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NC: 2024:KHC-D:13718 WP No. 105292 of 2024





THE HON'BLE MR. JUSTICE H.P.SANDESH
WRIT PETITION NO. 105292 OF 2024 (GM-TEN)

BETWEEN:

V.P. ENTERPRISES,
REPRESENTED BY ITS PROPRIETOR,
MANJAAPPA
S/O. NAGAPPA MARAHONNAPPANAVAR,
AGE: 41 YEARS, OCC: BUSINESS,
R/O. H.NO.001, ROTSON VENIZIA,
VIDYANAGAR HUBLI,
DISTRICT: DHARWAD-580001.

...PETITIONER

(BY SRI. MALLIKARJUNSWAMY B. HIREMATH, ADVOCATE)

AND:

KARNATKA INSTITUTE OF MEDICAL SCIENCES, P.B. ROAD, VIDYANAGAR, HUBBALLI, KARNATAKA-580022, BY ITS DIRECTOR.

..RESPONDENT



THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT OF CERTIORARI QUASHING THE PAPER PUBLICATION DATED 9/7/2024 ISSUED BY RESPONDENT AT ANNEXURE-C IMPUGNED NOTIFICATION DATED ISSUED BY THE RESPONDENT DATED 08.07.2024 PRODUCED AT ANNEXURE-D AND ETC.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 25.09.2024, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:







CAV ORDER

(PER: HON'BLE MR. JUSTICE H.P. SANDESH)

The prayer sought in the Writ Petition to quash the paper publication dated 09.07.2024 issued by the respondent at Annexure-C and also the impugned notification dated 08.07.2024 issued by the respondent at Annexure-D and grant such other relief as deems fit in the interest of justice.

- 2. The factual matrix of the case of the petitioner before this Court while invoking the writ jurisdiction is that the petitioner is a proprietary concern carrying on the business of laboratory equipments, consumables and chemicals to the hospitals and diagnostic laboratories within the State of Karnataka. It is also registered with the department of Drug Controller Government of Karnataka and so also registered under the GST and the same is produced as Annexures-A and B.
- 3. It is the case of the petitioner that the tenders across State are called for each equipment or department

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and there has never been any issuance of a tender notification for multiple department equipments under one package. It is strangely on 08.07.2024, the respondent issued a paper publication inviting applications for supply and installation of medical laboratory equipments on cost reportable test (CPRT) basis to Biochemistry, Pathology and Microbiology at Central Laboratory at Karnataka Institute of Medical Sciences, Hubballi (KIMS). The petitioner relies upon the paper publication which is produced as Annexure-C. The respondent, for the first time has called for the tender of all departments and has imposed a condition that all the equipments mentioned in publication and notification shall be supplied by the single bidder who is authorized by the company so manufactured and list of the same is mentioned in paragraph No.3 of the petition. It is contended that in list of the equipments mentioned in paragraph No.3, the item Nos. 3 and 4 are manufactured by only two companies i.e., Bio-Merieux and Becton Dickinsons in the entire world and only two persons have the dealership of these two companies one amongst

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it is the entire State of Karnataka i.e., Maxim Bio Medical. The main contention of the petitioner is that imposition of the aforesaid condition was only ensure that the said firm gets the impugned tender as others are not authorized distributors of equipments mentioned as item Nos.3 and 4. The petitioner relies upon the notification as Annexure-D. It is the contention of the petitioner that the pre-bidding meeting was scheduled on 20.07.2024 and the same was postponed to 25.07.2024 and the same was attended by this petitioner and so also others and the petitioner herein raised objections to the tender condition which mandated that all the equipments for all the three departments shall be supplied by the single bidder (Condition No.D) and the same was rejected without even assigning any reasons. The counsel would also contend that the pre-bidding proceedings were uploaded through the online portal on 22.08.2024 and it is only after the uploading of the said document, the petitioner came to know about the rejection proceedings of pre-bidding meeting 25.07.2024 is relied upon as Annexure-E. The main mainly

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contention of the petitioner is that the condition at SI. No.D is included only in order to defeat the right of the petitioner to participate in the tender and date is fixed for submission of online applications on 10.09.2024 and on 12.09.2024 the technical bid will be opened. Hence, the petitioner has approached this Court by filing this writ petition.

