

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

Decided on: 09.04.2018

+ **W.P.(C) 851/2018, C.M. APPL.3631-3632/2018**

CHADHA SPORTS (REGD)

..... Petitioner

Through : Ms. Aanchal Basur with Sh. Shahab
Ahmad, Advocates.

versus

PUBLIC WORKS DEPARTMENT, GNCTD AND ORS.

..... Respondents

Through : Sh. Ramesh Singh, Standing Counsel,
GNCTD with Sh. Aniruddha Deshmukh,
Advocates, for Respondent No.1.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The petitioner, in these writ proceedings, challenges a stipulation in the Notice Inviting Tender (NIT) dated 12.01.2018 for construction of Synthetic Athletic Track (SAT) at the Rajiv Gandhi Stadium, Bawana (hereafter referred to as “the project”). The NIT was issued by the GNCTD on 12.01.2018. The condition specifically challenged is the technical specification in the NIT requiring that the thickness of the SAT should be not less than 15 mm. The petitioner complains that this stipulation is arbitrary as it unduly narrows the field of competition and eliminates it as a potential bidder.

2. The NIT impugned in this case *inter alia* stipulates at the relevant place that the thickness should be:

<i>Property</i>	<i>Requirement</i>	<i>Test Norm</i>	<i>Proposed value to be filed by bidder</i>	<i>Remarks/Observation/deviation, if any</i>
XXX	XXX	XXX		
Thickness	≥ 15 mm	DIN V 18035-6		
XXX	XXX	XXX		

3. The petitioner, who supplies various kinds of equipment, including sports goods, refers to an earlier NIT dated 25.11.2017 which invited bidders for construction of SAT at the same place. Thus, it is stressed that the technical specifications clearly spelt-out that the tenderer should confirm to the requirements formulated by the International Association of Athletics Federations, Monte Carlo (IAAF). The petitioner relies upon the following condition in this regard:

*“The agency should note that the athletic track is **required to be made in conformity to the IAAF category**& hence must ensure the required quality and workmanship to achieve the same.”*

4. It is also stated that the Special Conditions-II in the said November 2017 NIT too provided that all designs, marketing, layouts and materials to conform to currently applicable IAAF rules and certifications. It is urged by the petitioner that the surface material supplied by it, i.e. BSS-1000 has a thickness of 13 mm which is manufactured by the second respondent and is in conformity with the IAAF performance specifications for SAT surfaces. It had, therefore, furnished its bid in the earlier tender of 25.11.2017. Apparently, the other respondents, i.e. Respondent Nos. 3-6 (hereafter “the contesting respondents”) also qualified. The petitioner claims that after

acceptance of its bids, the GNCTD colluded with the contesting respondents with the objective of excluding it from the tender process and issued a fresh NIT on 12.01.2018 with an entirely new specification.

5. It is alleged by the petitioner that the revised specification, i.e. the impugned NIT to the extent it stipulates a minimum thickness of 15 mm for SAT surface as opposed to earlier minimum norm of 13 mm was solely defined to oust it from the tender process. It is claimed that the petitioner on 20.01.2018 represented to GNCTD against the imposition of hitherto unknown standard. There was, however, no response. The petitioner argues that the NIT condition impugned was issued upon the dictates of the contesting respondents solely with the intent to deny other eligible bidders who were fit and would supply material of the required standard at a competitive rate. The petitioner cites the standards of the IAAF and submits that what is insisted upon by that sports body is the effectiveness of the surface and furthermore that its durability should be satisfactorily established. The two major criteria, which determined the thickness, i.e. above the prescribed 13 mm, are the ability of the product to fall within the prescribed value of force reduction of 35% to 50% and vertical deformation (0.6 mm to 2.5 mm) to the requirements prescribed by the IAAF.

6. It is submitted that the products which the petitioner offers and supplies, i.e. with the thickness of 13 mm fall within those defined ranges and consequently there was no reason for the GNCTD to change the hitherto standards that were notified and applied hitherto. Ms. Aanchal Basur, learned counsel argued that the change in the standard is without *rationale*. She relied upon the tender conditions, especially the stipulations in the NIT

dated 25.11.2017 and stated that the GNCTD did not furnish any response as to what impelled it to recall the tender and publish the new one with the impugned stipulations.

