IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 569 of 2006.

Judgement reserved on : 20.9.2006.

Date of decision: 30.10.2006

M/s M.K.Enterprises through its sole proprietor Mukesh Sharma & anr. ....Petitioners.

VERSUS

Union of India & ors. …Respondents.

Coram

The Hon'ble Mr. Justice V.K.Gupta, Chief Justice.

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?yes

For the petitioners: **Mr. Balram Gupta, Senior Advocate with Mr. Rakesh Sharma, Advocate.**

For the respondents: **Mr. Sandeep Sharma, Assistant Solicitor General of India, for respondents No. 1 to 3 and 5.**

Mr. R.L.Sood, Senior Advocate with Mr. Vikas Rajput, Advocate, for respondent No.4.

Surjit Singh, Judge.

The decision of the this writ petition depends upon the answering of the following questions:-

1. Is it permissible to a department or an instrumentality of the State which invites tenders for any work / job to award the work/ job by following some guidelines/ rules/ regulations assumed to be applicable to that department/ instrumentality,

---

Whether reporters of Local Papers may be allowed to see the Judgment? *Yes*

which in fact are not, and to which there is no reference, even implicit, in the notice inviting tenders?

2. Whether a provision in the Regulations for revision of the rates quoted in the tender by means of sealed or unsealed cover or in the form of an open letter placed in the tender box or if received by post deposited in the tender box by the Administrative Officer/ Office Superintendent, is unreasonable, arbitrary, unfair and hence violative of Article 14 of the Constitution of India?

2. First the relevant facts may be noticed. Chief Engineer, Project Deepak, Minto Court, Shimla, respondent No.2 herein, invited tenders through notice for handling and conveyance of Bitumen from ex-refinery Panipat to 507 SS& TC (GREF) at Hallomajra (Chandigarh) and various locations on Hindustan-Tibet and Dhami-Kingal Road in Himachal Pradesh under 38 BRTF of Project Deepak. The estimated cost of the work was rupees fifteen lacs. Tender documents could be had by the approved applicants on or after 16th May, 2006. The tenders were to be submitted up to 15 hours on 25th May, 2006. The same were to be opened immediately after the time stipulated for the submission of the documents, on 25th May, 2006. The writ petitioner and respondent No. 4 were among those who submitted the tenders for the work. The petitioner quoted the lowest rate, i.e. 277% above the rates given in Schedule-A, while the rate quoted by the respondent No.4 was 279% above the said schedule rate. In spite of the rate quoted by the petitioner being

lowest, contract was awarded to respondent No. 4, because he had quoted another rate on a piece of paper, which was 183% above the rate mentioned in Schedule-A. The grievance of the writ petitioner is that respondent No. 4 could not have been awarded the contract on the basis of the rate quoted by him on a separate sheet of paper, which was not part of the sealed tender submitted by him. The action of respondents No. 1 to 3 in awarding the contract to respondent No. 4 on the basis of the rate quoted on a separate sheet of paper is alleged to be illegal, discriminatory, arbitrary, contrary to the terms and conditions of the notice inviting tenders and also violative of Articles 14, 19 (i) (g) and 299 of the Constitution of India. It is alleged that the rate quoted by the writ petitioner was the lowest compared to the rates quoted by other tenderers in the tender forms and therefore, the contract ought to have been awarded to him. Prayer has been made for issuance of a writ of certiorari, quashing the letter dated 20.6.2006 (Annexure P-1) whereby contract for the job has been awarded to respondent No. 4. Prayer has also been made for issuing a writ of mandamus to respondent No.2 to award the contract to the writ petitioner.

3. Respondents No. 1 to 3 in their written reply have taken the plea that there is a provision, i.e. Rule 2.7 in the Appendix-A to Engineer-in- Chief's Branch letter No. 33416/ E8 dated 27.10.1980 pertaining to receiving and opening of tenders, as contained in MES Precis Vol. II, per which if a revised offer of a tenderer in a sealed or unsealed cover or in the form of an open letter has been found placed in the tender box, or if such an offer having been received by

post has been found deposited in the tender box by the Administrative Officer/ Office Superintendent, the revised offer, in that case shall not be considered as “late” or “non bonafide” and the tender opening officer shall take the revised offer into consideration while scheduling the tenders and shall make a mention of the revised offer in the comparative statement of tenders. They have alleged that the petitioner was fully aware of this provision in the MES Precis Vol.II. It is alleged that the MES Rules and Regulations pertaining to tenders and allotment of works are applicable to respondent No. 2 and that in view of the provision of the aforesaid Rule 2.7, there is nothing wrong in the award of the contract to respondent No. 4 on account of the revised rate quoted by him in the form of a letter which was found in the tender box at the time when the box was opened and tenders etc. were collected therefrom, being the lowest.