4. The counsel for petitioner would contend that the condition in the tender notification is contrary to the provisions of Karnataka Transparency in Public Procurement Act, 1999 (for short, 'KTPP Act') and Rules made thereunder and the same is only to ensure the nonparticipation and to facilitate a person has intentionally imposed the said condition and the entire process is arbitrary and liable to be guashed. The counsel would also contend that the condition which makes human impossible in view of there being no distribution given to other participants is arbitrary and offends Article 14 of the Constitution of India. It is also contended that the

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respondent in an earlier occasion having called for tender for each equipment and supply of manpower under separate tenders and in order to ensure the tender is awarded to Maxim Bio Medical, such a condition is imposed and hence, the counsel prays that this Court has to exercise the writ jurisdiction. The counsel would vehemently contend that the said condition is void.

5. The counsel in support of his argument, relied upon the judgment of the Hon'ble Apex Court in *Jagdish Mandal vs. State of Orissa and others*¹ and brought to notice of this Court the paragraph No.21 wherein discussion was made with regard to scope of judicial review of award of contracts and with regard to judicial review is concerned, the Hon'ble Apex Court relied upon the judgment in *Tata Cellular vs. Union of India*² and so also the judgment in *Sterling Computers Ltd. Vs. M & N*

1 (2007) 14 SCC 517

² (19944) 6 SCC 651

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Publications Ltd.,³ wherein discussion is made while exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether any infirmity in the decision making process and the Courts can certainly examine whether decision making process was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

6. The counsel also brought to the notice of this Court in paragraph No.22 wherein discussed with regard to judicial review of administrative action is intended to prevent arbitrariness, irrationalness, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made lawfully and not to check whether choice or decision is sound. The counsel also brought to the notice of this Court where an observation is made that Court before interfering in tender or contractual

³ (1993) 1 SCC 445

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matters in exercise power of judicial review, should pose to itself to the following questions:

1) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone?; or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached?'

- 2) Whether public interest is affected?
- 7. The counsel referring this judgment would contend that this Court can invoke the writ jurisdiction under Article 226 of the Constitution with regard to arbitrariness on the part of the respondent in imposing such condition.
- 8. Per contra, the counsel appearing for the respondent would vehemently contend that in the statement of objections the respondent has categorically contended in paragraph No.3 that existing equipment has

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capacity and frequent operational lower issues. Additionally, the reagents used are from a closed system, Contract higher Annual Maintenance (AMC) Concurrent Maintenance Contract (CMC) increasing the financial burden on the institution causing higher implementation costs. An assessment by the institute identified the need to outsource autoanalyzer based tests to achieve a cost effective solution and address the equipment limitations. A tender was issued on 10.07.2024 by the respondent for the supply and installation of laboratory diagnostic equipment. The tender specifies a 'cost per reportable test' basis, meaning that the supplier will be responsible for the sample processing, testing and result reporting after receiving the samples at the in-house central laboratory and it involves the supply and installation of 7 autoanalyzers equipment which are highly efficacious capacity and updated to present requirements, which are required to perform Biochemistry tests, Pathology tests and Microbiology tests. The cost per reportable test will cover all indirect expenses including

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manpower, water, electricity, and the cost of vacutainers and all other logistics etc. ensuring a comprehensive and transparent pricing structure. The main contention is that all will be taken care by the successful bidder. In a hospital setting like KIMS where the operation is 24x7, having a streamlined and efficient system for managing lab equipment and resources is crucial. A detailed justification for having one person supply and manage all seven lab equipments along with manpower and other logistics and having one person responsible for all equipment ensures a consistent approach to maintenance, operation, and troubleshooting which reduces the risk of miscommunication and errors that could arise if multiple individuals were involved. Further, the same person managing equipment can also coordinate manpower and logistics and with that intention, the condition was imposed.

