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

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Reserved on 21st May, 2021

Pronounced on 04th June, 2021

+ W.P.(C) 2060/2021

M/S OMEGA ELEVATORS

..... Petitioner

Through: Mr. Bhargav Hasurkar, Mr. Anshul
Narayan, Advs.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Satya Ranjan Swain, Sr. Panel
Counsel with Mr. Kautilya Birat, Mr. Vedansh
Anand, Advs. for R-2/ AIIMS

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+ W.P.(C) 4043/2021

M/S OMEGA ELEVATORS

..... Petitioner

Through: Mr. Bhargav Hasurkar, Mr. Anshul
Narayan, Advs.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kr.
Saxena, Mr. Mukesh Kumar Tiwari, Mr. Ramneek
Mishra, Advs. for Resp./ UOI

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

CM APPL.16898/2021-(EXEMPTION) in W.P.(C) 4043/2021

Allowed, subject to all just exceptions.

The application is disposed of.

W.P.(C) 2060/2021 & W.P.(C) 4043/2021 (COMMON GROUNDS)

1. The above two writ petitions raise similar issues and hence are being decided by this common order.
2. The petitioner in both the cases is M/s Omega Elevators, sole proprietorship concern of Mr. Kumarbhai Manharlal Desai having its registered office at 11, Sanjeev Baug Society, New Sharda Mandir Road, Paldi, Ahmedabad, Gujarat – 380007.
3. The petitioner is an original manufacturer of lifts and does not operate through any other agency for the purpose of sale, marketing or after-sale maintenance and service of the lifts.
4. It is further stated that petitioner has been successfully executing several contracts/ work orders for various State bodies and is also effectively maintaining all lifts/ escalators commissioned by it as on today. The credentials of the petitioner are brilliant and impeccable and it is a 100% Indian company.
5. The petitioner is a “A-Class” Certified/ Enlisted electrical Contractor with various State PWD Departments.
6. The petitioner in both cases is aggrieved by the tender issued by the respective respondents alleging violations of Article 14 of the Constitution of India as well as the notifications and guidelines issued by the Union of India (UOI). Briefly, stating the facts are as under:

W.P.(C) 2060/2021 & CM APPL. 6040/2021-(INTERIM ORDER)

- 1) The present writ petition is directed against E-Tender Notice/ Detailed Notice Inviting Tender (hereinafter referred to as DNIT) dated 08.02.2021 issued by respondent No.2 i.e. The Executive Engineer (Elect) -1 All India Institute of Medical Sciences (AIIMS). The substantive prayers are:-

PRAYER

It is therefore, most respectfully prayed that the Hon'ble Court be pleased to:

- i. Issue Writ in the nature of certiorari quashing the E-Tender Notice/ Detailed Notice Inviting Tender (Annexure P-1) issued by Respondent No.2 – i.e. Respondent No.2.The Executive Engineer (Elect)-1 All India Institute of Medical Sciences (AIIMS) having Tender reference no: nit66/eee-i/aiims/2020-21 for UPGRADATION OF LIFT NO.11,15,16 & 17 in MAIN HOSPITAL AT AIIMS, as the same is arbitrary, illegal and not maintainable in the eyes of law, and*
- ii. Be pleased to hold and declare that such insertion of list of makes is arbitrary as well as illegal as it seeks to make the tender manufacture specific and is per se illegal and without any application of mind.*

iii. *Issue Writ in the nature of mandamus directing and/ or commanding the Respondent, the Respondent No.2- i.e. The Executive Engineer (Elect)-1 All India Institute of Medical Sciences (AIIMS), to withdraw the list of makes from the tender document or alternatively direct the respondent no.2 to incorporate name of the petitioner i.e. OMEGA Elevators as an eligible bidder to offer its bid for Tender Notice (NIT) for UPGRADATION OF LIFT NO. 11, 15, 16 & 17 IN MAIN HOSPITAL AT AIIMS; and*

iv. *Issue Writ in the nature of mandamus quashing and setting aside condition in for Tender Notice for UPGRADATION OF LIFT NO. 11, 15, 16 & 17 IN MAIN HOSPITAL AT AIIMS, which entitles “Manufacturer’s of only certain brands from participating in the tender process;*

- 2) It is alleged by the petitioner that by way of the tender in question, the respondents have purposefully and intentionally omitted the name of the petitioner’s brand from the list of permitted brands in respect whereof of the bidders are allowed to bid for the tender.
- 3) It is further stated that the DNIT clearly states that the bids are invited only from selected brands that are OTIS/ Johnson/ Mitsubishi/Schindler/FUJIHD.

