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UNION OF INDIA & ANR.

v.

HBL NIFE POWER SYSTEMS LTD.

(Civil Appeal No. 3193 OF 2006)

B

JANUARY 20, 2016

[T. S. THAKUR, CJI. AND R. BANUMATHI, J.]

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Tender – In respect of purchase of essential defence supplies/ critical spare parts – Permissibility – Held: In respect of highly critical spare parts, the Government has a policy for issuance of the development indent, developing the source and registration with DGQA (Director General of Quality Assessment) – DGQA has a very stringent procedure before any vendor is registered with DGQA for supplying the product – An open advertisement inviting tenders can be issued only for purchase of common use items and not for purchase of defence critical spare parts like submarine batteries – The High Court erred in directing issuing advertisement inviting tender without keeping in view the policy of the Government.

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Allowing the appeal, the Court

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HELD: 1. Defence Ministry/ DGQA (Director General Quality Assurance) has a very stringent procedure before any vendor is registered with DGQA for supplying the ‘mission critical’ strategic defence product. The product, though is manufactured by a private supplier, it is not as if the Government is totally associated with the production process of the product.

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Prior to grant of registration, the Government pays the vendor to ‘develop’ the product under its supervision for over a period of time. Officials of the DGQA are posted at the factory of the supplier to ensure that the goods so produced are absolutely in order. The inspectors of DGQA inspect every stage of production.

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Development of such products would require upto a maximum of three years, as the development process involves drawing up of detailed technical specifications and performance criteria based on which the firm has to prepare a detailed design for each and every component to meet the stringent military standards. [Para 9] [581-H; 582-A-C]

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2. The subject-matter of the present case is submarine batteries. The importance of submarine batteries to a submarine cannot be underestimated as it is strategically a vital equipment for submarines. DGQA therefore ensures that it is associated during the production of the batteries by the approved vendor and only those batteries which pass the thirteen tests are purchased by the Navy. Ministry of Defence/Navy authorities cannot accept the final product without being fully associated with the development of the product right from the stage of procurement of raw material to the stage of final product. As per the policy, RFP (Request for Proposal) could be issued only to a firm which is duly registered with DGQA for supply of the product after development of the product under the aegis of DGQA. Having regard to the requirements of a highly critical spare part like submarine batteries, the Government has framed the policy for issuance of the development indent, developing the source and registration with DGQA. In the present writ petition, policy itself was not under challenge. [Para 10] [582-D, G-H; 583-B-C]

3. The Government cannot put the life of its defence personnel and submarine worth crores of rupees to risk simply because the respondent claims to have the capability and can supply submarine batteries. For such defence critical spare parts like submarine batteries, there cannot be any open advertisement inviting tenders. Advertisements are issued calling for tenders only for common use items which are normally available in the open market with a wide range of sources. Submarine batteries do not fall under this category of common use items. The respondent cannot claim any vested right to be issued a development indent or RFP or a supply order simply because it has made investments to manufacture submarine batteries. Straightway RFP cannot be issued to the respondent by ignoring the procedure for issuing a development indent and testing the batteries. [Para 11] [583-F-G]

4. The High Court did not keep in view the policy of the Government in purchasing the critical spare parts for the defence and in particular, in developing submarine batteries under the aegis of the Defence Ministry and the High Court erred in directing the appellants to issue an advertisement giving details

A about the technical specifications for submarine batteries and in selecting the product submitted in response to the advertisement. [Para 13] [585-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3193 of 2006

B From the Judgment and Order dated 27.10.2005 of the High Court of Delhi at New Delhi in LPA No. 2448 of 2005.

Pinky Anand, ASG, W. A. Qadri, R. Balasubramanian, Rishabh Jain, Karan Seth, Santosh Kumar, Anil Katiyar for the Appellants.

C Anitha Shenoy for the Respondent.

The Judgment of the Court was delivered by

D **R. BANUMATHI, J.** 1. This appeal assails the order dated 27.10.2005 passed by the High Court of Delhi allowing the appeal in LPA No.2448 of 2005 thereby directing the Union of India to issue an advertisement in leading newspapers having wide circulation inviting tenders for the submarine batteries mentioning the detailed technical specifications and the appellants to consider all the products which meet the technical specifications and thereby proceed to select the best product in accordance with law.

