

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI,
Suit No. 1521 of 2020

Plaintiff : M/s. Faiz Scientific Company, through
M/s. Obaid-ur-Rehman Khan and Abdul
Ghaffar, Advocates

Defendants No. 1 to4 : Province of Sindh, through the Secretary,
Home Department, Government of Sindh
and three others, through Mr. Ziauddin Junejo,
Assistant Advocate General, Sindh.

Date of hearing : 02.02.2021, 08.02.2021 & 11.02.2021.
Date of order : 01.03.2021.

ORDER

ZAFAR AHMED RAJPUT.J:- Through this order, I intend to dispose of C.M.A. No. 10320/2020, filed on behalf of the plaintiff under Order XXXIX, rule 1 & 2, C.P.C. read with Section 151, C.P.C. seeking interim order restraining the defendants No. 2 and 3 from opening the bids and further processing the procurement of Desktop Computers in pursuance of the Tender Notice No. INF-KRY: 2494/2020, dated 25.09.2020 (“Tender Notice”), to suspend the operation of the Tender Notice and the procurement process to the extent of procurement of Desktop Computers and operation of the terms, conditions and specifications impugned in the instant suit and to direct the defendants No. 2 and 3 to consider the bid of the plaintiff regardless of the same till the final disposal of the instant suit.

2. Briefly stated, facts of the casa, as pleaded by the plaintiff, are that the defendant No. 3 (*Assistant Inspector General of Police/Logistic*) advertised the Tender Notice, whereby he invited sealed bids under Single Stage-Two Envelop procedure for the procurement of computer laptops, laser printers, scanners and colour printers by adding three specifications for the computer laptops that the same (i) should be of an “an international brand” or “equivalent and / or better”, (ii) to have Environmental Standards (eco labels): “ENERGY STAR” and; (iii)

to be present in the Gartner and IDC report in the list of top 10 computer brands. It is case of the plaintiff that it procured the bidding documents for the Tender which reflected that the defendant No.3 did not mention in the Tender Notice the item Desktop Computers and no corrigendum was published with regard to the inclusion of item Desktop Computers, while the bidding document available at the website has no mention of computer laptops. It is claim of the plaintiff that the said three requirements have been incorporated in the tender specifications with malicious intent and only to cause prejudice to the plaintiff and to disqualify it from participating in the tendering process for the Desktop Computers in order to award the tender to favorite suppliers at the cost and expense of the taxpayers; hence, plaintiff has filed this suit for declaration and permanent injunction *inter alia* with the following prayer:-

- (i) *Declare and strike down the specifications (described in the body of the plaint) present in the tender for procurement of Desktop Computers bearing Tender Notice No. INF-KRY:2494/2020 dated 25.09.2020 and any subsequent award of contract (if any) in relation to the same as being illegal, unlawful, void ab inito, unfair, discriminatory, arbitrary, unreasonable, having been incorporated in the tender with malice and mala fides and in blatant abuse of discretionary powers and being ultra vires, inter alia, the Sindh PPRA Act, 2009, and the Sindh Public Procurement Rules of 2010 and articles 9, 18 and 25, Constitution of Pakistan, 1973;*
- (ii) *Declare that the plaintiff is legally and lawfully entitled to have his bid for Desktop Computers considered regardless of the terms and conditions (more fully described in the body of the Plaint) being illegal, unlawful, void ab inito, unfair, discriminatory, arbitrary, unreasonable, having been incorporated in the tender with malice and mala fides and in blatant abuse of discretionary powers and being ultra vires, inter alia, the Sindh PPRA Act, 2009, and the Sindh Public Procurement Rules of 2010 and articles 9, 18 and 25, Constitution of Pakistan, 1973);*
- (iii) *Declare that the procurement of the Desktop computers through the Tender Notice No. INRKRY:2494/2020 dated 25.09.2020 should be Single Stage Single Envelope process as opposed to a Single Stage Two Envelope process;*
- (iv) *Permanently restrain the Defendants no. 2 and 3 from opening the bids and processing, the procurement of Desktop Computers in pursuance the Tender bearing Tender Notice no. INT-KRY:2494/2020 , dated 25.09.2020 and / or suspend the*

operation of the Tender/Tender Notice and the procurement process to the extent of the procurement of Desktop Computers and/or suspend the operation of the terms, conditions and specifications impugned herein and direct the Defendant Nos. 2 and 3 to consider the bid of the Plaintiff regardless of the same;