4. Respondent No. 4 in his reply has alleged that he submitted the revised rate in the form of a letter that had been deposited in the tender box in terms of Rule 2.7 of MES Precis, Vol. II and the same was retrieved from that box alongwith the tenders to the knowledge of the petitioner and the latter raised no objection at the time when the comparative chart was prepared and the revised rate quoted by him in the aforesaid letter was entered in the comparative chart. He has alleged that the petitioner was aware of the provision of Rule 2.7 aforesaid.

5. During the course of the hearing at admission stage when our attention was drawn to Rule 2.7 of MES Precis, Vol. II, we felt that the legality of the rule needed to be tested on the touchstone

of Article 14 of the Constitution of India and since the pronouncement on this aspect was going to have far reaching effect on other tenders as well as contracts, we ordered the impleadment of Engineer-in-Chief, Military Engineering Service, as respondent No.5, because the aforesaid Rule 2.7, pertains to his Organisation.

6. Respondent No.5 has put in appearance through the Assistant Solicitor General of India and filed reply, wherein it is stated that a tenderer is free to revise his offer after the deposit/ placement of the tender in the tender box and since the tender box is locked and the tender cannot be taken out by a tenderer for rewriting the revised rate, provision has been made vide Rule 2.7 for submission of the revised rate by a separate letter. It has further been stated that sometimes a tenderer has to revise his rate offer by compulsion, on account of some mistake in calculation, which may come to his notice after the tender is submitted or due to fluctuations in the market rates of material, labour, fuel and other inputs and that Rule 2.7 gives as opportunity to the tenderer to rectify any bonafide mistake. It has also been stated that other departments also permit the revision of lowering the rates after the submission of the tenders but before the same are opened and that this is authorized vide para 18.4.2.3 of Section 18 of CPWD Works Manual. It is pleaded that the provision is similar to Rule 2.7 of MES Precis, Vol. II, in spirit and that the objective of the aforesaid para in CPWD Works Manual and Rule 2.7 supra is common, viz. to make the bidding process more competitive and beneficial to the tender inviting body.

7. Admittedly, neither in the notice inviting tender nor in the conditions of tender there was any clause that if a revised offer of a tenderer in a sealed cover or unsealed cover or in the form of an open letter had been found placed in the tender box or any such offer having been received by post was found deposited in the tender box by the Administrative Officer/ Office Superintendent, the same (the revised offer) shall not be considered late or non- bonafide and the Tender Opening Officer shall take into consideration the revised offer while rescheduling the tenders and shall also make a mention of such revised offer in the comparative statement of tenders. In the absence of such a condition in the notice inviting tenders or the conditions of the tender, the respondents could not have lawfully taken into account such a revised offer even if found in the tender box at the time of opening of such tenders. They could have taken such revised offer into account had the Rules/ Bye-laws or the Regulations governing the subject and applicable to their Organization contained such a clause.

8. Respondents No. 1 and 2 have taken the plea that MES Rules pertaining to the invitation of tenders and award of contracts are applicable to respondent No.2. In support of this plea, reliance is placed upon para-3 of the preface to the Border Road Organization, Regulations, which is reproduced below for ready reference:-

> "The aim of this book is to incorporate for the guidance of officers and subordinates of the General Reserve Engineer Force, the orders which have been issued so far by the Border Roads Development Board. This book

> is, however, by no means to be viewed as an encyclopedia of all rules because, as explained above, many of the rules and orders applicable to Defence Civilians and M.E.S. Works also apply. It is not necessary to reproduce them in this publication. The rules contained in this volume are, therefore, supplementary to those of general application like General Financial Rules, Civil Service Regulations, Fundamental Rules, MES Regulations, Treasury Rules, etc."