E 2. The subject-matter involved in the present case is submarine batteries required for the Indian Navy. Indian Navy has three types of submarines for which three different types of batteries are used. Type-I battery for EKM submarines, Type-II battery for SSK class submarines and Type-III battery for Foxtrot class submarines. Initially, these batteries were imported from the Original Equipment Manufacturer. In view of the recurring requirement of the batteries, subsequently a decision was taken to progress their indigenisation. Director General Quality Assurance (DGQA) working under the Ministry of Defence has a detailed procedure to 'develop/indigenise' critical items/spares. As per the said procedure, the Government identifies the possible vendors and assesses their capacity/technical qualifications and thereafter a development order is placed on the proposed supplier. During this period of development of the spares, the Government carries out regular inspection and the product is developed under the aegis of officials of the Defence Ministry and officers of the DGQA are associated throughout the development process right from the time of sourcing of raw materials to ensure that the product

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[R. BANUMATHI, J.]

not only meets the technical qualifications but is fully reliable and free from any errors in actual performance. A

3. By following the above rigorous procedure, M/s. Standard Batteries Ltd. was developed as an indigenous manufacturer for supplying Type-III submarine batteries. M/s. Standard Batteries Ltd. was subsequently developed as a manufacturer of Type-I submarine batteries in the year 1988. M/s. Exide Industries Ltd. was developed as an indigenous manufacturer of Type-II submarine batteries in 1989. In the year 1998, M/s. Standard Batteries Ltd. sold its business to M/s. Exide Industries Ltd. Since then, M/s. Exide Industries Ltd. has become a single vendor in supplying batteries for all three classes of submarines to the Indian Navy. Officers of DGQA are constantly associated with the manufacturing of the submarine batteries in Exide Industries Ltd. as and when they are required by the Indian Navy. As M/s. Exide Industries Ltd. has become the single vendor, in 2004, Government started exploring the possibility of developing another supplier as second source for submarine batteries. But as per the policy, the Government cannot register anyone for supply of submarine batteries without following the procedure or putting the vendor through the process of the development. In any event, the requirement of the supervision of DGQA in development of the product and thirteen quality tests intended to test submarine batteries could never be dispensed with. B
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4. The respondent made its representation in October 2004 to the Ministry of Defence claiming that it had developed submarine batteries and that they are under internal evaluation. On 31.03.2005, the respondent requested the Ministry of Defence for a development order so that the respondent can be developed as the second source of submarine batteries and the respondent agreed to undergo stringent tests before it could be registered for supplying the product. As the residual life of the existing batteries was coming to an end, in July 2005, the Government has been processing the request by the Navy to purchase submarine batteries. Since only M/s. Exide Industries Ltd. was then the only approved supplier of all types of submarine batteries, it was proposed to issue 'Request For Proposal' (RFP) to M/s. Exide Industries Ltd. alone and the Defence Minister gave approval to issue RFP to M/s. Exide Industries Ltd. for supplying eleven sets of submarine batteries. F
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5. Respondent filed writ petition before the Delhi High Court on 17.09.2005 claiming that it should be issued a request for proposal as H

A well, as it was registered for some other products namely torpedo
B batteries. Be it noted that the submarine batteries claimed to have been
C developed by the respondent were neither developed under the aegis of
D the DGQA nor the Government paid for development of the prototype
E cells. The learned Single Judge vide order dated 05.10.2005 dismissed
F the writ petition observing that if the extant policy envisages selection or
G shortlisting of a party for purposes of raising a development indent for
H an alternative indigenous source of equipment, this stage must be
I successfully crossed before venturing further into the issuance of request
J for proposal and thereafter issuance of a PAC. The learned Single Judge
K further held that procurement method was a policy matter and the policy
L did not suffer from any illegality and in any event, the policy has not
M been challenged by the respondent in the writ petition. Aggrieved by
N dismissal of the writ petition, the respondent filed LPA No.2448/2005
O which was allowed vide the impugned judgment dated 27.10.2005 and
P the High Court issued directions to the Ministry of Defence to procure
Q even the critical spare parts like submarine batteries only after issuing
R advertisement and calling for open tender. Assailing the impugned
S judgment, the appellant-Union of India has preferred this appeal.

6. Ms. Pinky Anand, learned Additional Solicitor General of India
E alongwith Mr. Qadri appearing for the appellants contended that while
F tender is issued for common use items, purchase of specialized and
G critical spare parts for the Defence Ministry cannot be done by an open
H tender and in the instant case, there were justifiable reasons for the
I Government to classify submarine batteries as critical and specialized
J defence product and to procure the same only from those suppliers who
K have developed the submarine batteries under the aegis of DGQA and
L are duly approved/registered with DGQA. It was submitted that in relation
M to essential defence supplies/critical spare parts, the Government must
N ensure that the supplier has the necessary technical qualifications,
O infrastructure and capacity to develop the product and in critical spare
P parts like submarine batteries, the Government cannot put the life of its
Q defence personnel and submarine worth several crores of rupees to risk
R simply because the respondent claims to have the capability. It was
S submitted that the High Court was not right in directing the Government
T for issuing tenders for critical spare parts like submarine batteries without
U knowing whether the said product can withstand all the thirteen quality
V tests and render reliable performance on board.