- (v) *Temporarily restrain the Defendants no. 2 and 3 from opening the bids and processing the procurement of Desktop Computers in pursuance to the Tender bearing Tender Notice No. INF-KRY:2494/2020 dated 25.09.2020 and/or suspend the operation of the Tender/Tender Notice and the procurement process to the extent of the procurement of Desktop Computers and/or suspend the operation of the terms, conditions and specifications impugned herein and direct the defendant Nos. 2 and 3 to consider the bid of the Plaintiff regardless of the same till the final disposal of the instant suit;*

3. The learned counsel for the plaintiff has contended that the plaintiff firm introduced "OneApple" branded computers in the local market in the year 2000, and it has also been working as an importer, stockiest, and authorized agent for various companies located in USA, Germany, Italy, China, Singapore, Korea and other Far Eastern countries and has also been involved in the business of supplying computer hardware through open competitive bidding to various government departments and private sector companies; that the requirement of Sindh Police for desktop computers (to the exclusion of the terms referred to hereinabove) can easily be met by the plaintiff, who offers technically efficient machines at competitive rates; that the illegal and unlawful inclusion of the condition of the brand being in the Gartner top ten (10) list is arbitrary and has obviously been included as a consequence of the abuse of the discretionary powers vested in the procuring agency; that the Gartner list or any product mentioned therein is neither endorsed or sanctioned nor authorized by either the Government of Pakistan or Government of Sindh for that matter any other agency is responsible or obligated to ensure that quality products are purchased, and; hence, this requirement is arbitrary, whimsical, unreasonable and discriminatory; that the requirements of the brand/product being on the IDC list and certified by and containing logo "ENERGY STAR" are also discriminatory and void ab initio; that these requirements are not only ultra vires the Sindh

Public Procurement Act, 2009 (*“Act of 2009”*) and are in gross violation of Rules 36 and 44 of the Sindh Public Procurement Rules, 2010 (*“Rules 2010”*) but also in violation of the fundamental rights of the plaintiff enshrined in Articles 9, 18 and 25 of the Constitution of Islamic Republic of Pakistan, 1973; that in the past, defendant No.2 had issued Tender Notice bearing No. 1NRKRY.No.2166/19, dated 27.04.1019, wherein it had required desktop computers and the plaintiff's bid was rejected in the bidding process on the grounds that the plaintiff's product was not of an international brand; therefore, the inclusion of the word 'equivalent' was redundant and otiose as far as the defendants are concerned; that the tender process in question will be a Single Stage- Two-Envelope under Rule 46 (2) of the Rule 2010, which rule is being abused by the procuring agencies, such as Sindh Police, as bidders who they wish to disqualify are disqualified on flimsy grounds after their technical envelopes are opened by depriving them of an opportunity to demonstrate their competitive rates. By adopting a Single Stage-Single Envelope tender process, the procuring agencies are forced to consider the competitive rates being offered by bidders, such as the plaintiff, compared to their foreign counterparts, thus making it more difficult for the bidders, like the plaintiff, to be discriminated against and disqualified; that the defendant No.2 has indulged in pre-bid rigging to discriminate against and eventually disqualify the plaintiff by incorporating unfair, uncompetitive, brand specific and discriminatory terms, conditions and specifications which are illegal, unlawful, malicious and ultra vires to the Act of 2009 and the Rules 2010; that unless this Court interferes, the taxpayer's money will be wasted on an expensive product as opposed to a cheaper one and that to a product which has been procured through a process which smacks of malice and mala fides, illegal, unlawful, void ab initio and ultra vires the procurement laws; that the plaintiff has made out a prima facie case in its favour for the grant of interim injunctive relief and balance of inconvenience lies in its favour and unless this Court grants such relief, the