9. Preface to a compilation of instructions, rules, regulations or any other book is not part of the compilation/ the book and therefore, on the strength of what is stated in para-3 of the Preface to the Border Roads Organization, Rules, as reproduced hereinabove, it cannot be said that the MES Rules are applicable to Border Roads Organization. Secondly a careful reading of the preface itself shows that not all, but <u>many</u> MES Rules are applicable and therefore, even if it be assumed on the basis of para-3 of the preface that some of the MES Rules are applicable to the Border Roads Organization, it cannot be held that Rule 2.7, upon which reliance is placed is applicable. Above all, the aforesaid Rule 2.7 suffers from the vice of arbitrariness, unfairness and unreasonableness, as is being discussed and held hereinafter. Therefore, the Rule, even if applicable, could not have been lawfully pressed into service.

10. It is apposite to notice Rule 2.7 of MES Precis,Vol. II, the validity of which is being examined on the touchstone of Article 14 of the Constitution of India. The same reads as follows:-

> "If a revised offer of a tenderer, in a sealed or unsealed cover or in the form of an open letter has been found placed in the tender box or if such an offer having been received by post, has been found deposited in the tender box by the Administrative Officer/ Office Supdt., the revised offer, in that case shall NOT be considered as `LATE' or `NON BONAFIDE' and the Tender Opening Officer shall take the revised offer into consideration while scheduling the tenders and shall make a mention of the revised offer in the comparative statement of tenders."

11. Normally the tenders are invited in sealed covers and in any case in properly closed covers. There must be some purpose behind it. We need not venture to speculate the purpose. The tenders are then opened in the presence of the parties or their authorized agents on the date and at the time and place already notified to the tenderers. Generally the date, time and place of opening the tenders are mentioned in the notice inviting the tenders itself. Now when the tenders are required to be submitted in sealed covers or at-least in properly closed covers, a revised offer in the form of an open letter placed in the tender box or sent by post and then deposited in the tender box would defeat the purpose behind the submission of tenders in sealed or at-least properly closed covers. Making of revised offer, by means of an open letter, particularly by post, has a large scope of manipulation. Suppose a revised offer is made in the form of an open letter (it can be even a post-card) by post, it will be received in the office of the Tender

Inviting Authority, and the person who receives it, will have the opportunity to read it before depositing into the tender box. If such a person happens to be unscrupulous, he may inform some other tenderer in whom he may be interested about such revised offer to unduly favour him. This is just one illustration. There may be many more ways and means of manipulations, if offers are permitted to be revised in the manner Rule 2.7 (supra), provides for. Moreover, when the tenders are invited on a prescribed form, the making of revised offers on plain papers should not be permissible. In **Tata Cellular** vs. **Union of India** [AIR 1996 SC 11], a three Judges Bench has spelt out broad requisites of a valid tender. One of these requisites is that the tender must be made in the proper form. Now when a tender is invited on a prescribed form, acceptance of revised offer on a plain paper would be contrary to the aforesaid judicial pronouncement.

12. It is, by now, well settled that the State actions even in contractual sphere should not be arbitrary or irrational and the guidelines, rules, policy, procedure and principles etc. formulated for taking actions in such sphere should also leave no scope for arbitrariness, unreasonableness or unfairness. Reference in this behalf may be made to **Union of India and ors** vs. **Hindustan Development Corporation and ors and six other matters** [AIR 1994 SC 988] and **Dutta Associates Pvt. Ltd.** vs. **Indo Merchantiles Pvt. Ltd. and others** [1997 (1) SCC 53].

13. Since Rule 2.7 of MES Precis,Vol. II has apparent potential of manipulation and is thus unreasonable and unfair, the

same is declared to be ultra-vires of Article 14 of the Constitution of India and is accordingly quashed and set-aside with all the consequences.

14. Relief claimed in the petition cannot be granted as the work has already been executed. It was submitted during the course of hearing that the work assigned to respondent No.4 has been completed. Learned Assistant Solicitor General made a statement that no more work will be allotted to respondent No.4, pursuant to the acceptance of his tender/ offer, in question, and that as and when any new work is intended to be allotted, fresh tenders will be invited.

