



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

Reserved on: 05th October, 2023

Pronounced on: 6th November, 2023

+ **W.P.(C) 4849/2023 and CM APPL. 18712/2023 & CM APPL. 51513/2023**

M/S MKU LTD

..... Petitioner

Through: Mr. Jayant Kumar and Ms. Hemlata Rawat, Advocate.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Vikram Jetly, CGSC with Ms. Shreya Jetly, Advocate and Ms. Avshreya Pratap Singh Rudy, GP for Respondent No.1.

Mr. Shadan Farasat and Ms. Natasha Maheshwari, Advocate for Respondent No. 2/ GNCTD. ACP Pankaj Sharma, SI Hemant, ASI Amarjeet and ASI Vijender Singh.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

THE FACTS:

1. M/s MKU Ltd., the Petitioner, challenges certain tender conditions stipulated in the procurement of “Bullet Resistant Helmets (Q3)” and “Bullet Resistant Vests (Q3)” by Delhi Police — alleging arbitrariness. As a manufacturer of body armour, protective garments, and personal protection items, the Petitioner supplies these products to forces under the Ministry of



Defence [*hereinafter* “**MoD**”] — including the Indian Army, Navy, and Air Force — and to additional forces under the Ministry of Home Affairs [*hereinafter* “**MHA**”], such as Assam Rifles, BSF, CRPF, CISF among others. The grievances raised before us relate to two tenders issued by Respondent No. 2 [Deputy Commissioner of Police (Provisioning & Logistics), Delhi Police Headquarters, Central Police Organization under MHA], on the Government E-marketplace (GeM), delineated hereinbelow:

(a) For the procurement of “Bullet Resistant Helmets (Q3)” of protection level “NIJ IIIA”, as detailed in Bid No. GEM/2022/B/2806821 dated 02nd December, 2022; and

(b) For the procurement of “Bullet Resistant Vests (Q3)” of protection level “NIJ IIIA”, as per Bid No. GEM/2022/B/2802972 dated 02nd December 2022 [*collectively, referred to as* “**Tender(s)**”].

2. The challenge is laid specifically to licensing and experience pre-requisites specified in both Tenders, as specified hereinbelow.

2.1. Clause 16 (iii) and (xi) of “Chapter-I: Instructions to Bidders” in Bid No. GEM/2022/B/2806821 for Bullet Resistant Helmets, as under:

“16. BIDDER’S PRE-QUALIFICATION CRITERIA:

The bidder must comply with the Pre-qualification/Eligibility criteria stipulated below. Delhi Police Reserves the right to disqualify the bidder in case the bidder does not meet any one or more of the following criteria.

<i>A. Bidder’s Pre-Qualification Criteria Sl. No.</i>	<i>Minimum Eligibility Criteria</i>	<i>Documents Required to be submitted</i>
	xxx ... xxx xxx	



iii	The total quantity of BR Helmets 12000 Nos. a) The sole bidder or the JV partners independently should have regularly for at least the last two years ending 31st March, 2021 supplied BR/BP Helmet/Patka. b) The 'sole bidder or the JV partners independently' should have supplied at least 7000 Nos. (Quantity) of Bullet Proof/ Resistant Helmet/ Bullet Proof/ Resistant Patka in any Ministry/Department/PSUs/Organization under Govt. of India or State Govts., in the last 02 FYs, ending on 31.03.2021.	Successful Supply Completion Certificate from Client' along with the copy of 'Work Order/Contract' shall be submitted.
xxx ... xxx ... xxx		
xi	Industrial License:- The sole bidder or all the members of the JV must have the valid Industrial License issued by DPIIT for consideration of non-metallic materials specially designed to provide ballistic projection. Same should be submitted with the Technical Bid. Firms not having Industrial License issued by DPIIT will not be considered. If the bidder is manufacturer and a CPSU, whose ownership is with the Central Government, such CPSUs are exempted and hence do not need a license.	Copy of valid Industrial License may be submitted."

