

**HIGH COURT OF ORISSA: CUTTACK**

**W.P.(C) Nos. 12485 and 12538 of 2010.**

**W.P.(C) No. 12485 of 2010**

In the matter of application under Articles 226 & 227 of the Constitution of India.

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M/s. Eastern India Containers ..... Petitioner  
Pvt. Ltd. represented through  
its Director Sri Sanapala Sreeramulu.

-Versus-

Union of India & others ..... Opp. Parties

For Petitioner : Mr. R.K.Mohanty, Sr.Advocate  
Mr. J.Mohapatra, & Mr.P.K.Kar,  
(Advocates).

For Opp. parties : Mr. S.D.Das, Asst. Solicitor  
General of India.

**W.P.(C) No. 12538 of 2010**

M/s. Uma Laminated Products ..... Petitioner  
Pvt. Ltd., represented by its Chief  
Executive Sri E.V.Ramgopal.

-Versus-

Union of India & others ..... Opp. Parties

For Petitioner : Mr. B. Routray, Sr.Advocate,  
Mr.D.K.Mohapatra,  
Mr. K.Mohanty, Mr.B.B.Routrary  
Mr.P.K.Sahu & Mr.S.Das,  
(Advocates).

For Opp. parties : Mr. S.D.Das, Asst. Solicitor  
General of India.

**P R E S E N T:**

**THE HON'BLE MR. JUSTICE B.P.DAS  
AND  
THE HON'BLE MR. JUSTICE B.K.MISRA**

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**Date of Judgment: 16.05.2012**  
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***B.K.MISRA, J***

The aforementioned writ petitions are being disposed of by this common order as in both the writ petitions prayer has been made to quash the impugned tender notices dated 13.4.2010 and 18.6.2012 under Annexures-1 and 2 issued by the opposite party no.3, namely, the General Manager, Ordnance Factory, Badmal in the district of Bolangir. The petitioners, who used to supply Ammunition Containers to different Ordnance Factories of the Country including Ordnance Factory at Badmal have approached this Court by filing separate writ petitions for a direction to quash the impugned tender notices dated 13.4.2010 and 18.6.2010 (Annexures-1 and 2) and also for a direction to the opposite party no.3 to float Limited Tender Enquiry (L.T.E.) of the annual ordering quantity from the established vendors only as per the Material Management and Procurement Manual (hereinafter referred to as 'MMPM').

2. Bereft of unnecessary details facts of the case are that the petitioners in previous years were supplying Ammunition Containers as reputed and established vendors i.e.

in respect of Ammunition Containers 39 A/L and Container 40 A/L which are required for packing 105 mm Ammunitions. The further case of the petitioner M/s. Uma Laminated Products Pvt. Limited is that the said Company has been supplying Laminated Papers and Laminated Paper Containers since the year 1973 to all major Ordnance Factories. It is the further case of the petitioners that in the year in question pursuant to the tender call notice of the opposite parties they submitted their tender papers within the specified time quoting the price for the containers but they were surprised in coming across the tender notice dated 13.4.2010 from the website wherein the opposite parties have resorted to open tender enquiry. The petitioners on coming to know about such floating of open tender enquiry represented to the Ordnance Factory Board namely, opposite party No.2 to cancel the tender notice as per the provisions of MMPM. It is alleged that there was no response to their representation from the opposite parties but on the other hand the opposite party No.3 again issued the open tender call notice on 18.6.2010 through the website and accordingly the petitioners thinking that their representation has been rejected by the opposite parties and when according to them such open tender floated by opposite party No. 3 is in violation of the MMPM procedures and when it was issued with malafide,

approached this Court under Articles 226 and 227 of the Constitution of India for the reliefs as has been stated above.