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7. Per contra, learned counsel for the respondent submitted that the respondent for the first time vide its letter dated 06.10.1999 had shown its intention to develop the submarine batteries and requested the appellant to provide the specifications of the same and in response to the same, appellants vide letter dated 22.11.1999 duly provided the technical specifications and on the basis of the same, respondent had developed prototype cells of the said batteries for testing which were offered to the appellants for evaluation way back in March 2004 and despite such offering, the appellants did not carry out any test. Contention of the respondent is that they continued to invest huge sums for developing prototype cells of submarine batteries under legitimate expectation that the respondent would be considered as an alternative source for supplying submarine batteries. Further contention of the respondent is that the goods purchased without any tender on proprietary basis only from one source is a flagrant violation of the constitutional mandate of Article 14 and by directing to issue an advertisement, the High Court rightly held against the monopoly of single source for supply of submarine batteries.

8. We have carefully considered the rival contentions advanced by the parties and perused the details of the procedure for development of submarine batteries and various tests required to be conducted on the submarine batteries and other material on record.

9. The defence procurement can be classified into two broad heads:-

(i) First category are common use items of generic or commercial specifications and these are available in open market. For example car batteries, spare of various vehicles etc. These items are procured by the Ministry of Defence by Open Tender Enquiry (OTE) i.e. by advertisements in the press and website.

(ii) Second category are those materials which do not fall within the above 'common use' category. These spares are 'mission critical' strategic defence products, which are procured only from those firms which are registered with Director General of Quality Assurance (DGQA) which functions under the Ministry of Defence. The supplier has to be registered with DGQA for the supply of that specific product.

Defence Ministry/DGQA has a very stringent procedure before any vendor is registered with DGQA for supplying the product. In the second

A category, though the product is manufactured by a private supplier, it is not as if the Government is totally disassociated from the production process of the product. As is seen from the Standing Orders of the DGQA (Annexure P-1), prior to grant of registration, the Government pays the vendor to 'develop' the product under its supervision for over a period of time. Officials of the DGQA are posted at the factory of the supplier to ensure that the goods so produced are absolutely in order. The inspectors of DGQA inspect every stage of production right from the sourcing of the raw materials by the vendor as it is quite possible that the vendor may purchase inferior quality material which may be difficult to detect in the final product. Development of the second source would require upto a maximum of three years, as the development process involves drawing up of detailed technical specifications and performance criteria based on which the firm has to prepare a detailed design for each and every component to meet the stringent military standards.

10. The subject-matter of the present case is submarine batteries.

D The importance of submarine batteries to a submarine cannot be underestimated as it is strategically a vital equipment for submarines. Submarines or diesel electrical vessels run on battery power. Power to the submarine is provided by about 240 to 528 batteries, weighing about 800 kgs each, depending on the nature of submarine. The only source of power to a submarine when it dives beyond nine metres into sea/

E ocean is submarine batteries. Improvement in battery technology and capacity is always an important goal in submarine design. Batteries are unique source of electric energy in underwater navigation. When a submarine is under surface, all its equipments are powered from the batteries, electric machines, lights, internal communication etc. which

F means that right from the first stage, the submarine batteries are vital for operating submarine. Survival of submarine depends on its radio noise levels which are directly related to the efficient functioning of onboard equipment and machinery especially when the batteries which is the only source of power and energy. If the batteries fail, submarine will be without power and it can have catastrophic consequences on men as also submarine would be lost. DGQA therefore ensures that it is associated during the production of the batteries by the approved vendor and only those batteries which pass the thirteen tests are purchased by the Navy. In case of submarine batteries, before a particular vendor is approved for supply of submarine batteries, as per the policy, first the

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H government issues development indent to the lowest bidder and the

[R. BANUMATHI, J.]

Government pays the proposed vendor to develop the product and the product is developed by the vendor under the supervision of the DGQA officials. Product so developed under the supervision of DGQA has to undergo thirteen tests as stipulated in Annexure P-2. Ministry of Defence/ Navy authorities cannot accept the final product without being fully associated with the development of the product right from the stage of procurement of raw material to the stage of final product. As per the policy, RFP could be issued only to a firm which is duly registered with DGQA for supply of the product after development of the product under the aegis of DGQA. Having regard to the requirements of a highly critical spare part like submarine batteries, the Government has framed the policy for issuance of the development indent, developing the source and registration with DGQA. It is pertinent to note that in the writ petition, policy itself was not under challenge. In fact, in the writ petition, respondent-company itself prayed only for issuance of request for proposal under the policy. The High Court did not keep in view the policy of the Government and the mandatory requirement of DGQA being associated with the development of submarine batteries which is a critical defence spare part.