2.2. Clause 16 (iii) and (xi) of "Chapter-I: Instructions to Bidders" in Bid No. GEM/2022/B/2802972 for Bullet Resistant Vests, as under:

"16. BIDDER'S PRE-QUALIFICATION CRITERIA:

The bidder must comply with the Pre-qualification/Eligibility criteria stipulated below. Delhi Police Reserves the right to disqualify the bidder in case the bidder does not meet any one or more of the following criteria.

<i>A. Bidder's Pre-</i>	<i>Minimum Eligibility Criteria</i>	<i>Documents Required to</i>
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<i>Qualification Criteria Sl. No.</i>		<i>be submitted</i>
xxx ... xxx ... xxx		
iii.	<i>The total quantity of BR Vests 12000 Nos.</i> <i>a) The sole bidder or the JV partners independently should have regularly for at least the last two years ending 31st March, 2021 supplied BR/BP Jacket / Vest.</i> <i>b) The 'sole bidder or the JV partners independently' should have supplied at least 7000 Nos. (Quantity) of Bullet Proof/ Resistant Jacket or Bullet Proof/ Resistant Vest in any Ministry/Department/PSUs/ Organization under Govt. of India or State Govts., in the last 02 FYs, ending on 31.03.2021.</i>	<i>Successful Supply Completion Certificate from Client' along with the copy of 'Work Order/Contract' shall be submitted.</i>
xxx ... xxx ... xxx		
xi.	<i>Industrial License:- The sole bidder or all the members of the JV must have the valid Industrial License issued by DPIIT for consideration of non-metallic materials specially designed to provide ballistic projection. Same should be submitted with the Technical Bid. Firms not having Industrial License issued by DPIIT will not be considered. If the bidder is manufacturer and a CPSU, whose ownership is with the Central Government, such CPSUs are exempted and hence do not need a license.</i>	<i>Copy of valid Industrial License may be submitted."</i>

3. The Petitioner, through letters dated 20th December, 2022, for each respective Tender, sought clarity from Respondent No. 2, specifically



regarding the requirement of an Industrial License i.e., license for manufacturing under Industries (Development and Regulation) Act, 1951 [*hereinafter* “**IDR Act, 1951**”]. The Petitioner emphasized the non-necessity of an Industrial License for Bullet Resistant Helmets and Vests of protection level “IIIA”, by relying upon press notes issued by Department of Industrial Policy and Promotion [*hereinafter* “**DIPP**”] and Department of Promotion of Industry and Internal Trade [*hereinafter* “**DPIIT**”], and a clarificatory letter from the Department of Defence Production, MoD. There were various back and forth communications between the Petitioner and Respondent No 2, on the requirement of the Industrial License. Finally, Respondent No. 2 informed the Petitioner that their bid would only be examined as per the pre-qualification criteria, including the requirement of an Industrial License.

4. Nonetheless, the Petitioner, participated in the tender process and submitted their bid document on 28th February, 2023. Not long after, on 09th March, 2023, they received a letter from Respondent No. 2, highlighting a discrepancy in bid submission i.e., non-submission of a valid Industrial License. Despite receiving subsequent reminders and opportunity to amend the error, the Petitioner did not rectify the same. In a follow-up, the Purchase Committee reviewed the Petitioner’s documents and ruled that Petitioner’s assumed exemption from providing an Industrial License was, in fact, invalid and misconceived. It was re-iterated that a bidder has to submit a copy of a valid Industrial License per the bid requirement. For Bullet Proof Vests, Respondent No. 2 also did not accept Petitioner’s documents as fulfilling the experience conditions stipulated in the respective Tender document.



