

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

Date of decision: 01st August, 2022

IN THE MATTER OF:

+ **W.P.(C) 5292/2022 & CM APPL. 15783/2022**

TRIDENT INFOSOL PVT LTD

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Himanshu Sethi, Mr.
Sandeep Sethi, Mr. Pavan Narang and
Ms. Aishwarya Chhabra, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Vikram Jetly, CGSC with Ms.
Shreya Jetly, Advocate and Mr.
Tarveen Singh Nanda, Government
Pleader.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant Writ Petition has been filed by the Petitioner Company under Articles 226 and 227 of the Constitution of India with the following prayers:-

“(i) To issue an appropriate writ of Mandamus or other appropriate writ declaring that the bids submitted by the Petitioner are not to be rejected merely in view of the pendency of ECIR no. 12/STF/2019;

(ii) To issue an appropriate writ of Mandamus directing the respondents to allow the Petitioner to bid for and compete in the

contracts in future and tenders even during the pendency of proceedings under ECIR no. 12/STF/2019;

(iii) To seek a declaration that respondent no. 2's condition/undertaking in clause 7.2.19 of DRDO procurement manual, 2020 "and that there is no enquiry going on by CBI/ED/any other govt. agency against them" be quashed being arbitrary, illegal, bad in law, unreasonable and violative of fundamental rights guaranteed under Articles 14, 19(1) (g) and 21 of the Constitution of India, 1950;

(iv) To declare that, mere pendency of proceedings/enquiry against any Director in his individual capacity should / could not be an impediment in bidding for tenders/contracts by the company;

(v) To declare that such enquiries pending against a company which merely got merged/amalgamated/taken over by a successor company cannot be an impediment or disqualification of successor company from doing Governmental business and bidding for tenders and contracts;

(vi) To declare that such enquiries / proceedings cannot be the basis of denying the Petitioner company from either participating or being considered and/or award of tenders/contracts, including as an interim measure during the pendency of the writ petition;

(vii) Pass such other and or further order (s) as this Hon'ble Court may deem fit and proper in the interest of justice"

2. The facts leading to the filing of the instant Writ Petition are as follows:-

- i. In 2017, the Petitioner merged with one, Alligator Designs Pvt. Ltd. (hereinafter referred to as 'the ADPL'), as per scheme approved by the Regional Director, Ministry of Corporate

Affairs, New Delhi *vide* Order No. 233/14/T- 1/2017/6513 dated 25/08/2017. It is pertinent to mention that criminal proceedings were initiated against the Directors of ADPL in 2013 alleging that the Directors of ADPL have forged and fabricated several “non-transfer & use” certificates in the name of Chhattisgarh Police for American Technologies Inc. There is also an allegation that they have applied for import licence from DGFT on the basis of photocopies issued by Bihar Police.

- ii. Thereafter, in 2019, the Enforcement Directorate (hereinafter referred to as ‘the ED’) registered ECIR No. STF/12/2019 (hereinafter referred to as ‘the said ECIR’) against some of the Directors of the Petitioner.
- iii. *Vide* Provisional Attachment Order No. 03/2020 (hereinafter referred to as the ‘Attachment Order’) the ED provisionally attached the assets of the Petitioner, on account of the fact that the Petitioner was holding the proceeds of crime generated by ADPL. The Attachment Order was confirmed by the Ld. Adjudicating Authority.
- iv. In 2021, the Electronics and Radar Development Establishment and Naval Physical and Oceanographic Laboratory, i.e. Respondent No. 3 and Respondent No. 4 respectively, invited online bids for supply of “VPX based multi-channel system using RFSOC Gen-3”, “3U VPX Signal Processing System (Qty- 3 Nos)” and the supply of three units of Integrated 6U VPX Power Supply Unit.

- v. It is pertinent to note that both Respondent Nos. 3 and 4, under the Impugned Condition i.e. Clause 7.2.19 of the DRDO Procurement Manual, 2020 sought the following undertaking:-

“Undertaking from the Bidders: An undertaking will be obtained from the Bidder firm/company/vendor that in the past they have never been banned/debarred for doing business dealings with Ministry of Defence/Govt. of India/ any other Govt. organisation and that there is no enquiry going on by CBI/ED/any other Govt. agency against them.”