3. The opposite party Nos. 2 and 3 have filed their common counter refuting the allegations of the petitioners. It is the specific assertion of the opposite parties that the petitioners have formed cartel on the basis or plea that they are registered supplier of containers and the quality of containers supplied by them are superior than the containers to be procured from the open market. It is also the specific case of the opposite party Nos. 2 and 3 that the tender call notice issued by the opposite parties is in consonance with Clause 4.4.1 of the MMPM and such open tender notice was floated when the price quoted by the petitioners were found 15% higher than the previous supply which the petitioners had undertaken about seven months back. It is the further case of the opposite parties that the petitioners were asked to give their rock bottom price which they offered but again when the said rock bottom price was still on the higher side and when the price quoted by the firms as rock bottom price was in the range of Rs.330.00, Rs.330.50 and Rs.330.25, the Tender Purchase Committee (T.P.C.) in their Level-1 meeting decided to procure the materials through open tender on the following grounds:-

“14. Observation of TPC-1:-

(i) All the three L-1 firms were repeatedly asked to review and offer a realistic rate comparable to prevailing market price for raw material and other

inputs. They have in the past supplied @ 310.00 per no (inclusive of all) and within a short period through sought much higher rates which do not seems justified.

(ii) All the three L-1 firms are forming cartel and quoted almost same rate.

15. Decision of TPC-1:

After deliberation, TPC decided to procure the material through open tender as per the followings:

(a) Quantity to be tender:

For O.F. Badmal	:	100900 nos.
For O.F. Chanda	:	55757 nos.
For O.F. Dehu Road	:	<u>14780 nos.</u>
Total quantity	:	171437 nos.

(b) This is not a source development tender enquiry, hence established suppliers of subject item are also eligible to apply/participate.”

4. It is the specific case of the opposite parties that the petitioners should not have any grievance by the action of the opposite parties in going for open tender as the registered suppliers are not debarred from participating in the open tender as they are also equally eligible to apply/participate. Accordingly, the opposite parties have prayed that the writ petitions should be dismissed having no cause of action.

5. We have heard learned counsel for the respective parties at length and also considered the cases of the parties by going through the materials placed before us.

6. It is an admitted fact that the petitioners and the three L-1 firms in the past had supplied containers @ Rs.310/- and that too seven months prior to the tender invited on 3.12.2009 for procuring Ammunition Containers 39 A/L and 40 A/L. When the Tenders were opened on 22.12.2009, it was found that M/s.

Vedant Paper Craft Private Limited, Nagpur have quoted Rs.356.50, M/s. Vidushi Tech. & Commercial, Nagpur for Ordnance Factory, Badmal quoted the price Rs.358.00 for supplying Ammunition Container for 39 A/L. The petitioner M/s. Eastern India Containers, Vishakhapatnam (W.P.(C) No.12485 of 2010) had quoted the price per Container, 39 A/L for Ordnance Factory, Chanda @ RS.356.25 and also quoted the price of RS.357.00 for such 39 A/L Ammunition Containers for Dehu Road Ordnance Factory. The Packwell Paper Tube Industries had quoted the price 356.270 for such supply of Ammunition Containers 39 A/L for Chanda Ordnance Factory. Accordingly, they were asked by the opposite parties to quote the rock bottom price and accordingly the Firms first quoted Rs.340.50 for supply of Ammunition Containers (39 A/L) and when that was found higher than the previous price of Rs.310/- again they were asked to reconsider their rock bottom price. The firms as has been mentioned above then quoted the price of Rs.330.00- Rs.330.25 for supply of Ammunition Containers 39 A/L. Thus, the Tender Purchase Committee (T.P.C.) in its meeting dated 19.5.2010 specifically observed that all the three L-1 firms namely, M/s. Vedant Paper Craft Private Limited, Nagpur, M/s. Eastern India Containers, Vishakhapatnam and M/s. Packwell Paper Tube Industries, Delhi have formed cartel and quoted almost the same rate and accordingly, the T.P.C. decided to procure the materials

through open tender for the Ordnance Factory at Badmal, Chanda and Dehu Road as per the required Ammunition Containers.

7. Learned Asst. Solicitor General while supporting the action of the opposite parties contended that the MMPM specifically provides for procurement of direct materials and Clause 4.4.2 clearly speak about the Multiple/Alternate vendor development programme under certain contingencies.

8. It would be profitable to quote the provisions of Clause 4.4.2 of the MMPM :-

“ (a) When it is apprehended that the established vendors have formed a group and quote to the disadvantage of the Government.

(b) When the rates offered by the established vendors are considered high and not realistic in terms of the prevailing market condition.

(c) When the composite index of vendor rating of an established vendor is found to be below the acceptable qualifying grade in spite of repeated efforts on the part of the purchaser to help the vendor to regain his original grading.