7. Ms. Basur argued that as a State agency, the respondent is bound by Article 14 and that it has displayed opaqueness in the formulation of tender criteria, by not furnishing any reason to depart from a known standard. The imposition of a higher standard, it is again emphasized, is only with an objective of defeating the petitioner's right and those of several other manufacturers, suppliers and prefer the products of another to solely prefer those of the contesting respondents. It was lastly argued that the respondents' offered to justify the change in standard by reference to the letter of the Athletics Federation of India is unreliable because that communication was addressed after the tender (NIT) was published in the present case.

8. The GNCTD resists these proceedings. Mr. Ramesh Singh, learned standing counsel appearing on its behalf, relies upon a comparative tender process issued by the NIT dated 25.11.2017 as well as the stipulations in an earlier tender dated 20.10.2016, for another sports complex at East Vinod Nagar. The learned Standing Counsel stated that the standard of 15 mm was not unknown and rather was advertised on 20.10.2016. He contended that the stipulation in that NIT too of 15 mm thickness was clearly an applied standard, which did not attract any controversy. It was submitted that the tender dated 25.11.2017 had to be recalled because the bill of quantities stated that the normal track should have a thickness of 1.5 mm – which was corrected to 15 mm. A copy of the corrigendum issued on 25.11.2017 has been produced and is relied upon. It was also stated that the Athletics

Federation of India also advised the standard of 15mm product's surface for synthetic tracks because of the letters and clarifications. In this regard, the e-mail dated 22.01.2018 was relied upon.

9. It is argued on behalf of the GNCTD that having regard to the narrow scope of judicial review, especially in regard to tender conditions relating to public contracts, this Court should not only be circumspect as far as interfering with the standards and criteria prescribed but also this court should not lose sight of the fact that the 15 mm thickness standard is not unknown. The choice of one product over the other, which is a primary decision, cannot be reviewed by the court. It was also submitted that whether the surface thickness ought to be of a particular kind, is not an issue that the courts can decide on.

10. This Court's restricted and circumspect jurisdiction in reviewing award of tender conditions has been the subject matter of several previous decisions of the Supreme Court. In *Directorate of Education v Educomp Datamatics Ltd*, the Supreme Court, (2004) 4 SCC, 19 *inter alia*, it was held as follows:

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

feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

11. In *Global Energy Ltd & Anr. v. Adani Exports Ltd & Ors* (2005) 4 SCC 435 the Court reiterated the principles that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. *Master Marine Services (P) Ltd v Metcalfe Hodgkinson (P) Ltd & Anr.* (2005) 6 SCC 138 reiterated the principles applicable:

"12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere."

12. *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* (2016) 16 SCC 818 is another decision, where the extremely limited powers of the Court to question framing of tender conditions, their interpretation and award of public contracts, was highlighted.

13. In this case, the facts would disclose that the 15 mm surface criteria was not alien; it was a previously known standard applied by the GNCTD in another tender. Such being the case, the introduction of 13 mm thickness in the immediately preceding tender, which was ultimately cancelled, cannot be faulted. The respondent government's explanation that the 13mm standard crept into the cancelled tender is plausible because there seems to be some inconsistency in the older NIT terms. Furthermore, the GNCTD sought opinion of the Athletics Federation, which clearly supported the decision to adopt the 15 mm surface thickness. Though the petitioner impeached this as an after-thought, the Court is of opinion that such an argument is insubstantial. It is always open to the public agency to seek confirmation, to avoid later complications, which may arise, if, the tender were to be proceeded with on the basis of a flawed criteria.

14. Considering the narrow and limited jurisdiction that this Court possesses to review tender specification process and the award of public contracts, this court is satisfied that there is no infirmity in the standards or criteria in question (i.e. 15mm thickness for the synthetic surface in this NIT) calling for interference. The petition consequently fails and is dismissed without costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 09, 2018