plaintiff will suffer irreparable loss, which cannot be calculated in terms of money; hence, the plaintiff is entitled for the interim injunctive relief as prayed for. In support of his contentions, learned counsel has placed his reliance on the cases of *Rashid A. Khan v. West Pakistan Railway Board and another* (PLD 1973 Lahore 733), *Javed Hotel Pvt. Ltd. v. Capital Development Authority and another* (PLD 1994 Lahore 315), *Pak. Shaheen Containers Services v. Trustees of Port of Karachi and others* (PLD 2001 Karachi 30), *Premier Mercantile Services Pvt. Ltd. vs. Trustees of Port of Karachi and others* (2003 MLD 1064), *Hafiz Muhammad Aleem v. Lahore Development Authority and others* (2012 YLR 1426), *Alleged Corruption in Rental Power Plants Etc.* (2012 SCMR 773), *Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others* (2014 SCMR 676), *M/s Shaheen Construction Company through Proprietor v. Pakistan Defence Officers Housing Authority through Administrator and another* (2012 CLC 1434), *M/s. Al-Noor through Partner v. The Province of Sindh through Chief Secretary Sindh and 8 others* (PLD 2019 Sindh 400), *M/s Arif Builders and Developers v. Government of Pakistan and 4 others* (PLD 1997 Karachi 627), *Kitchen Cuisine (Pvt.) Ltd. v. Pakistan International Airlines Corporation and others* (PLD 2016 Lahore 412), *M/s Shams and Brothers v. Government of Pakistan and others* (2007 CLD 125), *Balochistan Construction Company v. Port Qasim Authority* (SBLR 2001 Karachi 661), *Raja Mujahid Muzaffar and others v. Federation of Pakistan and others* (2012 SCMR 1651), *Habibullah Energy Limited and another v. WAPDA and others* (PLD 2014 SC 47), *Khawaja Muhammad Asif v. Federation of Pakistan and others* (PLD 2014 SC 206), *Jamshoro Joint Venture Limited v. Muhammad Asif* (2014 SCMR 1858), *M/s Shaheed Construction Company v. Pakistan Defence Officers Housing Authority* (PLD 2012 Sindh 434), *M/s Malik Mushtaq Goods Transport Co. Lahore v. Federation of Pakistan and others* (PLD 2010 Lahore 289) and an unreported judgment of this Court in **Suit No. 62/2015 (Re. M/s. Getz Pharma Pvt. Ltd. v. Province of Sindh and others)**.

The gist of the above case-law is that it is the duty of the State which includes Department of the Government or a Statutory Corporation to act fairly

even while performing an administrative function and it must not act in an unfair or arbitrary manner or discriminate one of the parties who contests for the award of a contract; that it is duty of the Court to ensure that the Public Procurement Regulatory Authority Ordinance, 2020 read with the Public Procurement Rules 2004 are adhered to strictly to exhibit transparency and it is universally recognized principle that process for awarding contract must be made in transparent manner for the satisfaction of the people, who are the virtual owners of the national exchequer, which is being invested in projects; that the procuring agency should obtain “value for money” and that the procurement process is economical and efficient, consistently with the requirement that the agency acts in a fair and transparent manner; that the public authority cannot mess up with public funds as it is not permitted to give largess in its arbitrary discretion or at its sweet will or in its such chooses on its absolute discretion; that the terms and conditions imposed for awarding of contract must have nexus/relation to the nature of contract intended to be awarded and its objective;

4. On the other learned, learned A.A.G. has maintained that the Tender Notice was published in different leading Newspapers i.e. Daily Jang dated 25.09.2020, Daily Express Tribune dated 21-09-2020, Daily Koshish, Daily Awami Forum and Daily Pahenji Akhbar, dated 23-09-2020; however, due to mistake in item No.1 “Computer Laptops” was publish in Daily Jang instead of “Computer Complete Set” and such corrigendum was issued in daily Jang, dated 06-10-2020; that the Sindh Police adopted an open competitive bidding, Single Stage-Two Envelop procedure, as defined under Clause 46(2) of the Rule 2010; that it is an open bidding competition wherein no requirements or specifications contrary to the provisions of Rules 2010 have been added purposely or maliciously in the bidding documents by the defendant No.3; that only International Brands are not required by the procuring agency i.e. Sindh Police and it has clearly been mentioned in the departmental specifications as