(d) When the total capacity of the established vendors is not adequate to meet purchase requirement including contingencies that may arise due to failure of any vendor.”

9. Thus, according to the learned Asst. Solicitor General when the price quoted by L-1 firms even their rock bottom price were similar, the opposite parties apprehended that cartel has been formed and the price has been quoted to the disadvantage of the Government and the rates quoted by the established vendors were also found not realistic in terms of the prevailing market price. To maintain transparency in the system,

the opposite parties decided to float open tenders by giving opportunity to the present petitioners also to apply and participate in the said process. It was also contended that the petitioners should not presupposes things that the containers to be supplied by the outsiders would be inferior to the containers supplied by them (petitioners).

10. Learned counsel for the petitioners on the other hand seriously refuted the contentions of the Asst. Solicitor General that in the case of limited tender enquiry among the established vendors there is guarantee of supply and also the quality in view of the removal clause under Clause 9.5 of the MMPM but in the open tender enquiry there is no such accountability except forfeiture of the PSD. It was also very strenuously urged that as per Clause 6.19.2(a), the Joint General Manager, Procurement who is a competent member of the committee when was not present in the TPC Level-1 meeting on 19.5.2010, the decision taken in that meeting is not a valid one and the same is not applicable to the present case as the said note relates to the Chairman only. Accordingly, it was contended that the floating of open tender dated 13.4.2010 and 18.6.2010 under Annexures- 1 and 2 are illegal, arbitrary and contrary to the procedure laid down in MMPM and hence the same are liable to be quashed.



11. The terminology 'Cartel' has been defined in Section 2(c) of the Competition Act, 2002 which reads as follows:-

“ cartel includes an association of producers, sellers, distributors, traders, or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions of services.”

In **Union of India & Others V. Hindustan Development Corporation & Others, (1993) 3 SCC 499**, the Apex Court held that:-

“ the cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. It amounts to an unfair trade practice which is not in the public interest. The intention to acquire monopoly power can be spelt out from formation of such a cartel by some of the producers. The monopoly is the power to control prices or exclude competition from any part of the trade or commerce among the producers. The price fixation is one of the essential factors.”

12. After giving our anxious hearing to the respective parties, we are of the view that when the Tender Purchase Committee (T.P.C.) in their Level-1 meeting decided to go for open tender it cannot be faulted with on the ground of transparency nor on the ground that the members including the Chairman acted with malafide and that the Joint General Manager in charge of Procurement was absent when the meeting of the T.P.C. was held on 19.5.2010. Unless there are allegations of malafide, fair competition is always wholesome. Competition in the open market is always in the interest of good trade practice. It may

amount to an interference if a party is favoured with the order of supply without indulging in any fair play and more so when the MMPM makes provision for developing new source and development of multiple/alternate vendor within the meaning of Clause 4.4 and 4.4.2 of the MMPM. The petitioners have nothing to loose when they have been given an opportunity to contest in the process of tender vide TPC Level-1 meeting dated 19.5.2010 which will elevate the level of transparency which is very much in need in the public interest. In the given facts and circumstances of this case it would be premature to hold that the opposite parties will not be able to procure the Ammunition Containers 39 A/L, 40 A/L of the quality needed by the Ordnance Factories if they go for open tender. Pricing is best determinant when the suppliers and the department interacts keeping in view the quality of products. In our humble view creating a cartel in favour of the petitioners and conferring upon them the exclusive right of supply is against ethics of business practice.

13. Coming to the jurisdiction of the Court, we are of the view that when the Tender Purchase Committee for the reasons recorded decided to go for open tender and when the present petitioners are also eligible to apply and put tender papers, the intervention of this Court do not seem to be called for on the ground of fair play and justice. Further more the petitioners have

failed to show any breach in the fundamental rights if they are allowed to participate in an open tender with new entrant.

14. Thus, for the aforesaid reasons, we refrain from interfering with the tender process vide Annexures-1 and 2 which have been floated by the Defence Establishment like Ordnance Factory, Badmal, opposite party No.3.

Accordingly, the writ petitions being devoid of merit stand dismissed. No costs.

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**B.K.Misra, J.**

**B.P.Das, J.**                      **I agree.**

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**B.P.Das, J.**

**Orissa High Court, Cuttack**  
**The 16<sup>th</sup> May, 2012/RNS**