PETITIONER'S CONTENTIONS:

5. In the aforementioned circumstances, being technically non-responsive and ineligible, Petitioner has filed the instant petition, assailing the afore-noted conditions. Mr. Jayant Kumar, counsel for the Petitioner, has advanced contentions on the following grounds:

(A) Clause 16(xi) – Requirement of a valid Industrial License

5.1. The Tenders stand in contradiction to directives previously issued by the DIPP and DPIIT. Per DIPP's Press Note No. 1 (2019 series), released on 01st September, 2019 [*hereinafter* "**DIPP's Press Note**"], an Industrial License is mandated solely for the manufacturing of items in Annexure-I therein. Said Annexure among other items, includes body armour or protective garments rated at NIJ Level III or its national equivalent and above. Subsequently, the Industrial Licensing Section of DPIIT, under the Ministry of Commerce and Industry, issued Press Note No. 2 (2019 series) on 11th September, 2019 [*hereinafter* "**DPIIT's Press Note**"], which elucidated that manufacture of any parts or accessories in the defence sector does not necessitate an Industrial or Arms License, except if such items are explicitly detailed in the annexure accompanying DIPP's Press Note.

5.2. MoD's letter dated 02nd August, 2021, reaffirmed that the pre-requisite of an Industrial License applies to the manufacturing of Body Protective Equipment, encompassing Bullet Proof and Bullet Resistant Helmets, Vests, Jackets, and Body Armor, offering ballistic protection of Level III or its national equivalent and above.

5.3. In a separate instance, the Empowered Committee of the Indian Army had responded to pre-bid queries in an RFP process for procuring Ballistic Helmets for Sikh troops specifically of "NIJ Level IIIA" – wherein it was



clarified that the NIJ Level IIIA level is considered a lower specification compared to NIJ Level III. Therefore, aligning with DIPP's Press Note that there is no requirement for an Industrial License for products of the protection level in-question.

5.4. Furthermore, DG CRPF had issued an open enquiry tender having reference no. U.II-1400/2022-23-Proc-VI for procurement of bullet resistant helmets without the requirement of an Industrial License. The BSF and Indian Army, which are also departments of the Government of India, do not insist on an Industrial Licence for supply of similar products of protection level NIJ IIIA. These departments are clearly complying with the aforesaid press notes issued by DIPP and DPIIT. Especially, where DIPP and DPIIT, who themselves are the licensing authority have specified that a license is only required for products of protection level of NIJ III and above, and thus, not for those below NIJ III. Therefore, Delhi Police has arbitrarily sought an Industrial License for products of protection level NIJ IIIA.

(B) Clause 16(iii) – Requirement of completion certificate and work order

5.5. Clause 16 (iii) which concerns the experience prerequisites is primarily impugned on account of the period specified therein i.e., FY 2019-20 and 2020-21. Said period under consideration coincides with the COVID-19 pandemic, a time when supply operations were diminished and numerous industries, including the Petitioner, faced significant disruptions. Confining the evaluation of experience to the supply made in FY 2019-20 and 2020-21 is arbitrary and unjust, considering the global crisis and extraordinary circumstances at play.

5.6. This arbitrary and unconstitutional condition put forth by the Respondent No. 2, treats vendors who have supplied the products in-



question to governmental entities beyond that narrow period of COVID-19 or have supplied the products to foreign buyers – as lacking capability to supply the products under the Tender. The Respondents should have adopted a broader view, considering the supply of bulletproof vests to the Indian Government beyond this constrained period. That apart, exports to foreign government agencies, conducted with explicit authorization from the Indian Government, should be acknowledged as valid experience. Other relevant supplies, such as bulletproof helmets to government entities, should also contribute to the experience criteria for supplying vests, in the period mentioned in the Tender.