9. The counsel would also vehemently contend that the contention of the petitioner that the tenders

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across State are called for each equipment or department and there has never been any issuance of a tender notification for multiple department equipments under one package is incorrect. The KTPP Act permits procurement entities to design tender processes that best meet the service requirements and ensure effective delivery. Previous successful implementations in esteemed institutions such as AIIMS institutions like National Cancer Institute AIIMS, Jajjar, AIIMS Bhopal and Jaydeva institute of Cardiology, Bangalore, KIDWAI Memorial Hospital, Bangalore and other institutions like BMCRI PMSSY Bangalore, Mandya Institute of Medical Sciences (MIMS) Mandya, Sri Atal Bihari Vajpai Medical College and Research Institute, Bangalore (SABVMCRI) and many institutions of National and State importance substantiate the efficacy of this approach. The respondent produced the documents as Annexures-R1, R1a, R1b and R1c to that effect.

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- 10. The other contention that imposition of other aforesaid condition was only to ensure that the said firm gets the impugned tender as others are not authorized distributors of equipments mentioned in SI.Nos.3 and 4 is not correct and the petitioner be put to strict proof of the same. It is contended that there are multiple suppliers, capable of fulfilling the equipment requirements as detailed in the tender. The list is also given in the statement of objections, totally, 6 in number and copies of the broachers are produced as Annexure-R2 to R2e.
- 11. The counsel would vehemently contend that the very contention that only to help and favor, the said condition is imposed cannot be accepted. He would contend that the tender is not called for to favor any one and even the respondent is not aware of who are all going to participate and only intention is that one person is responsible for all laboratory activities. He would also contend that Rule 28A of KTPP Act stipulates the turn-key means tenders and single tender has already been

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implemented and also contend that in page No.129 of the petition, the reasons for rejection are also assigned in Annexure-E. Though pre-bidding meeting was held, the very contention of the petitioner categorically held that same is not agreed, single bidder has to establish the equipments mentioned for all three departments and so that one person is responsible for all laboratory activities. Hence, the very contention that no reasons have been assigned for rejection cannot be accepted.

12. In reply to the arguments of the respondent's counsel, the petitioners' counsel has filed rejoinder as against the statement of objections and the petitioner's counsel would contend that only in order to defeat an issue involved, the respondent has independently withheld the work orders of the institutions. The work order pertaining to Atal Bihari Vajape Medical College if had been produced would establish that the firm named in the petition i.e., Maxim Bio Medical alone is having the OMS of all seven machineries and this act of the respondent is an

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attempt to favor an individual. The counsel would also contend that the companies mentioned at SI.Nos.1, 3, 5 and 6 in the statement of objections are Chinese company. The Lifecode Proteomics is not an original manufacturer rather a distributor of Chinese company and copies of the same are produced as Annexures-F, F1, F2 and F3 insofar as Biolab Scientific Ltd., is concerned, it do not meet the requirement of tender specifications and the same is not installed anywhere so as to comply the condition No.4 of the tender document. The counsel would also vehemently contend that the grievance of the petitioner is only with regard to the particular condition and in the pre-bidding meeting, objection is raised by all except the eligible.

13. The counsel for respondent would rely upon the judgment of this Court in W.A.No.381/2024 disposed of on 25.04.2024 and contend that this Court has elaborately discussed with regard to the matter of tender, scope of judicial review is also discussed and also discussed with regard to extent of intervention so also discussion with

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regard to decisional process and categorically held that public interest is the paramount consideration and also discussed even basic tenets while challenging the tender and also taken note of the conduct of the appellant and rightly dismissed the appeal confirming the judgment of the Single Bench and the said judgment is aptly applicable to the case on hand.