- 4) The petitioner further alleged that the petitioner made a detailed representation dated 12.02.2021 with the respondent but the petitioner was told that the tender will remain limited to the brands mentioned in the tender document.
- 5) A bare perusal of the DNIT states that *“The Executive Engineer Electrical, AIIMS, New Delhi on behalf of the Director, AIIMS invites online item rate tender from the manufacturer/ authorised dealers of OTIS/ Johnson/ Mitsubishi/ Schindler/ FUJIHD make lifts for the following work.”*
- 6) The petitioner further alleged that the respondents are insisting on conducting the tender only amongst the chosen few manufacturers. Such insistence on part of the respondents makes the tender brand-specific, which is arbitrary and amounts to creation of a syndicate. The above actions of the respondents are not only violative of Article 14 and 19 of the Constitution of India, but also violative of CPWD’s office memorandum dated 10.01.2019 as well as the office order issued by the Ministry of Commerce and Industry, Government of India dated 29.05.2019.
- 7) The petitioner also relies on communication/ directive dated 03.01.2019 issued by the Prime Minister’s Office (PMO).
- 8) The specifications have also been stated as in the DNIT which the petitioner meets.

- 9) Lastly, the petitioner has submitted that he has undertaken project with various hospitals in the country which is more than 500 in number.
- 10) In view of this matter, the present petition has been filed.
- 11) The Respondent No. 2 i.e. AIIMS has filed its Counter Affidavit, wherein it has stated and argued that:
- a) That the petitioner's elevators were found to be not satisfactory for one of the lifts installed at the hospital, NDDTC Ghaziabad Premises which is part of respondent No.2.
 - b) The respondent has further stated that the petitioner was unable to maintain the said lift due to which annual maintenance order was not renewed by the Department.
 - c) On merit, the respondent has stated that respondent No.2 is not bound to follow CPWD manual and the DNIT has been invited in accordance with CVC guidelines requiring three or more bidders.
 - d) The respondent has further stated and argued that the Notice Inviting e-Tenders (NIT) has been invited on the basis of specialised nature of work involved. The five approved makes are considered on the basis of specialised nature of the work.
 - e) The respondents also stated and argued that the lifts of "OTIS/ Johnson /Mitsubishi /Schindler /FUJHD are "make in India"

compliant.

- 12) The petitioner has filed a rejoinder. The lift eligibility criteria published by CPWD dated 25.10.2019 has been relied upon and it has been stated that the petitioner meets each and every eligibility criteria published by CPWD.
- 13) In regards to the lift in Ghaziabad, it has been stated that the project was awarded to the petitioner on 13.03.2004. The petitioner has been maintaining the lift until 2019. The petitioner stated and argued that it is petitioner who has been chasing the concerned authority for payments of its dues pertaining to the lift in question. Due to the non-payment and refusal on the part of the concerned authority to make payment of the maintenance amount, the petitioner has not renewed the contract. The petitioner has further stated and argued that the lift was installed in the Drug De-addiction centre at AIIMS, Ghaziabad, UP and the lift was abused by the patients. As a result of such abuse, even the doors of the lift had to be re-installed as they were damaged.

W.P.(C) 4043/2021 & CM APPL. 12209/2021-(INTERIM ORDER), CM APPL.16897/2021-(DELAY IN FILING C/A)

- 1) That the present writ petition has been filed seeking the following substantive reliefs:

PRAYER

It is therefore, most respectfully prayed that the Hon'ble Court be pleased to:

- i. Issued Writ in the nature of certiorari quashing the E-Tender Notice/ Detailed Notice Inviting Tender (Annexure P -1) issued by Respondent No.2 – i.e. The Executive Engineer, (E), DED-102, CPWD having Tender reference no: 67/ 2020-21/DED-102/DELHI/3 pertaining to supply, installation, testing and commissioning of 10 passenger Lift at Nehru Museum, Teen Murti House, New Delhi as the same is arbitrary, illegal and not maintainable in the eyes of law and further be pleased to hold and declare that inserting brand names and restricting participation of the tender only to such brands/ manufacturers is illegal and against the spirit of Article 16 of the Constitution of India; and*
- ii. Be pleased to hold and declare that such insertion of list of makes is arbitrary as well as illegal as it seeks to make the tender manufacture specific and is per se illegal and without any application of mind.*
- iii. Issue Writ in the nature of mandamus directing and/ or commanding the Respondent, the Respondent No.2- i.e. The Executive Engineer, (E), DED-102, CPWD, to withdraw the list of makes from the tender document or*

alternatively direct the respondent no.2 to consider the bid of the petitioner i.e. OMEGA Elevators at par with other bidders to offer its bid for Tender Notice (NIT) having Tender reference no. 67/2020-21/DED-102/DELHI/3 pertaining to supply, installation, testing and commissioning of 10 Passenger Lift at Nehru Museum, Teen Murti House, New Delhi; and