October 30 ,2006. **(Surjit Singh)**
(Hem) **Judge.**

Per V.K.Gupta, C.J.(Concurring)

I have had the advantage of reading a very well reasoned and elaborate judgment of my learned brother Surjit Singh, J. and even though I fully agree with the opinion rendered as well as the conclusion arrived at by my learned brother, looking to the importance of the points involved for consideration in this case, I thought I would add a few words of mine.

As the facts of the case clearly have indicated, despite the petitioner being the lowest tenderer as per the rates quoted by

various tenderer, including respondent No.4, the petitioner was denied the awarding of the contract on account of the fact that respondent No.4 had offered to execute the contract work at a rate lower than that offered by the petitioner and this was done through the mechanism, not of the said lower rate having being quoted in the tender documents as originally submitted, but in a separate, loose note found in the tender box at the time the tenders were opened. Actually, respondent No.4 in the tender as originally submitted had quoted a rate higher than the petitioner but his above referred lower rate came to be quoted in a separate, loose note which he had deposited in the tender box much after the original tender had been submitted by him. This novel procedure was permitted, adopted, and followed by respondents No. 1 to 3 only because of their stated reliance upon a rule which they say was applicable with respect to the tendering process undertaken by Border Roads Organisation (BRO). This rule actually has been admitted not to have been issued by BRO itself, but is a rule finding a place in the so called Statute Book of Military Engineer Services. This rule has been repeatedly referred to as Rule 2.7 in the Replies filed

by the respondents in the writ petition. For ready reference, we reproduce hereinbelow Rule 2.7 which reads thus:-

> **"If a revised offer of a tenderer, in a sealed or unsealed cover or in the form of an open letter has been found placed in the tender box or if such an offer having been received by post, has been found deposited in the tender box by the Administrative Officer/ Office Superintendent, the revised offer, in that case shall NOT be considered as 'LATE' or 'NON BONAFIDE' and the Tender Opening Officer shall take the revised offer into consideration while scheduling the tenders and shall make a mention of the revised offer in the comparative statement of tenders."**

This Rule 2.7 was inserted vide letter No. 33416/ E8 dated 27th October, 1980 issued by the Engineer-in-Chief, Military Engineer Services. The background to the insertion of this Rule is that the procedure for receiving and opening of tenders in Military Engineer Services (MES), contained in para 422 of Defence Services Regulations (DSR) provided, inter-alia, that the tenders would be addressed to the Accepting Officer and those would be deposited in locked boxes . The tenders which are received in time

would be opened at the time stated in the Notice of Tender etc. etc. Clauses (a), (b), (c), (d) and (e) of para 422 of DSR have been reproduced in para 1 of the reply affidavit filed on behalf of respondent No.5 in this Court on 17th August, 2006. The Engineer-in-Chief, MES, with a view to remove any uncertainty arising out of the use of the words "of whatever description" supplemented the process by issuing a detailed procedure for receiving and opening of tenders vide his above referred letter No. 33416/ E8 dated 27th October, 1980. Para 2 of the aforesaid affidavit filed on behalf of respondent No. 5 being relevant for this purpose is reproduced hereinbelow. It reads thus:-

> " That it can be safely inferred from the sub para (d) of the para 422 of MES Regulations that all tenders of whatever description will be opened immediately after the time stipulated in the tender documents for their submission. But, to remove any uncertainty of the words ' of whatever description", Engineer-in-Chief of MES has supplemented the process by issuing a detailed procedure for receiving and opening of tenders vide letter No. 33416/E8 dt. 27.10.1980 which is enclosed herewith as Annexure R-3/M. It is

> **humbly submitted that vide para 16 of the Defence Services (Regulation for Military Engineer Service), Engineer-in-Chief is authorized to issue supplementary rules and instructions and as such, has issued the instructions dt. 27.2.1980. Copy of para 16 is enclosed as Annexure R-4/M."**

The impugned Rule 2.7 was therefore issued by the Engineer-in-Chief heading the Military Engineer Services because it is claimed that Engineer-in-Chief is authorized to issue the supplementary Rules and instructions.

MES is a separate, distinct Organization headed by its Engineer-in-Chief. It functions under the Ministry of Defence.