- 14. Having heard the petitioner's counsel and also the counsel appearing for respondent and also the principles laid down in the judgments referred by the petitioner's counsel as well as the judgments referred by the respondent's counsel, this Court has to analyse the material available on record with regard to issue involved in the case on hand whether the Court can exercise the writ jurisdiction?
- 15. Having considered the material on record including the Annexures relied upon by the petitioner's counsel as well as the respondent's counsel and principles laid down in the judgment, it is not in dispute that the

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petitioner has filed the present writ petition questioning the condition imposed in the tender i.e., condition which all the equipments for all mandated that departments shall be supplied by a single bidder. It is the contention of the petitioner that in the pre-bidding meeting held on 25.07.2024, the objection was raised by petitioner well as others and pre-bidding the as proceedings were uploaded through online portal on 22.08.2024 and then only the petitioner came to know about the same and the rejection came to the knowledge of the petitioner and immediately filed the writ petition.

16. The petitioner's counsel relies upon the invitation for tenders as per Annexure-D wherein 7 equipments are mentioned and tender is called for as per The main contention of the petitioner Annexure-D. the Annexure-D to contend referring that golden parameters also stated that no Chinese manufacturer or Chinese suppliers or parts/reagents are manufacturers in China and assembles in India is not allowed. The

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petitioner's counsel also brought to the notice of this Court Annexure-E i.e., pre-bidding meeting proceedings held on 25.07.2024 and objections are raised by the petitioner. In respect of item No.9 is concerned, when the deletion is start, the reason assigned that not agreed. Standard guidelines as per KTPP Act and KTPP Act do not permit the The counsel also contend that a question was same. raised for removal of this clause will lead to maximum participation and fair bidding process and replied that the same is agreed exigency of supply and installation of Sl.Nos.1 or 2 or 3 and 4 equipments. The counsel would also contend that no reasons are assigned but the counsel appearing for the respondent brought to the notice of this Court that with regard to the objection raised in prebidding meeting requiring the single bidder that all equipments and the same was not agreed and the reasons for rejection single bidder has to establish the equipments for all three departments and further reason is stated that one person is responsible for all laboratory activities. Hence, the very contention of the petitioner that no reason

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has been assigned cannot be accepted. The respondent also relied upon Annexures-R1, R1a, R1b and R1c stating that previous successful implementations in esteemed institutions such as AIIMS institutions like National Cancer Institute AIIMS, Jajjar, AIIMS Bhopal and Jaydeva institute of Cardiology, Bangalore, KIDWAI Memorial Hospital, Bangalore and other institutions like BMCRI PMSSY Bangalore, Mandya Institute of Medical Sciences (MIMS) Mandya, Sri Atal Bihari Vajpai Medical College and Research Institute, Bangalore (SABVMCRI) and documents are also relied upon.

17. No doubt, the counsel appearing for the petitioner would contend that the statement of objection filed by the respondent and giving details of equipments mentioned in item No.3 and 4 are manufactured by the several companies in the world and examples are also given. The counsel for petitioner for petitioner would contend that first one is Chinese, second one is Canadian, third one is distributor in China, fourth one is American

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and the respondent itself relied upon Annexures-R2 to R2e. The main reason for calling of the tender for supply by single bidder is only on the ground that it will be a responsibility of one person who offers the same and the same is stated in paragraph No.3, 4 and 6 and that same person managing equipment can also coordinate manpower and logistics.

18. With regard to the principles laid down in the judgments referred supra is concerned, no doubt, the Hon'ble Apex Court in *Jagadish Mandal*'s case, particularly in paragraphs 21 and 22 discussed with regard to the scope of judicial review and this Court has also extracted the circumstance under which the Court can exercise the power of judicial review which has been in para 22 of the judgment. If it is with a mala fide or intended to favour someone or the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached and also taken note of public interest is affected.