“International Branded Desktop Computer e.g. HP/Dell/Lenovo/Acer or equivalent or better”; and if the plaintiff thinks that its brand is equivalent or better, there is no question of stopping it from participating in the tendering process, which is in accordance with Rule 13(1) (ibid); that Environmental Standards (eco-labels) Energy Star is the essential requirement for Environment protection & energy saving while the Gartner and IDC reports are mentioned in specification to ensure procurement of quality wise best product against the Government funds and the reports of Gartner and IDC are recognized worldwide; that Sindh Police has faced such issues where new equipment, with one year warranty or more, malfunctioned multiple times within warranty period, due to which many operations and tasks were put on hold for maintenance; that the Sindh Police, due to its importance for the social wellbeing of the public, has the right to choose the best equipment for high performance as it is necessary for them to be up-to-date with technology and Gartner and IDC reports, due to their success rate and exposure, have suggested the companies which have a minimum malfunctions within the warranty period; that the afore-said requirements / specifications have not been incorporated purposely to disqualify the plaintiff as there are many firms in the country who can fulfill above specifications; that eleven firms, including plaintiff, have taken part in the initial bidding process by purchasing bidding documents but no one has raised any objection or lodged any complaint against the said specifications and method of procurement, except the plaintiff; that the specifications are common and do not include references to brand names, model numbers, catalogue number or similar classifications; that Sindh Police has implemented more than seventeen automation modules at police station level throughout Sindh and more than 600 police stations will be provided this hardware with warranty support, and due to such justified reasons the funds were demanded from Government of Sindh for the procurement of complete computer sets of international brand with principle warranty support; that Sindh

Police has adopted the single stage-two envelope procedure in the line of Rules 2010, as amended in 2019, under which the procuring agency could evaluate the products of technical nature in a manner prescribed in advance without reference to the price and rejects any proposal which does not conform to the specified requirements; that Single Stage-Two Envelope process has been adopted as the procurement is not for few units; it is for 1000 units of complete computer sets; therefore, solid technical and financial evaluation is must to execute this volume of project; that Sindh Police has practiced single stage-two envelope procedure since many years and hundreds of bidders have taken part in procurement process, yet neither SPPRA nor any bidder has ever raised any objection concerning the single stage-two envelope procedure, which is the best way of procurement; that the computers are being procured purely on merits as per Rules 2010 and no question of pre-bid rigging, discrimination, unfairness and disqualifying the plaintiff arises; that even the plaintiff has not participated in tender process as it has not dropped/deposited tender documents duly filled; that the plaintiff has failed to make out any prima facie case in its favour for the grant of interim injunctive relief, and it is in fact defendant No. 3 and Sindh Police Department who shall suffer irreparable loss in case the relief prayed for is granted to plaintiff as the entire process for procurement of articles under Tender Notice shall become redundant and as such the balance of inconvenience at this stage is in favour of defendant No.3 and Sindh Police Department; that the C.M.A. under reference being baseless and in violation of Rules-31 (ibid) is liable to be dismissed.

5. I have heard learned counsel for the parties and perused the material available on record with their assistance.

6. In order to appreciate to contentions of learned counsel for the parties, I deem it appropriate to reproduce the relevant provisions of *Rules 2010*, as under:

13. Specifications. - (1) Specifications shall allow the widest possible competition and shall not favour any single contractor or supplier nor put others at a disadvantage. Specifications shall be generic and shall not include references to brand names, model numbers, catalogue numbers or similar classifications. However, if the procuring agency is convinced that the use of a reference to a brand name or a catalogue number is essential to complete an otherwise incomplete specification, such use or reference shall be qualified with the words "or equivalent".