- iv. *Issue Writ in the nature of mandamus quashing and setting aside email communication dated 19.03.2021 which illegally disqualifies the petition from the tender process (Annexure-11);*
- 2) In this writ petition, the petitioner has challenged the E-Tender Notice/ Detailed Notice Inviting Tender (DNIT) issued by respondent No.2 (The Executive Engineer, (E), DED-102, CPWD) pertaining to supply, installation, testing and commissioning of 10 Passenger Lift at Nehru Museum, Teen Murti House, New Delhi.
- 3) The petitioner has stated that the DNIT clearly states that the bids are invited only from the selected brands that are KONE/ THYSSENKRUPP/ JOHNSON/ SCHINDLER/ OTIS.
- 4) The said condition has been imposed despite the fact that the tender is an open tender.
- 5) The petitioner has further stated that they have made a detailed representation dated 18.12.2020 to the respondents, bringing it to

the notice of respondent No.2 that insertion of specific brands in the tender document is illegal and the petitioner was assured by the respondents that they would not be disqualified on the ground of brand condition. Consequently, the petitioner participated in the tendering process to offer its own branded product.

- 6) The petitioner has stated and argued that the insistence of the respondent on conducting the tender only amongst chosen few manufacturers, makes the tender brand specific which is arbitrary, violative of Article 14, and amounts to creation of a syndicate.
- 7) The petitioner has stated and argued that the petitioner is competent like all other brands that the respondents are insisting upon. The petitioner has challenged the disqualification of the petitioner by the respondent vide email dated 19.03.2021 which states that the “*Reason for Disqualification: Undertaking regarding providing of Lift from one of the five approved makes has not been given.*”
- 8) Hence the Petition.
- 9) We have also heard the learned counsel for the respondent who submits that the instruction 1(g) of the ‘*Information and Instructions for Contractors for e-Tendering Forming Part of Bid Document*’ reads as under:

g) The bidder shall submit, along with the performance guarantee after the acceptance of tender, an undertaking from

the authorised signatory of OEM regarding:

(i) Authorization Certificate from OEM of Lift, namely, Kone/Thyssenkrupp/Johnson/Schindler/Otis.

(ii) The OEM shall unconditionally support technically throughout the execution of contract and during defect liability period of 1 (one) year, for the useful life of the system, and

(iii) The manufacturer shall furnish an undertaking regarding availability of spares for the entire expected life of the lift i.e. 15 to 20 years.

- 10) The respondent argued that the petitioner, knowing fully well of the said instruction, participated in the DNIT but when it was disqualified by the communication dated 19.03.2021 for not submitting the desired undertaking, the petitioner has chosen to file this Petition. The petitioner having participated in the DNIT and having not been declared as a successful bidder, cannot be permitted to maintain the writ petition to assail the conditions of the DNIT.
- 11) The respondents have further stated and argued that the five brands/ makes mentioned in the DNIT are reputed brands of unquestionable quality and performance, and hence no fault can be found with the actions of the respondents.
- 12) The respondent has further submitted that the order issued by CPWD dated 10.01.2019 permits the requirements of a client to be

taken into account, and these five makes were the requirements of the client.

- 13) Lastly, the respondents have relied on judgment of this Court being *Delite Kom Limited v. Government of NCT of Delhi, W.P. (Civil) No. 5350 of 2007* which, according to the respondents, permits specification of brands in a tender.

DISCUSSION

- 1) Since the legal issues raised arise in the same factual background, vis, that the Respondents in both the petitions have invited tenders for supply and installation of lifts of specified brands, which does not include the brand of the petitioner's lifts, we have heard the submission in both the petitions at the same time and proceed to decide them by this common judgment.
- 2) We have heard the arguments of Mr. Bhargav Hasurkar, learned counsel for petitioner and Mr. Satya Ranjan Swain, Sr. Panel Counsel for Respondent No. 2 in W.P.(C) 2060/2021, and Mr. Ruchir Mishra, learned counsel for Respondent No.1 in W.P.(C) 4043/2021 and considered the judgments cited.
- 3) The mandate of Article 14 of the Constitution of India is most relevant and mandates that there should be no arbitrariness in state action. It has been held in *Ramana Dayaram Shetty v. International*

*Airport Authority of India*¹:

*“21. This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well-settled as a result of the decisions of this Court in E.P. Royappa v. State of Tamil Nadu [(1974) 4 SCC 3 : (1974) 2 SCR 348] and Maneka Gandhi v. Union of India [(1978) 1 SCC 248] that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. **The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory.** This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in Erusian Equipment and Chemicals Ltd. v. State of West Bengal where the learned Chief Justice pointed out that*

“the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of

¹ (1979) 3 SCC 489

equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods”.