(C) Court's interreference warranted in the present Tenders

5.7. The condition insisting on Industrial License which is otherwise not required at all is arbitrary, unreasonable and illegal. In addition, the narrowly defined conditions of experience seem to deliberately exclude certain participants, potentially favouring others, and appear patently unreasonable and arbitrary on the surface. As such, the issues arising in the present matter warrant the interference of the Courts. Reliance to this effect is placed on the decision of the Supreme Court in **Directorate of Education and Ors. v. Educomp Datamatics Limited and Ors.**,¹ the decision of this Court in **Mega Kleen v. Union of India and Ors.**,² the decision of the Karnataka High Court in **Landis Gyr Limited. v. General Manager (Ele) Procurement Bangalore Electricity Supply Company Ltd.**³

¹ AIR 2004 SC 1962.

² MANU/GH/0232/2010.

**RESPONDENT NO. 2'S CONTENTIONS:**

6. In opposition, Mr. Shadan Farasat, representing Respondent No. 2, refutes Petitioner's arguments, and emphasizes the following aspects:

6.1 The terms and conditions of the Tenders have received approval from Respondent No. 1-Union of India, post which they were floated on the GeM portal.

6.2 The Petitioners have failed to meet the essential tender requirements, specifically the need for a Industrial License. In this regard, the reliance upon the DIPP and DPIT press notes, and the MoD letter dated 02nd August, 2021, are misconceived. Said documents do not restrict the Respondents from imposing the requirement of possessing a valid Industrial License for product with protection level at NIJ IIIA or indicate that makers of products of the said protection level are exempt from possessing an Industrial License. That apart, the DPIT Press Note only relates to parts and accessories, whereas in the present case, a complete product was being requisitioned.

6.3 Petitioner's claim of fulfilling experience prerequisites for Bullet Proof Vests, based on a certificate for supplies made to the Philippine National Police is also untenable. This particular credential does not satisfy the stipulations outlined in Clause 16(iii) of the Tender. Respondents, being the creators of the tender documents, possess the prerogative to stipulate conditions that they perceive and understand to be in the best interest.

6.4. It is a settled legal principle that courts typically do not interfere with the terms of tenders—a domain considered to be within the purview of contractual realms. This Court should not act as an appellate authority over

³ 2011 (3) KCCR 217.



these conditions. The terms of the tender, should not be subject to judicial scrutiny, as they fall within the sphere of contractual matters where the government retains the discretion to formulate conditions aligning with their requirements and perceived benefits.

7. *Per contra*, the Petitioner further made the following submissions in rejoinder:

7.1. The approval letter from the MHA in respect to the present Tenders, does not mention that an Industrial License should be insisted upon. Instead, the said approval letter directs Delhi Police to make special efforts to widen competition for proper price discovery and encourage more suppliers to enter the market. Evidently, the Delhi Police is going against the mandate of the MHA approval and is restricting competition by way of the Tenders.

7.2. Delhi Police has insisted on an Industrial Licence under the IDR Act, 1951, which belongs to the restrictive license era and today, most industries do not require any license post the liberalization. In fact, there is no provision for optional licensing and thus, in view of DPIIT's Press Note, for products which do not require license – an Industrial License cannot be obtained.

7.3. There are no quality or capability oriented parameters under the IRD Act, 1951, unlike other quality related legislations like the Bureau of Indian Standards Act, 2016. Delhi Police could verify the quality of the products being supplied by subjecting them to testing. In every tender – including the present Tenders, specifications stand prescribed and their testing procedure has also been prescribed. No relaxations are sought by Petitioner in regard thereto. If Delhi Police desires to insist for an Industrial License, it should issue a tender for products with protection level NIJ III and not NIJ IIIA.



7.4. Valid supply completion certificates have been submitted to Delhi Police on 25th April, 2023 and the said documents have been submitted with proof of service before this Court.

ANALYSIS AND FINDINGS:

8. In evaluating the contentions presented, we recognize that the core of the dispute lies in the interpretation and application of Clause 16 (iii) and (xi) in the Tenders – specifically concerning the requirement for submitting a valid Industrial License and successful completion certificates of past work.