(2) Procurement of used or reconditioned equipment, plant or machinery is not permissible in any case whatsoever.

23. Clarification and Modification of Bidding Documents. - (1) An interested bidder, who has obtained bidding documents, may request for clarification of contents of the bidding document in writing, and procuring agency shall respond to such queries in writing within three calendar days, provided they are received at least five calendar days prior to the date of opening of bid;

Provided that any clarification in response to a query by any bidder shall be communicated to all parties who have obtained bidding documents;

(2) Procuring Agency shall re-issue the Notice Inviting Tenders, in accordance with Rules 17 and 18, if it is convinced that there is a material infirmity or ambiguity in the bidding documents, which cannot be addressed without modifying the contents of bidding documents.

31. Mechanism for Redressal of Grievances. - (1) The procuring agency shall constitute a committee for complaint redressal comprising odd number of persons, with appropriate powers and authorizations, to address the complaints of bidders that may occur during the procurement proceedings.

(2) The committee shall be headed by head of the procuring agency or an official of the procuring agency, at least one rank senior to the head of the procurement committee and shall include the following;

(a) District Accounts Officer, or his representative, in case of the local governments or provincial line departments at district level, or a representative of the Accountant General, Sindh in case of Government departments at the provincial level;

(b) an independent professional from the relevant field concerning the procurement process in question, to be nominated by the head of procuring agency;

(3) Any bidder being aggrieved by any act or decision of the procuring agency after the issuance of notice inviting tender may lodge a written complaint.

(4) The complaint redressal committee upon receiving a complaint from an aggrieved bidder may, if satisfied;

(a) prohibit the procurement committee from acting or deciding in a manner, inconsistent with these rules and regulations;

- (b) *annul in whole or in part, any unauthorized act or decision of the procurement committee; and*
- (bb) *recommend to the Head of Department that the case be declared mis-procurement if material violation of Act, Rules, Regulations, orders, instructions or other law relating to public procurement, has been establish;*
- (c) *reverse any decision of the procurement committee or substitute its own decision for such a decision:*

Provided that the complaint redressal committee shall not make any decision to award the contract.

(5) *The committee shall announce its decision within seven days. The decision shall be intimated to the bidder and the Authority within three working days by procuring agency. If the committee fails to arrive at the decision within seven days, the complaint shall stand transferred to the Review Committee which shall dispose of the complaint in accordance with the procedure laid down in rule 32, if the aggrieved bidder files the review appeal within ten (10) of such transfer.*

(6) *The Procuring Agency shall award the contract after the decision of the complaint redressal committee;*

(7) *Mere fact of lodging of a complaint shall not warrant suspension of the procurement proceedings;*

Provided that in case of failure of the Complaint Redressal Commission to decide the complaint; the procuring agency shall not award the contract, until the expiry of appeal period or the final adjudication by the Review Committee.

36. Reservations and Preference. - (1) *Procuring agencies shall allow all interested bidders to participate in procuring procedure without regard to nationality, except in cases in which any procuring agency decides to limit such participation to national bidders only or prohibit participation of bidders of some nationalities, in accordance with these rules or policy of the Federal Government;*

(2) *Procuring agencies shall allow for a preference to domestic or national suppliers, contractors or consultants in accordance with the policies of the Government. The magnitude of price preference to be accorded shall be clearly mentioned in the bidding documents under the bid evaluation criteria.*

44. Discriminatory and difficult conditions. - *Save as otherwise provided, no procuring agency shall introduce any condition which discriminates among bidders. In ascertaining the Sindh Public Procurement discriminatory nature of any condition reference shall be made to the ordinary practices of that trade, manufacturing, construction business or service to which that particular procurement is related.*

46. Procedures of open competitive bidding. - Save as otherwise provided in these rules, the following procedures shall be permissible for open competitive bidding;

(1)