It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.” (emphasis supplied)

And also in *New Horizons Ltd. v. Union of India*², where the court observed the following,

“ 17. At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of

² (1995) 1 SCC 478

selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of “free play in the joints” is necessary for an administrative body functioning in an administrative sphere [See : Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489 : (1979) 3 SCR 1014] (SCR p. 1034 : SCC pp. 505-06, para 12); Kasturi Lal Lakshmi Reddy v. State of J & K [(1980) 4 SCC 1 : (1980) 3 SCR 1338] (SCR p. 1355 : SCC pp. 11-12, para 11); Fasih Chaudhary v. Director General, Doordarshan [(1989) 1 SCC 89 : 1988 Supp (3) SCR 282] (SCR p. 286 : SCC p. 92,); Sterling Computers Ltd. v. M & N Publications Ltd. [(1993) 1 SCC 445] ; Union of India v. Hindustan Development Corpn. [(1993) 3 SCC 499] (at p. 513)].” (emphasis supplied).

- 4) Article 14 speaks of equality before law and equal protection of the laws. Equality of opportunity applies to matters of public contracts. Unlike an individual, the State cannot choose to exclude persons by discrimination. In matters of floating a tender, awarding a contract, the State has to satisfy the criterion of fairness and reasonableness.
- 5) In order to pass the test of permissible classification, two conditions must be fulfilled, namely,

- a) The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the groups; and
 - b) That the differentia must have rational nexus to the objects sought to be achieved.
- 6) In fact, earlier judgments of High Courts of different states in the case of the petitioner itself have found such a categorization/condition unsustainable in law. In *M/s. Omega Elevators v. Union of India*, WP Nos. 11478 & 11481 of 2019 which was a similar matter to the one before us, currently, the Telangana High Court held that *‘there should be some rational nexus between the basis of classification and the object intended to be achieved by the respondents. When there is no such glaring difference between the lift manufacturers mentioned in Group-I with that of the petitioner, the said categorization is unsustainable in law.’* The court further stated that it was within its ambit to review the conditions posed by the respondents when it includes brand specifications by relying on the judgment as held by the Hon’ble Supreme Court in *Union of India v. N.S. Rathnam*³, wherein the court held as follows:

“13. It is, thus, beyond any pale of doubt that the justiciability of particular notification can be tested on the touchstone of Article 14 of the Constitution. Article 14, which is treated as basic feature of the Constitution, ensures equality before the law or equal protection of laws. Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed. Therefore, if the two persons or two sets of persons are similarly situated/placed, they have to be treated equally. At the same time, the principle

³ (2015) 10 SCC 681.

of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position. It would mean that the State has the power to classify persons for legitimate purposes. The legislature is competent to exercise its discretion and make classification. Thus, every classification is in some degree likely to produce some inequality but mere production of inequality is not enough. Article 14 would be treated as violated only when equal protection is denied even when the two persons belong to same class/category. Therefore, the person challenging the act of the State as violative of Article 14 has to show that there is no reasonable basis for the differentiation between the two classes created by the State. Article 14 prohibits class legislation and not reasonable classification.

- 14.** *What follows from the above is that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that, that differential must have a rational relation to the object sought to be achieved by the statute in question. If the Government fails to support its action of classification on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held as arbitrary and discriminatory. In Sube Singh v. State of Haryana [(2001) 7 SCC 545] , this aspect is highlighted by the Court in the following manner: (SCC p. 548, para 10)*

“10. In the counter and the note of submission filed on behalf of the appellants it is averred, inter alia, that the Land Acquisition Collector on considering the objections filed by the appellants had recommended to the State Government for exclusion of the properties of Appellants 1 and 3 to 6 and the State Government had not accepted

