement Procedure-2013. It is further submitted that M/s Ohio Ordnance Works, USA has also provided certification regarding its capability and resources to transfer technology of the gun to India."*

11. The second respondent, Elbit, also entered appearance; it contested the petitioner's argument and relied on the authorizations that were issued by the US Government. The first of these is approval numbered DSP-73 730049592 dated 27.06.2014 valid for 48 months to Ohio Ordnance Works, Inc. in respect of two M2HB Caliber: .50 guns. The manufacturer of the commodity is *"Ohio Ordnance Works, Inc."* The export was for temporary use by Elbit, to Israel. The purpose cited was *"To Elbit Systems Land and C4I Ltd. for the firearms to be used for integration and fire trials for systems they develop. Firearms will be returned upon completion of all testing."* Furthermore, the document also states that:

*"(1) Neither the applicant, its chief executive officer, president,*

*vice presidents, other senior officers or officials (e.g., comptroller, treasurer, general counsel) nor any member of its board of directors is:*

*(a) the subject of an indictment for or has been convicted of violating any of the U.S. criminal statutes enumerated in22 CFR 120.27 since the effective date of the Arms Export Control Act, Public Law 94-329,*

*90Stat. 729 (Jupe30,1976);or*

*(o) ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from any agency of the U.S. Government;*

*(2) To the best of the applicant's knowledge, no party to the export as defined in 22 CFR 126.7 has been convicted of violating any of the U.S. criminal statutes enumerated in 22 CFR 120.27 since the effective date of the Arms Export Control Act, Public Law 94-329, 90 Stat. 729 (June 30,1976); or is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from any agency of the U.S. Government;"*

12. The second authorization is No. DSP-5 050547142; the product in question is one Operators Manual for Machine Guns, Caliber .50 M2, Heavy Barrel classified as Defense Article Type: Technical Data. The other product is one "Technical Manual Unit and Direct Support Maintenance Manual (Including Repair Parts and Special Tools List) for Machine Guns, Caliber .50;M2,Heavy Barrel (again classified as Defense Article Type: Technical Data). This document specifically states that the export of these manuals is to India; the end user is *"India Navy, Rajaji Marg Technical Manager-Maritime Systems Acquisition Wing, Ministry of Defence Room No5, D-11 Wing Ground Floor, Sena Bhawan New Delhi 110011 INDIA"*. The

purpose- according to this certificate is “Off-Shore procurement”. The third approval document is No. DSP-5 050551126 dated 19.02.2015. It relates to technical data assisting in dis-assembling the machine guns and the end-user is listed as the Indian Navy.

13. The contentions in these proceedings reveal that what the petitioner purports to be aggrieved by primarily is the alleged non-compliance with US law in regard to procurement of the naval guns, by the second respondent – the successful tenderer, which are the subject matter of the present proceedings and the tender. The petitioners’ bid was not the lowest and consequently, it was not designated as L-1. At that stage, it complained to the Union that the second respondent could not export the guns, because of lack of authorization. In other respects, i.e. technical feasibility as well as viability of the product, there is no dispute. Nor is it disputed that both the petitioner and the second respondent are not manufacturers, but are systems integrators. The relevant tender condition which is emphasized by the petitioner states that for the export of the product (to India)

> *“there are no Government restrictions or limitations in the country of the supplier or countries from which subcomponents are being procured and/ or for the export of any part of the system being supplied including those required for the subsequent Licensed Production, under this RFP."*

14. The respondents assert that the regulatory approvals for export initially for the purpose of field trials, leading up to the sale of the equipment, have been obtained. The Union also relies on the information received by US authorities stating that the necessary approvals for this stage, i.e. field trials were provided and that since the contract is not between one

government and another, but a commercial one, at the stage of the actual export, the matter would have to be examined for formal authorization.

15. It is apparent from the materials on record, that the second respondent made relevant disclosures about the nature of the contract and export (from US) of the guns, i.e. field trials in Israel, with the export of guns to Indian Navy. It secured approval for export – for the purpose of field trials; it also obtained approval for export of technical data and manuals relating to the gun, to the Indian Navy itself, so that the process of procurement could be facilitated. In these circumstances, given that the bidder was merely required to obtain approval, the condition has to be construed in a reasonable manner. What appears to be the position (clear from the US Government communication) is that the approval for export of guns to India is to be sought after the award of the contract. If such is the position in the law of the "country of the supplier" the tender condition should be interpreted in the light of the fact that each country would have a different legal *regime* with respect to export or import of arms and ammunition. That in US the *regime* envisions a two-step approval: first at the stage of trials, and second, at the stage of securing the contract, would not mean that the condition in the subject tender was violated. Furthermore, there is nothing *prima facie* in US law, particularly the Arms Export Control Act that prohibits the sale of the naval guns in questions, by the second respondent, to the Indian Navy.

16. In view of the above discussion, this court holds that there is no merit in the petition. It is, therefore, dismissed with no order as to costs.

**S. RAVINDRA BHAT**
**(JUDGE)**

**YOGESH KHANNA**
**(JUDGE)**

**JULY 03, 2017**