(2) *Single stage – Two Envelope Procedure-*

- (a) *bid shall comprise a single package containing two separate envelopes. Each envelope shall contain separately the financial proposal and the technical proposal;*
- (b) *envelopes shall be marked as “FINANCIAL PROPOSAL” and “TECHNICAL PROPOSAL” in bold and legible letters to avoid confusion;*
- (c) *initially, only the envelope marked “TECHNICAL PROPOSAL” shall be opened;*
- (d) *envelope marked as “FINANCIAL PROPOSAL” shall be retained in the custody of the procuring agency without being opened;*
- (e) *procuring agency shall evaluate the technical proposal in a manner prescribed in advance, without reference to the price and reject any proposal which does not conform to the specified requirements;*
- (f) *no amendments in the technical proposal shall be permitted during the technical evaluation;*
- (g) *financial proposals of technically qualified bids shall be opened publicly at a time, date and venue announced and communicated to the bidders in advance;*
- (h) *financial proposal of bids found technically non-responsive shall be returned un-opened to the respective bidders; and*
- (i) *[Not printed in original Notification.]*
- (j) *bid found to be the lowest evaluated or best evaluated bid shall be accepted.*

(3)

(4)

(Emphasis Supplied)

7. In terms of Rule 13 of the Rules 2010, the tender specifications should allow the widest possible competition and should not favour any single contractor or supplier nor put others at a disadvantage. Specifications should be generic and should not include references to brand names, model numbers,

catalogue numbers or similar classifications. However, if the procuring agency is convinced that the use of a reference to a brand name or a catalogue number is essential to complete an otherwise incomplete specification, such use or reference should be qualified with the words “or equivalent”. Rule 23 offers an opportunity to an interested bidder to seek clarification of contents of the bidding document in writing and in case procuring agency is convinced that there is any material infirmity or ambiguity in the bidding documents, it shall re-issue the Notice Inviting Tenders, in accordance with Rules 17 and 18. Rule 31 provides mechanism for the redressal of grievances of the bidders that may occur during the procurement proceedings, through a complaint redressal committee, constituted by the procuring agency whereby any bidder being aggrieved by any act or decision of the procuring agency after the issuance of notice inviting tender may lodge a written complaint. Under Rule 31(4), the complaint redressal committee is empowered to prohibit the procurement committee from acting or deciding in a manner, inconsistent with these rules and regulations; annul in whole or in part, any unauthorized act or decision of the procurement committee; recommend to the Head of Department that the case be declared mis-procurement if material violation of the Act, Rules, Regulations, orders, instructions or other law relating to public procurement, has been established and reverse any decision of the procurement committee or substitute its own decision for such a decision. Rule 36 ensures all interested bidders to participate in procuring procedure without regard to nationality, except in cases in which any procuring agency decides to limit such participation to national bidders only or prohibit participation of bidders of some nationalities, in accordance with these rules or policy of the Federal Government. Rule 36(2) makes it obligatory upon procuring agencies to give preference to domestic or national suppliers, contractors or consultants in accordance with the policies of the Government. Under Rule 44, the procuring agency, save as otherwise provided, has been

restrained from introducing any condition which discriminates among bidders. Rule 46 provides the procedure for open competitive bidding. Rule 46(2) stipulates Single Stage – Two Envelope Procedure, whereunder bid should comprise a single package containing two separate envelopes. Each envelope should contain separately the financial proposal and the technical proposal. Initially, only the technical proposal is opened. Procuring agency evaluates the technical proposal in a manner prescribed in advance, without reference to the price and rejects any proposal which does not conform to the specified requirements. The financial proposals of technically qualified bids are required to be opened publicly at a time, date and venue announced and communicated to the bidders in advance and the financial proposal of bids found technically non-responsive are returned un-opened to the respective bidders and; thereby the bid found to be the lowest evaluated or best evaluated is accepted.