such recommendations only on the ground that the constructions made by the appellants were of 'B' or 'C' class and could not be easily amalgamated into the developed colony which was proposed to be built. There is no averment in the pleadings of the respondents stating the basis of classification of structures as 'A', 'B' and 'C' class, nor is it stated how the amalgamation of all 'A' class structures was feasible and possible while those of 'B' and 'C' class structures was not possible. It is not the case of the State Government and also not argued before us that there is no policy decision of the Government for excluding the lands having structures thereon from acquisition under the Act. Indeed, as noted earlier, in these cases the State Government has accepted the request of some landowners for exclusion of their properties on this very ground. It remains to be seen whether the purported classification of existing structures into 'A', 'B' and 'C' class is a reasonable classification having an intelligible differentia and a rational basis germane to the purpose. If the State Government fails to support its action on the touchstone of the above principle, then this decision has to be held as arbitrary and discriminatory. It is relevant to note here that the acquisition of the lands is for the purpose of planned development of the area which includes both residential and commercial purposes. That being the purpose of acquisition, it is difficult to accept the case of the State Government that certain types of structures which according to its own classification are of 'A' class can be allowed to remain while other structures situated in close vicinity and being used for same purposes (residential or commercial) should be demolished. At the cost of repetition, it may be stated here that no material was placed before us to show the basis of classification of the existing structures on the lands proposed to be

acquired. This assumes importance in view of the specific contention raised on behalf of the appellants that they have pucca structures with RC roofing, mosaic flooring, etc. No attempt was also made from the side of the State Government to place any architectural plan of different types of structures proposed to be constructed on the land notified for acquisition in support of its contention that the structures which exist on the lands of the appellants could not be amalgamated into the plan.”

18. *We are conscious of the principle that the difference which will warrant a reasonable classification need not be great. However, it has to be shown that the difference is real and substantial and there must be some just and reasonable relation to the object of legislation or notification. Classification having regard to microscopic differences is not good. To borrow the phrase from the judgment in Roop Chand Adlakha v. DDA [1989 Supp (1) SCC 116 : 1989 SCC (L&S) 235 : (1989) 9 ATC 639] : “To overdo classification is to undo equality.”*

7) Then again in *Omega Elevators v. National Health Mission*, WP-12880-2018, the Madhya Pradesh High Court held that ‘*the condition that certain specific manufactures or the distributors of such manufacture alone would participate in the tender process is arbitrary and does not provide a level playing field to all the manufactures. Consequently such condition is set aside.*’ Learned counsels for the Respondents have not been able to distinguish these decisions on the relevant and germane facts. In our view, they are squarely attracted to the facts of the two cases being dealt with by us, and we find ourselves in respectful agreement with the principles on which they are founded.

- 8) The judgment relied by the learned counsel for the respondents of this Court in *Delite Kom Limited vs. Govt. of NCT of Delhi* also does not aid the respondents, but rather the petitioner.
- 9) This was a case where the tender was invited by a specific brand of compactor. The Court found that the contract had not only been performed, but the payment had also been partially released to the vender by the time the petitioner was heard. Thus, the Petitioner did not seek the substantive relief in the Petition. The Court, however, decided to examine the procedure adopted by the High Court to award the contract, and whether the same was correct.
- 10) To justify its action of limiting the tender to only one brand of compactors, the respondents relied upon the CPWD circular dated 03.03.2006 bearing No.17, which reads as follows:

"GOVERNMENT OF INDIA
QUALITY ASSURANCE CORE WING
CPWD, NIRMAN BHAWAN, NEW DELHI.

No: CSQ/QACW/G-2/83

Dt: 03.03.2006

Circular No. 17

Sub: Use of approved/branded materials in the works.

Instructions have been issued vide Directorate's OM No. DGW/CON/184 dt: 28.8.03 to indicate makes/brands of the items to be used on work, in the agreement of the work. While preparing such a list, following guidelines may be followed:

- (i) For some of the items there is a large variation in the market rates of various brands and there is a tendency to use the cheapest brand. While incorporating such a list in the NIT, Technical Sanctioning Authority must ensure that the market rate variation

between various brands of a particular item (when product of various brands are functionally equivalent) should be minimum and not more than $\pm 10\%$.

If client demands a particular brand of an item to be provided in a work due to some special reason, it should be obtained in writing from them with reasons for going for a particular brand and that brand may be specified before hand in the NIT by the Technical Sanctioning Authority after obtaining proprietary certificate from competent authority.

- (ii) The final approval of the brand to be used shall be the discretion of Engineer-in-Charge. The brand used shall be one of the brands specified in the list of approved materials attached in the agreement.
- (iii) In case of non availability of material of the brands specified in the list of approved materials, an equivalent brand may be used after getting written approval of T/S authority giving details to indicate that the brand proposed to be used is equivalent to the brands mentioned in the agreement.
- (iv) Inspite of directions issued vide SE/SS/EE(S&S)I/880 dt: 11/15.1.1996 and No. CSQ/SE/S&S/EEI/04-61 dt: 7.1.98 and further vide No. SE(S&S)/EE/ISI product/90 dt: 16.7.03, the use of BIS marked products is not being stressed upon by the field staff.