11. If the country wishes to play a substantial role in the Indian Ocean and Arabian Sea, India must ensure high standards of defence power comparing with the neighbouring countries and it should have modernized submarines. Modernized submarines require submarine batteries with high sophisticated standard under the aegis of DGQA. The Government cannot put the life of its defence personnel and submarine worth crores of rupees to risk simply because the respondent claims to have the capability and can supply submarine batteries. For such defence critical spare parts like submarine batteries, there cannot be any open advertisement inviting tenders. Advertisements are issued calling for tenders only for common use items which are normally available in the open market with a wide range of sources. Submarine batteries do not fall under this category of common use items. The respondent cannot claim any vested right to be issued a development indent or RFP or a supply order simply because it has made investments to manufacture submarine batteries. Straightway RFP cannot be issued to the respondent by ignoring the procedure for issuing a development indent and testing the batteries.

12. As the matter was pending for over a decade, we have asked the appellant-Union of India about the subsequent development of the

A second source for supply of submarine batteries and for the status of the respondent. In response, on instruction Mr. S.W.A. Qadri, on behalf of the appellant has filed elaborate written submission. It is stated that after grant of stay order dated 16.12.2005 by this Court against the impugned order, the appellant initiated a case for development of an alternate vendor for submarine batteries seeking development indents from IHQ (N)/DEE as per directives of Ministry of Defence vide ID No.3536/04/D(N-I) dated 08.02.2005. Accordingly, open tender was issued in newspapers on 29.05.2006 wherein several firms including the respondent responded. For development of a second source of Type-I batteries, development order was placed on the respondent HBL Ltd. on 22.03.2007, as per which the firm was to develop four Type-I cells at a cost of Rs.11.16 lakhs with a delivery schedule of eighteen months. The prototype batteries manufactured by respondent-HBL failed to meet DGQA's stipulated standard for relevant discharge (C2) test. Thereafter, on 12.07.2011, a meeting was held with the participants of DEE and M/s. HBL representatives. Post detailed deliberation, the respondent was asked to manufacture four cells afresh and present them for type testing. Test of batteries was completed at the factory premises in June 2012 and batteries were transferred to BCF, Sewri in January 2013. However, on receipt at BCF, Sewri, visible bulging was observed in all batteries and lead tape discontinuity in one battery during first maintenance charge. During analysis in February 2013, bulging was found to exceed permissible limit of 12 mm on all batteries post first full charge. However, respondent opined that the bulging was due to improper packaging whilst transporting batteries from the premises (Hyderabad) to Mumbai. Thereafter, respondent firm-HBL agreed on certain conditions for manufacturing of four new prototype cells with a lead time of three-six months and agreed to complete manufacturing of test cells by February 2014. However, there was delay on the part of the respondent and finally the trial of test cells was completed on 14.11.2014 and the trials were validated by CQAE, Secunderabad. Test cells were received at BCF, Sewri in January 2015. Charging/discharging trials commenced wherein charging parameters were examined and found to be satisfactory. In this regard, in the written submission filed by UOI, it is stated as under:-

H "8. ...The performance report forwarded by ASD (Mbi)/BCF wherein all parameters of the cells were examined, indicates satisfactory test results. In view of the satisfactory completion of indigenization efforts by respondent herein (M/s. HBL, Hyderabad)

the firm was nominated as IHQ MOD (N) approved vendor for supply of Type-I submarine batteries for EKM submarines on 28.05.2015 A

9. ...the next procurement case shall have an additional qualified vendor for Type-I submarine batteries to increase the market competence for both technical and financial aspects.” B

Though the subsequent developments may not be relevant to determine the issue, we have referred to the written submission *in extenso* for the sake of completion.

13. The aforesaid discussion and also the written submission as to how the respondent developed the batteries over a period of time reiterate that the development of second source could only be as per the guidelines of DGQA and under the supervision and inspection of the officials of the DGQA and not independently. The High Court did not keep in view the policy of the Government in purchasing the critical spare parts for the defence and in particular, in developing submarine batteries under the aegis of the Defence Ministry and the High Court erred in directing the appellants to issue an advertisement giving details about the technical specifications for submarine batteries and in selecting the product submitted in response to the advertisement and the impugned order is not sustainable. C
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14. The impugned order of the High Court is set aside and this appeal is allowed. In the facts and circumstances of the case, we make no order as to costs. E

Kalpana K. Tripathy

Appeal allowed.

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