- vi. The Petitioner submitted its bids to Respondent No. 3 and 4 on 04.02.2021, 15.03.2021, and 03.05.2021.
- vii. Stating that the Petitioner had failed to comply with the Impugned Condition, the Respondent wrote to it *vide* letter dated 22.06.2021 seeking the said undertaking, as mandated in the Impugned Clause.
- viii. The Petitioner furnished the said undertaking placing on record the existence of the said ECIR against the Petitioner Company.
- ix. On 10.06.2021, the technical evaluation committee of Respondent No. 3 rejected the bid of the Petitioner in the following terms:

“20. As the vendors had not submitted the undertaking on banning/debarring and enquiries by CBI/ED/other agencies as desired by Sl. No.15 and Sl. No.1 7 respectively of parts-I& 2 of the RFP, a request was made to the vendors vide letter No. NPOL/HNG/GEN dated 22-6-2021] to submit

the same. All the vendors submitted the undertaking. Vide the undertaking by M/s. Trident Infosol Pvt. Ltd, submitted vide their letter reference DHBPB-220016/UL dated 23/6/2021, it was stated that one enquiry by ED under PMLA is on the firm. Therefore, the offer of the firm is rejected.”

- x. Thereafter, Respondent No. 4 also rejected the bid of the Petitioner owing to the pendency of the investigation by the ED.
- xi. Upon the rejection of its bids by Respondent Nos. 3 and 4, the Petitioner advanced clarificatory letters dated 21.09.2021, 30.09.2021, 06.10.2021, 13.10.2021, and 04.01.2022, to Respondent No. 2, clarifying *inter alia*, the following:-

“There is no substantive charge by ED against Trident Infosol Pvt Ltd. Trident has been made a party by ED on account of amalgamation of Alligator Designs Pvt Ltd. with Trident Infosol Pvt Ltd. whereby all the assets of Alligator have been taken over by Trident by virtue of this amalgamation. ED has made Trident as a beneficiary of the order proceeds which is not correct & the same is being contested by us at PMLA Tribunal Hon'ble Delhi High Court.

Additionally, its worthwhile mentioning here that as per settled law. when any company gets amalgamated, liabilities are transferred as existing on the date of amalgamation to transferee and no future legal liabilities including criminal liabilities [in any] can be transferred to transferee (In our case Trident Infosol) from transferor (in this case Alligator Designs). The ED case pertains to

Alligator Designs which was amalgamated with Trident Infosol effective January 2017, whereas ED case is of year 2019. With the said law in place inclusion of Trident Infosol in the case against Alligator Designs by ED is being contested by us in the appropriate courts.”

xii. Since the bid of the Petitioner was not being considered, the Petitioner has filed the instant writ petition.

3. Ld. Senior counsel for the Petitioner argued that the only investigation where the Petitioner had been made a party was ECIR No. 12/STF/2019 dated 31.07.2019. It was further argued that the decision of the Respondents to declare the technical bid of the Petitioner as invalid, in the technical bid evaluation phase, was arbitrary, discriminatory and unjust.

4. The Ld. Senior Counsel for the Petitioner further contends that there existed no allegations against the Petitioner Company being involved in the commission of the predicate offence under the PMLA. It has further been argued by the counsel for the Petitioner that the pendency of the ED proceedings would continue to prejudice the Petitioner for an indefinite period, leading to its civil death. The Ld. Senior Counsel places reliance on a judgment passed by the Division Bench of this Court in M/s Good Year Security Services (Regd) v. Union of India & Ors., 2017 SCC OnLine Del 9639 and submits that an entity cannot be debarred from participating in a tender process for an indefinite period of time.

5. The Ld. Senior Counsel for the Petitioner has placed reliance upon the judgments passed by the Apex Court in Kulja Industries Limited. v. Chief Gen. Manager W.T. Project BSNL &Ors., (2014) 14 SCC 731 to state that

the Petitioner ought to have been given a fair hearing before being blacklisted. Further, reliance has been placed on Nicholas Piramal India Ltd. v. S. Sundaranayagam, **CRL. M.C. No.5392/2005**, to state that the entity which has evolved upon amalgamation cannot be prosecuted for an offence committed by the transferor company.