It must be ensured that all materials to be used in CPWD works bear BIS certification mark. In cases where BIS certification system is available for a particular material/product but not even a single producer has so far approached BIS for certification, the material can be used subject to the condition that it should confirm to CPWD specifications and relevant BIS codes. In such case written approval of the Technical Sanctioning Authority may be obtained before use of such material in the work.

This issues with the approval of DG(W).

Sd/-
SUPERINTENDING ENGINEER (QA)"

11) The circular was partially modified vide circular dated 15.05.2007, which reads as follows:

"GOVERNMENT OF INDIA
TECHNO LEGAL & QUALITY ASSURANCE CORE WING
CPWD, NIRMAN BHAWAN, NEW DELHI.

No: CSQ/QACW/G-2/581-E

Dt: 15/05/2007

**Sub: Use of approved/branded materials in the works-
Modification to circular No. 17 dt: 3.3.06.**

In partial modification to Circular No. 17 issued vide No. CSQ/QACW/G-2/83 dt: 3.3.2006, the para (i) of the circular is being elaborated further as under –

- (i) For some of the items there is a large variation in the market rates of various brands and there is a tendency to use the cheapest brand. While incorporating such a list in the NIT, Technical Sanctioning Authority must ensure that the market rate variation between various brands of a particular item (when product of various brands are functionally equivalent) should be minimum and not more than $\pm 10\%$.

If client demands a particular brand of an item to be provided in a work due to some special reason, it should be obtained in writing from them with reasons for going for a particular brand and that brand may be specified before hand in the NIT by the Technical Sanctioning Authority. However if during execution the client want any item of a particular brand, he can be asked to choose from any of the brands equivalent to the brands specified in the agreement and if the client wants to go for any other item which is not equivalent to the specified brands he will make a request for that in writing specifying reasons.

If client insists for an item which is being produced by a sole manufacturer, the technical sanctioning authority shall specify the same in NIT after obtaining proprietary certificate from competent authority (i.e. CE; the Head of Deptt.).

This issues with the approval of DG(W).

Sd/-
SUPERINTENDING ENGINEER (TLQA)"

12) Reliance placed by the respondents on these circulars was, however, negated in the facts of that case, by observing *“In so far as the High Court itself is concerned, the matter of supply of furniture was taken up by a Committee of Judges of the Court from time to time but there is nothing to suggest what was the special reason that weighed with the High Court in choosing furniture manufactured only by Godrej & Boyce, other than the advice given by the PWD.”*

13) We may quote para 12 to 14 of the judgment, which reads as under:

“12. In so far as the present case is concerned, it does appear that the High Court decided to opt for good quality but in doing so it ought to have been advised that there are other equally good manufacturers of furniture including modular furniture and compactors and they should also be considered. It would then be left to the wisdom of the High Court to decide which brand to accept. We are of the view that in its failure to correctly advise the High Court, Respondents No.1 to 3 committed a lapse to the detriment of the Petitioner.

13. However, since the Petitioner has given up its grievance with regard to the supplies already made, we are not disturbing the tender process that was initiated but would direct Respondents No. 1 to 3 to be far more careful in future in advising not only the Delhi High Court but other departments of the Government as well.

14. In *Nagar Nigam, Meerut v. Al Faheem Meat Exports Pvt. Ltd. & Ors.*, JT 2007 (1) SC 484 the Supreme Court has summarized the law in the following words: -

“The law is, thus, clear that ordinarily all contracts by the Government or by an instrumentality of the State should be granted only by public auction or by inviting tenders, after advertising the same in well known newspapers having wide circulation, so that all eligible persons will have opportunity to bid in the bid, and there is total transparency. In our opinion this is an essential requirement in a democracy, where the people are supreme, and all official acts must be actuated by the public interest, and should inspire public confidence.””

- 14) The reliance placed by the respondent on the judgment in Delite Kom Limited (Supra) is misconceived. The High Court in para 15 of the judgment had held that *‘there must be a special reason, as mentioned in the Circulars, for selecting a particular brand and once that pre-condition is fulfilled, Respondents No.1 to 3 can fix the terms and conditions of the contract.’* The Court further observed that while it recognized that Godrej & Boyce is a reputed brand, however, it does not mean that other companies, which may be equally good should be excluded from consideration. This would stifle private enterprise and competition which would be to no one’s advantage. It was found that the Consumer i.e. the Delhi High Court had not chosen the specific brand for any special

reasons or features after being made aware of the availability of other similar brands, and after evaluation of the features of all the brands available.