9. The Petitioner has placed heavy reliance upon the press notes issued by the DIPP and DPIIT. At the outset, a perusal of DIPP's Press Note indicates that manufacturing of items listed in Annexure-I, as delineated by the Department of Defence Production, MoD, mandatorily requires an Industrial License. In the said annexure, among other categories of items, this stipulation unequivocally applies to, "*body armour or protective garments classified of level III (NIJ 0101.06, July, 2008 or national equivalent and above)*". The DPIIT Press Note further emphasizes that Industrial Licenses or Arms Licenses are not mandated for the manufacture of any parts or accessories in the defence sector, unless they are specifically listed in any annexures of the aforesaid DIPP Press Note. In our opinion, the absence of a specific licensing requirement in the above press notes for products with protection level "NIJ IIIA" – does not preclude or invalidate the Tender conditions. The press notes do not impliedly or explicitly – prohibit entities from seeking or obtaining such licenses for products of the protection level in-question, nor do they restrict procuring agencies from mandating such licenses as a precondition in their tenders. In a nutshell,



body armour or protective equipment of protection level III and above must be mandatorily supplied by a bidder who holds an Industrial License. The tender issuing authority can impose an Industrial License as a pre-condition for equipment of protection level NIJ IIIA. Pertinently, in the course of the hearing, counsel for Respondents have informed us that the Petitioner would have been duly granted an Industrial License for products of the said production level, had they applied for the same. Although this submission was controverted Counsel for Petitioner, however, no material was presented before us to substantiate the same.

10. At this juncture, we must also underscore the criticality of the products. The items in question pertain to the safety and security of police personnel. Therefore, the stipulation of possessing a valid Industrial License by the Respondents is far from arbitrary; rather, it is a condition rooted in ensuring the utmost reliability and capability of the bidders. The life-saving potential of this equipment necessitates such rigor in the procurement process. Imposing such a condition in the tender remains within the purview of the Respondents' authority, ensuring adherence to stringent quality and regulatory benchmarks. This condition is not merely a procedural formality but a substantive requirement, as it pertains to the identification of bidders with the proven technical prowess and operational integrity necessary for the production and supply of such specialized protective gear. In this context, demanding an Industrial License as a prerequisite for participation does not only align with the legal frameworks, but also reinforces the commitment to procuring equipment that meets the highest standards of quality and reliability.

11. Thus, the imposition of the requirement of an Industrial Licence by



the Delhi Police can be viewed as a measure to ensure an additional layer of quality assurance and compliance, given the sensitive nature of the items being procured. It is the prerogative of tendering authorities to stipulate conditions that meet their specific needs and concerns, especially in sectors with significant implications for national security. It is also noteworthy that this condition was not decided in isolation but was, in fact, sanctioned by the MHA, thereby lending further credence to its validity. In view of the above, we note that the necessity for Industrial Licenses is established as an essential criterion in the Tenders, and the Petitioner's assumption that a valid Industrial License is not required for the products in-question being procured under the Tenders is plainly incorrect.

12. For the foregoing reasons, Petitioner's reliance on tender conditions implemented by BSF or Indian Army, or even the DG CRPF in their procurement of bullet-resistant helmets, without the requirement of an Industrial License, does not have any bearing on a tender being issued by Delhi Police. The Delhi Police, as an independent tender issuing authority, is not bound by their actions. We thus find that the Petitioner's assertion that Delhi police's conduct is arbitrary – has been drawn by way of making a false equivalence.

13. We also find it pertinent to highlight that the Purchase Committee of Delhi Police has demonstrated due diligence in this matter. The committee, on 28th December, 2022, upon detailed examination of a representation submitted by another prospective bidder on the same issue, prior to Petitioner's representation – reached a unanimous decision to uphold the condition necessitating a valid Industrial License as a fundamental component of the Tenders. Ensuring transparent communication, this



resolution was duly conveyed to the Petitioner, affirming that the stipulation of a valid Industrial License remains an indispensable criterion for participation. This approach underscores their commitment to preserving the integrity and stringent standards of the procurement process. Such a measure reaffirms the commitment to procedural adherence and the paramount objective of this tender: securing equipment of unassailable quality for the safety and security of our police personnel.