Border Road Organization (BRO) is altogether a different, separate and distinctive Organization constitute by, and functioning under and being a part of the Ministry of Road Transport and Highways. It is not either a part or a subsidiary of the MES or the Ministry of Defence. This apart, BRO had issued its own Regulations, called the Border Road Regulations (BR Regulations). At pages 110 and 111 of BR Regulations a procedure with respect to invitation and acceptance of tenders has been prescribed in

details. This procedure is contained in Clauses 688, 689, 690, 691 and 692, amongst various other Clauses on the subject. Clause 692 being relevant for our purposes is reproduced hereunder. It reads thus:-

> **"692. The procedure for receiving and opening tenders will be as follows:-**
>
> **(a) Tenders will be addressed to the Accepting Officer as notified in the Notice of Tender.**
>
> **(b) Tenders will be deposited in locked boxes, the key of which will be held either personally by the Accepting Officer or by an officer specially nominated by him. Tenders received by post will also be deposited in the box.**
>
> **(c) All Tenders received in time will as far as possible, be opened at the time stated in the Notice of Tender by two officers appointed by the Accepting Officer and scheduled by them in the Comparative Statement of Tenders (IAFW 1810) which will be signed by both the officers. They will also initial each of the tenders at suitable places for identification of the tenders received in time.**
>
> **(d) All tenders, of whatever description, will be opened immediately after the time stipulated in the tender documents for their submission in the presence of such of the tenderers as may wish to be present. The**

> **rates or percentages quoted will be read out in their presence. They will be informed that the tenders are subject to check and examination in accordance with departmental practice.**
>
> **(e) No tenders received after expiry of the appointed time will be considered for acceptance. Such tenders may, however, be opened to ascertain the desirability of reinviting tenders."**

The respondents are relying upon the Preface to a Book carrying the title of "BR Regulations" to make out a case that the Regulations or Rules or Orders issued by the MES are ipso facto or mutatis mutandis applicable to BRO. In support of this contention the following excerpt from the aforesaid Preface of the aforesaid Book has been referred to and relied upon:-

> **"…. Similarly, the Works and Accounting Procedure, which is adjusted from time to time to the requirements on the ground is based on pattern adopted by M.E.S. or stores organizations on Defence side.**
>
> **3. The aim of this book is to incorporate, for the guidance of officers and subordinates of the General Reserve Engineer Force, the orders which have been issued so far by the Border Roads Development**

> **Board. This book is, however, by no means to be viewed as an encyclopedia of all rules because, as explained above, many of the rules and orders applicable to Defence Civilians and M.E.S. Works also apply. It is not necessary to reproduce them in this publication. The rules contained in this volume are, therefore, supplementary to those of general application like General Financial Rules, Civil Service Regulations, Fundamental Rules, MES Regulations, Treasury Rules, etc."**

Preface of a book containing executive instructions is not and cannot be a substitute to Law, Rules, Regulations or even executive instructions. Actually a Preface is nothing but the introductory remarks either by the Author of the book or by someone else. The contents of the Preface at best can be the personal views of the Author of the Preface. Preface cannot be equated with even an executive instruction because even with respect to executive instructions and their authentication, there is a set procedure under which the instructions are issued by the competent Authority and duly notified for information as well as for dissemination. We therefore cannot persuade ourselves at all to agree

to the contention of the respondents that because the Preface of the book suggests that MES Rules and Regulations should be, or are applicable mutatis mutandis or ipso facto to BRO, therefore Rule 2.7 should also be held applicable to BRO. We are saying so because we are convinced that in order to apply Rule 2.7 of MES Rules to an Organization which is neither MES itself, nor is a part of MES nor is its sister Organization, the competent Authority either in the Ministry of Road Transport and Highways or the BRO itself ought to have, through a well accepted and set procedure, issued an executive Order or an executive instruction, duly authenticated in the manner commonly accepted, applying Rule 2.7 of MES Rules to BRO. This admittedly has not been done. Only because someone in the Preface of the Book imagined or conjectured that MES Regulations should apply to BRO also, these cannot be held applicable.

M.E.S. and BRO are independent, distinctive Organizations. Both of them have their own Rules and Regulations. The affidavit filed on behalf of respondent No.5 clearly and unmistakably suggests that Rule 2.7 was issued alongwith other Rules vide letter dated 27th October, 1980 by the

Engineer-in-Chief for MES alone. Without the BRO formally adopting this Rule and formally applying this by the aid of a specific Notification, Order, or even a communication issued in this behalf, it cannot be permitted to say that this Rule was mutatis mutandis or ipso facto applicable to BRO as well.