- 15) In the facts of the present cases as well, the respondents have not given any special/specific reasons for limiting the tender to five manufacturers of lifts. There is nothing in the counter affidavits, tender conditions or anything urged before us, to show any particular specifications/ features which the five manufacturers named in the tender could only comply with. The respondents have failed to show as to why the petitioner was not equally good to participate in the tender, or as to why it should be excluded from consideration. Pertinently, the respondents have laid down the technical specifications in the tenders in question, and any prospective bidder, who satisfies those specifications should be able to participate in the tendering process. The acts of the respondent in limiting the tender to five named manufacturers is clearly indicative of creating a syndicate and excluding the petitioner in the matter of public procurement without any reason or justification. The same cannot be permitted. It is clearly arbitrary and discriminatory without any disclosed rationale.
- 16) In the present cases, the acts of the respondents smack of arbitrariness and unreasonableness. The factum of floating the tender and restricting it to four / five manufacturers does not meet the twin test of permissible classification as enunciated by the Supreme Court in *NS Rathnam Case (Supra)*.

- 17) The factum of the lift installed by the petitioner in Ghaziabad being a reason for its exclusion also does not meet the test of Article 14 of the Constitution of India. The respondents have neither given a Show Cause Notice to the Petitioner, nor passed any order blacklisting the Petitioner. In effect, without taking steps to blacklist the Petitioner – which action, if taken, would have been opened to judicial scrutiny, the Respondents have sought to treat the petitioner as blacklisted. This is not permissible.
- 18) The argument in W.P.(C) 4043/2021 that the petitioner having participated in the tender, now cannot be permitted to challenge the same, is also misconceived. The petitioner did not accept the condition 1(g)(i) and has averred that it participated on the assurance that its bid would be entertained despite it offering a brand different from one of the specified brands. Immediately on receiving the communication dated 19.03.2021, the Petitioner has filed the writ petition.
- 19) In this view of the matter, the action of the respondent in floating the tenders, limited to their particular brands, and ousting the petitioner is hit by Article 14 of the Constitution of India.
- 20) It will also be necessary to refer and rely on the directions/ communications issued by the Government of India from time to time.
- 21) The Ministry of Commerce and Industry, Govt. of India on 29.05.2019 came up with an order regarding Public Procurement

(Preference to Make in India), Order 2017 bearing No. P-45021/2/2017-PP (BE-II).

22) Clause 10 of the order reads as under:

Specifications in Tenders and other procurement solicitations:

- a. Every procuring entity shall ensure that the eligibility conditions in respect of previous experience fixed in any tender or solicitation do not require proof of supply in other countries or proof of exports.*
- b. Procuring entities shall endeavour to see that eligibility conditions, including on matters like turnover, production capability and financial strength do not result in unreasonable exclusion of local suppliers who would otherwise be eligible, beyond what is essential for ensuring quality or creditworthiness of the supplier.*
- c.*
- d.*

23) The CPWD on 10.01.2019 modified its earlier Office Memorandum dated 09.11.2018 wherein five lift manufacturers namely, OTIS, Kone, Mitsubishi, Schindler and Johnson were discontinued in the enlistment of lift manufacturers. The OM order No. DG/SE TAS(E)/Enlist. Rules-Lifts-A/03 reads as under:

CENTRAL PUBLIC WORKS DEPARTMENT
ISSUED BY THE AUTHORITY OF DIRECTOR GENERAL, CPWD,
DG/SE TAS(E)/Enlist Rules-Lifts-A/03

NIRMAN BHAWAN, NEW DELHI

DATED: 10/01/2019

OFFICE MEMORANDUM

SUB: Discontinuation of the enlistment of contractors in Category-Lifts, Class-A

In continuation of OM No. DG/Misc.(E&M)/09 dated 09-11-2018, vide which list of 5 nos. Lift Manufacturers i.e. M/s OTIS, M/s Kone, M/s Mitsubishi, M/s Schindler and M/s Johnson Lifts Pvt. Ltd. Chennai was kept on hold, it has now been decided to discontinue the enlistment of lift manufacturers. Accordingly, Enlistment Rules-2018 for Category-Lifts, Class-A issued vide OM no. DG/SE TAS (E)/ Enlist Rules-Lifts-A/01 dated 10-04-2018 stands modified with immediate effect. This also applies to the effect of removal of names of M/s OTIS, M/s Kone, M/s Mitsubishi, M/s Schindler and M/s Johnson Lifts Pvt. Ltd. Chennai from the Works Manual as laid down in Section 16.7(i) of CPWD Works Manual 2014.

NIT approving authorities may therefore take decision to invite tenders of SITC of Lifts as per prevailing Rules, Orders and Guidelines of the Government issued by the Government from time to time and as per the requirements of the client.

This issues with the approval of DG, CPWD.