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- 19. The other judgment of the Division Bench of this Court relied upon by the counsel for respondent in detail discussions with regard to scope of judicial review in a case of warrant of contracts and taken note of even the judgment in *Jagadish Mandal*'s case and several judgments with regard to the scope and ambit of interference by the Court exercising writ jurisdiction while confirming the rejection order passed by the Single Bench.
- 20. Having taken note of the principles laid down in the judgment referred by the petitioner's counsel and also the respondent's counsel, the law is settled that while exercising the writ jurisdiction, the Court has to take note of the issue involved between the parties. In the present case, the main contention that condition imposed by the tender authority is that all 7 equipments shall be supplied by the single bidder and the contention of the petitioner is that the said condition is violative of Articles 14 of the Constitution. In this regard, this Court would like to rely upon the judgment of the Hon'ble Apex Court in *Meerut*





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Development Authority vs. Association of Management

Studies⁴ in paragraph 26, it is held that a tender is an

offer. It is something which invites and is communicated

to notify acceptance. Broadly stated it must be

unconditional; must be in the proper form, the person by

whom tender is made must be able to and willing to

perform his obligations. The terms of the invitation to

tender cannot be open to judicial scrutiny because the

invitation to tender is in the realm of contract.

21. It has to be noted that it is a fundamental law

that when the tender inviting authority invites tender, it is

only an invitation to offer. The invitation to offer may be

accompanied by the terms and conditions which the

Tender Inviting Authority would like to act upon against

the prospective bidders. It is for the prospective bidder or

the intending party who may submit its offer as to whether

to accept the tender conditions or not. In cases of

unwillingness or inability to go with the tender condition,

⁴ 2009 (6) SCC 171

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the offer itself may not be submitted. When the intending party responds to the invitation to offer namely, the tender notice, it is not permissible for such party to put forth its own conditions and seek variance in the conditions of tender.

22. It is important to take note of the fact that it is the domain of the Tender Inviting Authority as to which conditions are to be attached with the tender notice and with which conditions it would accept the offers from the intending bidders. When any intending bidder puts forward its own term in disagreement with the term or condition in the tender, it will amount to conditional offer which is not permissible. It is also important to note that it becomes a counter offer when the offerer comes out with his own offer or with different and varied conditions. The same is not permissible for the intending bidder to dictate its own term to the Tender Inviting Authority. In the case on hand, the petitioner also insists the tender inviting authority to relax the said condition that a intending

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bidder cannot claim by way of right to seek acceptance of its bid or to be able to enforce the bid condition in the tender as per its desire or choice, becomes an absolute proposition in the context of the facts and circumstances of this case and this Court has to take note of facts of each case while considering the contentions raised.

- 23. This Court would like to refer the judgment of the Apex Court in the case of *Sterling Computers Ltd.* (supra) and the same was also discussed in the case of *Jagadish Mandal* wherein also the Apex Court held that while exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the 'decision-making process'. The Courts can certainly examine whether 'decision making process' was reasonable, rational, nor arbitrary and violative of Article 14 of the Constitution.
- 24. This Court would also like to rely upon the judgment in *Michigan Rubber (India) Ltd. vs. State of*

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Karnataka⁵ wherein it was *inter alia* observed that certain preconditions or qualifications for tenderers have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. The interference by the Court, it was observed, has to be very restrictive since no person can claim a fundamental right to carry on business with the Government and also further held that the Court is neither to sit in appeal nor to substitute its view. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical which referred in paragraph 35 of the aforesaid judgment.

25. This Court would also like to refer the judgment in the case of *Tata Cellular* wherein also the judgment in Jagadish Mandal's case was discussed and also the extent of intervention has been discussed in the said judgment

⁵ (2012) 8 SCC 216

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and held that the decision must be free from arbitrariness, not affected by bias or actuated by mala fides.

26. In the case of *Montecarlo Ltd. Vs. National* Thermal Power Corporation Ltd.⁶ it was observed that the Tender Inviting Authority is the best person to understand and appreciate its requirement in the tender documents and in Silppi Constructions Contractors vs. Union of **India**⁷, it was observed similarly that the Court must realize that its interference should be minimum as the authority which has authored the tender document is the right judge. The Apex Court also taken note of the fact that a tender is a commercial transaction, the contours of judicial review power in respect of tender disputes would be accordingly determined keeping in mind the public interest and the same should be subserving the public interest.