6. *Per contra*, the counsel for the Respondent has argued that cancelling the Petitioner's bid does not constitute discrimination, as the Respondent was merely following the DRDO Procurement Manual, 2020. It has further been argued by the counsel for the Respondent that the Impugned Condition has been incorporated to maintain high standards of integrity and is inconformity with public interest.

7. The counsel for the Respondent also draws attention to the fact the DRDO is an R&D organization, which undertakes projects of national importance. Due to the sensitive nature of its work, the DRDO has been exempt from the rigours of the Right to Information Act, 2005.

8. Further, the Ld. Counsel for the Respondent states that the Petitioner is the sister concern of Alligator Designs, and that Directors of the two companies are the same. It has further been brought to the notice of this Court that the proceeds of crime to the tune of Rs. 2,36,25,000/-, received by Alligator Designs were transferred to the Petitioner Company.

9. The Respondent has placed reliance upon the judgment titled R.K. Jain & Sons Hospitality Pvt. Ltd. through Its Director v. Union of India & Anr., **W.P. (C) 3712/2020**, to state that one cannot challenge the conditions of the tender after having participated in it.

10. Having heard the counsels appearing for the Petitioners and the Respondent and perusing the material on record, this Court will proceed to examine the present case.

11. The said tenders have been floated by Respondent Nos.3 & 4, i.e. the Electronics and Radar Development Establishment and Naval Physical and Oceanographic Laboratory respectively.

12. Courts generally follow a hands off approach when Government fixes the eligibility conditions in the matters pertaining to tenders, especially those that pertain to matters of national security. In Siemens Public Communication Networks (P) Ltd. v. Union of India, (2008) 16 SCC 215, the Apex Court has observed as under:

“41. In the instant case, as has been rightly contended by the learned Additional Solicitor General appearing for the Union of India, the contract is in respect of sensitive army equipments which are urgently needed. It cannot be held that the process adopted or decision made is so arbitrary or irrational that no responsible authority acting reasonably or in accordance with the relevant law could not (sic) have taken such a decision. The inevitable conclusion is that the appeal is devoid of any merit and deserves dismissal, which we order. However, there shall be no order as to costs.”

(emphasis supplied)

13. A Division Bench of this Court in Axiscades Aerospace and Technologies Pvt. Ltd. v. Union of India &Ors., **2018 SCC OnLine Del 9320**, has observed as under:

“35. The present tender process deals with technology for protecting the country's aircrafts from bird strikes and therefore, this Court ought to bear in mind the

security implications involved. As regard the period of time specified in the DPP, 2011, this Court is of the opinion that while it would not be appropriate for it to comment on what would an adequate time window and whether extension of time was warranted in the circumstances, prima facie, the Court is of the view that what emerges from the above factual discussion and analysis of the judicial decisions is that the withdrawal of the RFP dated 30.04.2012 is based on justifiable grounds, inter alia, the terms of the RFP with respect to the commercial arrangements were not satisfied by the any of the vendors. Furthermore, the MoD's contentions that the Petitioner's bid, if allowed to stand would have resulted in unfairness to other Indian bidders, because all of them tendered in Indian currency, whereas the Petitioner tendered in a manner that allowed it to hedge in foreign currency. This, according to MoD resulted in an unequal playing field, which compelled it to cancel and withdraw the bid.

36. *Given the facts and circumstances of the present writ petition, this court finds no reason to interfere with the decisions of the Union MoD. The decision to award a public contract is not based merely on factors such as fulfilment of technical qualifications and financial viability of the offer of a given bidder but much more. **The vital public interest is a necessary condition, which invariably informs every decision of the executive authority or agency that is to award the contract. It is not this court's judgment call, therefore, to decide whether the government's decision is what is best and in its interests, is indeed so.***

(emphasis supplied)

14. The Supreme Court in Manohar Lal Sharma v. Narendra Damodardas Modi, (2019) 3 SCC 25, has observed the following with regards to judicial review in contracts pertaining to defence procurement:

“9. We also cannot lose sight of the tender in issue. The tender is not for construction of roads, bridges, etc. It is a defence tender for procurement of aircrafts. The parameter of scrutiny would give far more leeway to the Government, keeping in mind the nature of the procurement itself. This aspect was even emphasised in Siemens Public Communication Networks (P) Ltd. v. Union of India [Siemens Public Communication Networks (P) Ltd. v. Union of India, (2008) 16 SCC 215] . The triple ground on which such judicial scrutiny is permissible has been consistently held to be “illegality”, “irrationality” and “procedural impropriety”.

10. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India [Reliance Airport Developers (P) Ltd. v. Airports Authority of India, (2006) 10 SCC 1] the policy of privatisation of strategic national assets qua two airports came under scrutiny. A reference was made in the said case (at SCC p. 49, para 57) to the commentary by Grahame Aldous and John Alder in their book Applications for Judicial Review, Law and Practice:

“57. ... ‘There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not

entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service [Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 WLR 1174 (HL)] this is doubtful. Lords Diplock, Scaman and Roskili (sic.) [To be read as “Roskill”.] appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.”

11. It is our considered opinion/view that the extent of permissible judicial review in matters of contracts, procurement, etc. would vary with the subject-matter of the contract and there cannot be any uniform standard or depth of judicial review which could be understood as an across the board principle to apply to all cases of award of work or procurement of goods/material. The scrutiny of the challenges before us, therefore, will have to be made keeping in mind the confines of national security, the subject of the procurement being crucial to the nation's sovereignty.”

(emphasis supplied)

15. The said Tenders are for procurement of instruments which are necessary for the security of the country. Keeping in mind the nature of tender, it cannot be said that the Impugned condition, which warrants that an undertaking should be given by the Bidder firm/company/vendor that in the past they have never been banned/debarred for doing business dealings with Ministry of Defence/Govt. of India/ any other Govt. organisation and that there is no enquiry going on by CBI/ED/any other Govt. agency against them, is bad in law or is violative of Article 14 of the Constitution of India.

16. Further, as is evident upon a perusal of the Attachment Order dated 19.08.2020 the Petitioner Company is a sister concern of ADPL and the Directors of the Petitioner Company, *namely*, Nitin Gupta, Pawan Seth and Ashok Gupta are also Directors of ADPL. It also appears that investigation reveals that the Directors of ADPL, with the help of their aids have used fake and forged certificates in their erstwhile contracts. It also cannot be denied that the assets of the Petitioner have been attached by the said Attachment Order. In view of the above, there is no infirmity in the decision of the Respondents in rejecting the bid of the Petitioner/company.

17. Even generally, as has been laid down in a catena of judgments, the scope of judicial review available to this Court under the tender jurisdiction is limited. In Tata Cellular v. Union of India, (1994) 6 SCC 651, the Supreme Court has stated as under:

“94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) 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.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

18. Similarly, in Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, the following principles were reiterated:-

"23. From the above decisions, the following principles emerge:

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

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

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

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

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

business with the Government.

(emphasis supplied)

19. Hence, while the State's instrumentalities ought to act fairly entering contracts with private parties, this cannot impinge upon the right of the Government in setting the terms of the tender. Hence, this Court ought only to intervene if the condition is arbitrary, discriminatory, *mala fide* or actuated by bias.

20. As has been noted, the present tender was floated by Labs of Respondent No. 2, which are specialised labs engaged in research pertaining to critical defence technologies and systems. It is in this context that the Respondent Nos. 3 and 4 have imposed the Impugned Condition to sift through entities which have criminal proceedings/investigation pending against them. This condition is imperative to maintain the integrity of such projects which deal with matters of national importance, security and are of immense public importance.

21. Considering the nature of the work undertaken by the Respondents, it is evident that the Impugned Condition is not arbitrary, discriminatory, *mala fide* or actuated by bias. Hence, this Court does not find any infirmity with the Impugned Condition and is disinclined to interfere with it.

22. Further as has also been noted, material on record shows that there are allegations that the key managerial personnel, nature of work and functioning of the Petitioner Company is the same as ADPL and the Petitioner Company has allegedly benefitted from the proceeds of crime to the tune of Rs. 2,36,25,000/-, received by ADPL as these were transferred to the Petitioner

Company. Hence, the Petitioner cannot claim that it has been unfairly excluded the Petitioner from participating in the bid.

23. As noted above, this Court is not inclined to interfere with the Impugned Condition or the decision of the Respondent Nos. 2-4 from excluding the Petitioner from participating in the said tender process.

24. With these observations, the petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

AUGUST 01, 2022

hsk/s

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