(D. K. Tulani)
Superintending Engineer (E) TAS

Issued from file No. E-314102/30(1)/Lifts/CE(E)/CSQ/2018

Copy to : (Through website only)

1. All Spl. DGs, ADGs CPWD, E-in-C PWD, Delhi Govt.
2. All CEs, CPWD, PWD Delhi Govt. – They are requested to endorse a copy of this to all SEs & EEs concerned.

Superintending Engineer (E) TAS

24) The office of the Prime Minister of India also issued a letter on 03.01.2019 stating as under:

Nripendra Misra
Principal Secretary to Prime Minister

D.O. No.330/31/C/64//2018-ES-1

3rd January, 2019

Dear Secretary,

Complaints are being received, alleging that Government entities are indicating foreign make/brands and/or restrictive conditions in their tenders, thereby excluding local manufacturers from bidding process.

2. It may be noted that such stipulation of foreign make/brands and/or restrictive conditions (line mandatory requirement of certification by foreign bodies) in the tenders is not only violative of Public Procurement (Preference to Make in India) Order, 2017 (PPP-MII Order 2017) issued by DIPP, but also in violation of the General Financial Rules. In this regard, it is necessary to follow the following general guidelines:

- a. Indicating foreign make/brands in the tender, and thereby excluding local manufacturers and service providers from participation, is in violation Public Procurement (Preference to Make in India) Order 2017. Also, as per Rule 144(i)(b) of GFR

2017, procuring agency shall not indicate a requirement for a particular trade mark, trade name or a brand.

- b. As per Rule 144(iii) of the GFR 2017, the technical specifications shall, to the extent practicable, be based on the national technical regulations or recognized national standards.
- c. Ministries/Departments should also ensure that their procurement entities do not incorporate any such restrictive and discriminatory eligibility criteria regarding turnover, specifications/testing/other standards in tender documents that exclude local manufacturers/service providers.

3. Please ensure compliance of the above guidelines strictly at the level of Ministry/Department as also by all attached/subordinate officers and PSUs/Autonomous bodies under the administrative control of your Ministry/Department. Any violation in regard shall be viewed seriously.

With regards,

Yours sincerely

Sd/-

(Nripendra Misra)

Shri Arun K Panda,
Secretary,
M/o Micro, Small & Medium Enterprise,
New Delhi

May also be circulated to all the division...illegible

- 25) A bare perusal of the entire set of office orders/ letters, clearly demonstrate the shift and the intent of the Govt. of India to:
- a. Desist from specifying manufacturers in matters of public procurement through tender.
 - b. To ensure that there is no unreasonable exclusion of local suppliers who would otherwise be eligible, beyond what is essential for ensuring quality or credit worthiness of the suppliers.
- 26) The actions of the respondents in specifying five manufacturers to participate in the tender and excluding the other suppliers/ prospective bidders, such as the petitioner are clearly violative of the order dated 29.05.2019 of the Ministry of Commerce and Industry, Govt. of India. In none of the counter affidavits, it has either been alleged or shown to us that no other supplier/ prospective bidder, such as the petitioner, meets the eligibility criteria on matters of turnover; production capability; financial strength, or; technical specification and capability.
- 27) In this view of the matter, the action of the respondent in limiting the tender to five manufacturers and excluding the petitioner cries foul of the order dated 29.05.2019 passed by M/o Commerce and Industry, Govt. of India and order No. DG/SE TAS(E)/Enlist. Rules-Lifts-A/03 dated 10.01.2019 passed by CPWD.
- 28) The letter of the Principal Secretary to the Prime Minister dated

03.01.2019, further clears the misconceptions, if any, when it clarifies that indicating foreign make/ brands in the tender, and thereby excluding local manufactures and service providers, is in violation of Public Procurement (Preference to Make in India), Order 2017 and Rule 144(i)(b) of General Financial Rules 2017. In fact, said letter states that indicating foreign makes or brands in a tender is a restrictive and discriminatory eligibility criteria aimed at excluding local manufacturers/ service providers which should be avoided.

29) For the reasons as stated above, we allow these two writ petitions and quash Tender reference no:

i. nit66/eee-i/aiims/2020-21 for UPGRADATION OF LIFT NO. 11, 15, 16 & 17 IN MAIN HOSPITAL AT AIIMS dated 08.02.2021.

-AND-

ii. 67/2020-21/DED-102/DELHI/3 pertaining to supply, installation, testing and commissioning of 10 Passenger Lift at Nehru Museum, Teen Murti House, New Delhi.

The parties are left to bear their respective costs.

JASMEET SINGH, J

VIPIN SANGHI, J

JUNE 04, 2021 / 'ms'