8. In the instant case, it appears that the defendant No.3 invited tender through various newspapers for the procurement of four items including 1000 units of computer complete sets by adding three specifications that the computer complete sets (i) are to be of an "an international brand" or 'equivalent and/or better', (ii) to have Environmental Standards (eco labels): ENERGY STAR and; (iii) to be present in the Gartner and IDC report in the list of top 10 computer brands. It may be relevant to mention here that in one newspaper i.e. Daily Jang, dated 25.09.2020, "computer laptop" had been published mistakenly at the place of "computer complete set"; however, such corrigendum was published in the said newspaper on 06.10.2020. The plaintiff after purchasing the bidding documents approached to the defendant No. 3 through letter, dated 28.09.2020, seeking clarifications with regard to said specifications by terming the same discriminating, difficult, mala fide and illegal with a request to revise the same and adopt Single Stage-One Envelop procedure for procurement. The defendant No.3, vide letter dated 01.10.2020, replied the queries and regretted the request

of the plaintiff. The plaintiff; thereafter, did not make any complaint / grievance to procuring agency in terms of Rule 31 of Rules 2010 and filed the present suit directly before this Court seeking declaration and striking down aforesaid specifications of the Tender Notice and for adoption of Single Stage-One Envelope procedure on the ground that the said three specifications have been incorporated in the tender with malicious intent and only to cause prejudice to the plaintiff and to disqualify it from participating in the tendering process for 1000 units of computer complete sets in order to award the tender to favorite suppliers at the cost and expense of the taxpayers.

9. It may be observed that the specification is the most important document within the tender. It provides suppliers with description of the services or quality of goods required, to allow them to propose the most appropriate solution or products at the best price. Considering the scope of work, procuring agency can be said to be the best authority to decide the technical specifications, quality and performance of the goods against the value of Government funds and the bidder cannot be permitted to say that the specifications must be such which suits him. It has been observed in the case of *Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others* {(2000) 5 SCC 287} that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It has further been observed that it is not for the Courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitation. It has further been observed that the terms of the invitation to tender are not open to judicial scrutiny being in the realm of contract. It has further been observed that the Government must have a free hand in setting the terms of the tender; it must have reasonable play in its joints as a necessary concomitant for an administrative body in an

administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide and actuate by bias.

10. So far the subject tender is concerned, it appears *prima facie* that the specifications thereof are in terms of Rule 13 of the Rules 2010, as the same allow the widest possible competition, which do not favour any single bidder or supplier nor put others at a disadvantage. The specifications though include brand names i.e. *HP/Dell/Lenovo/Acer* but it has been used to complete a specification, which does qualify with the words “or equivalent”. It is an admitted position that the plaintiff availed the opportunity, as provided under Rule 23 (*ibid*), to seek clarification of the tender specifications and adoption of Single Stage-Two Envelop procedure vide letter dated 28.09.2020; however, the defendant No.3 being convinced that there was no material infirmity or ambiguity in the bidding documents regretted to re-issue the N.I.T. It is also an admitted position that the plaintiff; thereafter, being aggrieved by the act and decision of the procuring agency, did not lodge any complaint before the complaint redressal committee as provided under Rule 31 (*ibid*). So far compliance of Rule 36(2) (*ibid*) is concerned, suffice to say it that the obligation upon procuring agencies to give preference to domestic or national suppliers is subject to their qualification to meet with terms and conditions of the tender. The plaintiff admittedly does not qualify the specifications of tender; hence, no question of discrimination among bidders as provided under Rule 44 (*ibid*) arises. So far adopting Single Stage-Two Envelope procedure by the procuring agency is concurred, it may be observed that under Rule 46 (*ibid*) **four different procedures are permissible for open competitive bidding i.e. (i) Single Stage-One Envelope (ii) Single Stage-Two Envelope (iii) Two Stage Bidding and (iv) Two Stage-Two Envelope Bidding, out of them Single Stage-Two Envelope procedure is permissible under Rule 46 (2). It is the prerogative of the procuring**

agency to adopt or practice any of the four procedures which it considers the best procedure for procurement.