There is another reason why the procedure prescribed under Rule 2.7 should not have been followed with respect to the tendering processes undertaken by BRO. As can be seen in the earlier parts of my judgment, in the Regulations issued by the BRO itself a complete procedure, a self-contained one has been prescribed which relates to, and fully regulates all aspects concerning the invitation of tenders and their consideration at all stages. In the earlier part of the judgment, I have already taken note of various Clauses occurring at pages 110 and 111 of BR Regulations, particularly Clause 692. These Clauses clearly suggest that a foolproof system for receipt of tenders by deposit in the locked boxes has been described. No part of the procedure contained in the aforesaid BR Regulations suggests that apart from submitting the tenders, any tenderer at a

subsequent stage can revise the rates upwards or downwards by adopting a procedure prescribed under Rule 2.7. If the Regulations prescribed by BRO do not contain any stipulation contrary thereto, applying a procedure of an outside agency having nothing to do with the BRO is not permissible under law.

There is yet another aspect which cannot be lost sight off in rejecting the application of the procedure contained in Rule 2.7 and that is that the conditions as well as terms contained in the Notice Inviting Tender and in the documents accompanying thereto do not contain any stipulation about the applicability of Rule 2.7. Rule 2.7 is not a part of the statute as it applies to BRO. It also does not form any part of BR Regulations. The intending tenderers, therefore, are not supposed to know that the procedure prescribed by an Organisation which has nothing to do with BRO would be applicable with respect to the tendering process undertaken by BRO. They, therefore, would be at a disadvantage, thus legitimately complaining of hostile discrimination when they would be confronted with a fait accompli of such a nature that someone or the other having put a note in the

tender box or having sent such a note by post would steal a march over them because they bonafide believe that such a procedure is not either applicable or permissible with respect to the tendering process undertaken by BRO.

We now come to anther important aspect, also touching upon Article 14 of the Constitution of India. This Court had vide order dated 11th July, 2006 impleaded Engineer-in-Chief, MES, New Delhi as a respondent in this case because in that Order as well as in the subsequent Orders dated 8th August, 2006, 17th August, 2006 and 18th September, 2006 this Court had clearly indicated that it shall be pronouncing upon the validity of Rule 2.7 on the touch stone of Article 14 of the Constitution of India and therefore, Engineer-in-Chief , MES should file his own affidavit defending this Rule.

The normal procedure relating to award of contracts is by the invitation of tenders from eligible tenderers. Tenders in sealed covers are deposited by the intending tenderers in closed, sealed boxes. Any person intending to formulate its terms and conditions can do so only by incorporating these terms and conditions in

sealed tenders. The impugned Rule 2.7 makes a departure from this salutary practice, established by traditions, based on healthy norms, because it permits a tenderer to make a departure from his tender and terms and conditions contained therein by placing a sealed or unsealed cover or even an open letter either in the tender box or even sending it by post and this so called revised offer, made through the sealed or unsealed cover or an open letter is not to be considered as having been received late or being non-bonafide and the tender opening Officer is enjoined the obligation and duty to take this revised offer into consideration while processing and considering the tenders and to make mention of the revised offer in the comparative statement of tenders.

In our considered opinion this procedure directly impinges upon and violates Article 14 of the Constitution of India because apart from being arbitrary, it clearly smacks of a discriminatory attitude as well as has a very grave potential for mischief and manipulation. The most acceptable norm of submitting and receiving sealed tenders and keeping them in a sealed, closed box is compatible with purity of the tendering process, also maintaining its integrity as

well as confidentiality. The impugned Rule 2.7 is so fraught with the danger of a party, a tenderer or even a functionary in the office of the Tendering Department manipulating the tendering process to suit the needs of a favourite or to cause prejudice to someone for the sake of a favourite or to confer undue benefit or advantage to the said favourite at the cost of another tenderer. Such a discriminatory condition cannot be allowed to operate because it not only vitiates the purity of tendering process but in all likelihood is so open to abuse as well as misuse that it perhaps tends to lose the confidence of the people in the impartiality and independence of the tendering process as well as its integrity and confidentiality.

October 30, 2006 **(V.K.Gupta),**
(rks/C) **Chief Justice**