⁶ [(2016) 15 SCC 272],

⁷ [(2020) 16 SCC 489]

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27. In the case of Air India Ltd. vs. Cochin **International Airport Ltd. and others**⁸, the Hon'ble Apex Court held that in arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Hence, it is clear that it is free to choose its own selection methods and stipulate conditions to invite tenders from the prospective bidders is the exclusive domain of the tender inviting authority. It is also observed that it's right to decide as to upon what terms and conditions it would prefer to enter into contractual obligation and to issue work order for any tender based project, the freedom and the space-in-thejoint in prescribing the conditions of tender is necessary to be accorded to the tendering authority and while imposing

⁸ [(2000) 2 SCC 617],

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the condition the Hon'ble Apex Court in the case of Raunaq International Limited vs. IVR Construction

Limited⁹ underlined the need to safeguard public interest to insulate the public good from the litigation by which the parties seek to derive commercial gain.

- 28. In the case of *Air India Ltd.*, (supra) it is held that when larger public interest is involved, some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.
- 29. Having considered the principles laid down in the judgment and also the issue involved in the present

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⁹ [(1991) 1 SCC 492]

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case is concerned, imposition of condition to supply the equipments by the same bidder. It is the contention of the petitioner that the said condition is violative of Article 14 of the Constitution and it is highly impermissible for the single bidder to supply the same and also it is the contention that only in order to favor a particular condition company, the said is imposed but the respondent in its statement of objections gave examples for having called such tenders and relies upon the Anneuxres-R1 series as well as R2 series. So that the same can be done. It is important to note that it has to be even discretional domain of the tender inviting authority that it could specify the condition and the Tender Inviting Authority is the best to judge as to what condition should be prescribed in the tender conditions for submission of bids by the tenderers, depending upon the exigencies of the tender work. In the case on hand, in order to supply 7 equipments, a tender invitation was called and it is the contention of the petitioner that it is highly impossible to meet the condition and the said condition cannot be

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accepted. The petitioner cannot enter into the domain of the tender inviting authority and impose the condition not to impose such a condition. It is important to note that it is fundamental law to act upon against the prospective bidders. It is for the prospective bidders to submit their offer as to whether to accept the tender conditions or not. In cases of unwillingness or inability to go with the tender condition, the offer itself may not be submitted and his inability to go with the tender condition cannot be a ground to interfere with the tender process. When the intending party responds to the invitation to offer namely, the tender notice, it is not permissible for such party to put forth its own conditions and seek variance in the conditions of tender as contended by the petitioner in the case on hand. It has to be taken note of that it is the domain of the Tender Inviting Authority as to which conditions are to be attached with the tender notice and with which conditions it would accept the offers from the intending bidders. It is only an offer and if the condition of the petitioner is accepted which amounts to conditional

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offer which is not permissible and the same is not permissible for the intending bidder to dictate its own term to the Tender Inviting Authority and the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. As held by the Hon'ble Apex Court in the case of **Meerut Development Authority**. When such being the case, I do not find any merit in the petition to grant the relief as sought. The Hon'ble Apex Court has discussed in detail in several judgments which have been referred supra with regard to the right of the bidder if he is unable to meet the conditions imposed, he cannot invoke the writ jurisdiction and the respondent has categorically assigned reasons for calling tender and imposing the condition and the same is for the benefit of the institution that the person who participates in the bid is accountable and responsible in spite of giving and calling tender to different persons. It is contended that Rule 28A of the KTPP Act permits the same but the very contention of the petitioner's counsel that it does not permit under the KTPP Act, cannot be accepted

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and also the case of the respondent that single tender has

already been implemented and to that effect, the

respondent has produced documents in terms of

Annexures-R1 series. When such being the case, I do not

find any merit in the petition to quash the impugned

tender notification.

In view of the discussions made above, I pass 30.

the following:

ORDER

Writ Petition is dismissed.

Sd/-(H.P. SANDESH) **JUDGE**

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CT-MCK

List No.: 1 SI No.: 1