11. It may be relevant to observe here that injunction, by its nature, is a preventive remedy for the purpose of preserving the status quo of the matter of suit pending the determination of suit. By use of words “status quo” all that can be implied is that same status in regard to title or possession of immovable property as existed on date of filing of suit is to be maintained. For issuance or refusal of interim injunction what the Court has to see is that a good prima facie arguable case is made out in favour of the plaintiff and if the plaintiff succeeds in establishing a good prima facie arguable case then other two ingredients i.e. irreparable loss and balance of convenience, would be looked into. The Court has to make only a tentative assessment of plaintiff’s case for enabling itself to see whether above mentioned three prerequisites for grant of injunction exist in favour of plaintiff or not. While dilating upon the merits of a case on these parameters, the Courts may tentatively examine the pleadings, affidavits, counter affidavits, rejoinder, if any, and the documents annexed thereto.

12. The term “prima facie case” is not specifically defined in the Code of Civil Procedure, 1908. The judge-made-law or the consensus is that in order to satisfy about the existence of prima facie case, the pleadings must contain facts constituting the existence of right of the people and its infringement at the hands of the opposite party. For, unless the plaintiff shows existence of some of his right and its infringement, it shall not be deemed that he has any prima facie case. The existence of a prima facie case is to be judged or made out on the basis of material/evidence on record at the time of hearing of injunction application; such evidence or material should be of the nature that by considering the same Court should or ought to be of the view that the plaintiff applying for injunction is in all probabilities likely to succeed in the suit by having a decision in his

favour. Where no prima facie case is made out by the plaintiff, no temporary injunction can be issued in his favour and, likewise, where prima facie case could not be established without recording evidence, the Court would refrain from granting such injunction.

13. Irreparable loss means simply such loss, which is incapable of being calculated on the yardstick of money. For grant of interim injunction the existence of a prima facie case is not by itself sufficient, the plaintiff should further show that irreparable loss will occur to him, if the injunction is not granted and that there is no other remedy open to him by which he can protect himself from the consequences of the apprehended injury.

14. Balance of Convenience as a requisite for grant of interim injunction in favour of plaintiff means if an injunction is not granted and the suit is ultimately decreed in favour of the plaintiff the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendant if an injunction is granted but the suit is ultimately dismissed. Although it is called “balance of convenience”, it is in fact the “balance of inconvenience”, and it is for the plaintiff to show that the inconvenience caused to him would be greater than that which may be caused to the defendant. The Court whilst granting temporary injunction weighs one party’s needs against other party’s needs and determine where the balance of convenience lies.

15. So far the case in hand is concerned, I am of the tentative view that there is nothing on record to show that the subject tender and bidding documents do not qualify in terms of procurement laws and rules. The plaintiff has failed to make out prima facie good arguable case for the grant of interim injunctive relief as prayed for that the specifications of Tender Notice and procedure of Single Stage-Two Envelop are arbitrary, discriminatory, mala fide and irrational in any manner whatsoever or intended to favour anyone. On the contrary, it appears that

the plaintiff seeks to rewrite and re-determine certain specifications of tender, so as to tailor-make the said specifications only with a view to suit the plaintiff's own convenience. The balance of convenience also does not lie in favour of the plaintiff but in favour of defendant No.3 and procuring agency, who would suffer more inconveniently by granting injunction than the plaintiff by withholding it. The plaintiff has not participated in the tender proceedings by filling and dropping tender documents; unless its position is so, it cannot claim the benefit nor can it hope that its offer would be accepted, it cannot be said that it will suffer the loss of some benefit or advantage. Likewise, the defendant No.3 and procuring agency shall suffer irreparable loss rather than the plaintiff as the entire proceedings of procurement shall become redundant in case the injunction is granted in favour of the plaintiff. In this regard, it may be observed that any attempt by unsuccessful bidder/tenderer with imaginary, flimsy and made-up grievances and business rivalry, to make mountains out of molehills of some non-suited specifications, and persuade court to interfere by exercising its powers, should be resisted. Such resistance either interim or final may hold up public works for years and may increase the project cost manifold.

16. For the foregoing facts and reasons, the instant application is dismissed being devoid of merit, with no order as to cost.

17. Needless to mention here that the observations made herein above are tentative in nature and will not influence the case of the plaintiff on merit.

18. Above are the reasons of my short order dated 01.03.2021, whereby instant application was dismissed.

JUDGE