14. Next, we shall address the Petitioner's challenge to the condition pertaining to past experience in Clause 16 (iii). On this aspect, Petitioner's claim hinges on their successful supply of bullet proof vests during the COVID-19 era to a foreign government agency, particularly the Philippine National Police, as authorised by a certificate issued by the MoD dated 21st August, 2019. While this supply may indeed have received authorization from the MoD's Department of Defence Production, it regrettably falls short of fulfilling the explicit stipulations set forth in the Tender condition. Significantly, the Petitioner has, until this point, failed to produce a valid completion certificate, a crucial document attesting to both performance and experience, as mandated by the Tenders' terms and conditions. This lapse persists despite multiple opportunities presented by the Purchase Committee of the Delhi Police.

15. We must reiterate the well-entrenched legal principle that a participant in a tender cannot, after submission of their bid, contest the tender terms on grounds of inconvenience or non-compliance. Participating in the tender implies an implicit acceptance of its conditions, and a bidder is estopped from challenging the same at a later stage, particularly to benefit from their own oversight. The Petitioner has failed to



provide the requisite completion certificate for bullet resistance vests, despite repeated requests communicated *via* multiple emails. The provision of completion certificates is not a capricious demand but a vital element of the pre-qualification criteria. This requirement was instituted to narrow the field to those bidders with proven experience and the capacity to deliver high-quality vests, thereby safeguarding the well-being of the police personnel destined to wear them. This prerequisite was uniformly enforced among all contenders, ensuring a level playing field. Therefore, Petitioner's non-compliance is a clear breach of the stipulated conditions in the Tenders, further weakening the Petitioner's stance. Consequently, it is untenable for the Respondents to retroactively contest this pre-qualification stipulation solely on the grounds of non-compliance or even perceived inconvenience.

16. Lastly, we must reiterate another well-established legal principle: The government, in its role as a contractual party, holds the freedom to determine the specifics of contracts (in this case, the conditions in the Tenders), and these specifics should not be subject to alteration or scrutiny by the judiciary, barring instances of illegality or substantial public interest.⁴ In the complex tapestry of tender processes, it is pertinent to remember that the tendering authority possess comprehensive discretion to draft conditions that suit their precise needs and objectives, a freedom that is not just statutory but also practical, ensuring the procurement is with the exacting standards necessary for specialized products or services. This is particularly true for sensitive equipment integral to law enforcement and public safety, where there is no room for cutting corners.

⁴ *Agmatel India Private Ltd. v. Resoursys Telecom and Ors.*, (2022) 5 SCC 362, *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Anr.*, (2016) 16 SCC 818, *Silippi Constructions*



17. Courts, traditionally, are not keen on stepping on toes when it comes to these expertly devised conditions, acknowledging that the tendering authority is in the driver's seat with regard to understanding the intricacies and exigencies of their requirements. This judicial restraint stems from a recognition that these authorities, armed with their technical know-how and situational awareness, are best positioned to determine their requirements. Consequently, unless these conditions are glaringly perverse arbitrary or signal a clear deviation from the principles of fairness, the courts prefers to maintain a stance of non-interference, allowing the tendering process to follow its course, guided by the hands of those who know best. In essence, the court avoids crossing the bridge into an administrative arena where it traditionally does not tread.

18. For the foregoing reasons, no arbitrariness, mala fides, or irrationality, has been made out in the impugned Tender conditions. The Petitioner failed to submit a valid Industrial License as per both Tenders and additionally, failed to submit a valid completion certificate in respect of the Tender for bulletproof vests. As such, the Petitioner would be technically non-responsive and ineligible under both Tenders.

19. Dismissed along with pending applications.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

NOVEMBER 06, 2023/as

Contractors v. Union of India, (2020) 16 SCC 489.