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# VALIDITY OF A RESTRICTIVE CLAUSE IN A TENDER: ARGUMENTS IN FAVOUR AND AGAINST

## BACKGROUND AND INTRODUCTION

On 13.09.2023, a Division Bench of the High Court of Delhi[“HC”] dismissed five interconnected writ petitions joint largely on the ground of welfare and fairness principles in the public procurement matters. [Refer *Silica Udyog India Pvt. Ltd. and Others v. Union of India and Others*, 2023 SCC OnLine Del 5632] The writ petitions primarily challenged the eligibility criteria enumerated in the revised Notice Inviting Tenders [“NITs”] floated by the three leading Oil Marketing Companies - HPCL, BPCL, and IOCL. The HC found no compelling reason for judicial interference in the matter as there was lack of *evidence* to suggest the revised clauses in NITs to be arbitrary, discriminatory, or introduced with malafide intent. In this backdrop, the arguments for and against the validity of a restrictive clause in a tender have been discussed in this short article.

## ARGUMENTS: IN FAVOUR OF REVISION OF TENDER

### 1. Prerogative to set the terms and conditions

It is the prerogative of the agency calling bids to set the terms and conditions of the tender. Any changes and revisions in the terms and conditions of the tender introducing any restrictions must articulate its nexus to the broader goal of procurement optimization. The primary tenet of any public procurement process is to ensure fair competition and any restriction should be in furtherance of this objective.

### 2. For balancing supply-demand dynamics

To avert an imbalance in the future due to the supply-demand dynamics, it is crucial to manage the procurement process carefully. Especially, with the supply overshadowing demand, if multiple units under the same ownership or management were allowed to bid separately, it could disproportionately benefit them, thereby defeating the principles of fair competition and equitable distribution. -

This approach aligns with the broader principle of maintaining market integrity and ensuring the welfare of all participants.

### 3. To prevent market monopolization and ensure diversified participation

The aim of fostering a diverse supplier base can serve as a counterbalance to the intrinsic challenges posed by an oligopsonistic market. By discouraging market domination by a single entity, the tender conditions can be revised to mitigate the risks associated with limited buyer options, thereby creating a more level playing field for all market participants.

### 4. On arbitrariness and unreasonableness

By restricting larger entities with multiple manufacturing units from flooding the tender with numerous bids, the restrictive clause provides newer entities a fair shot at securing the tender thereby ensuring protective measure for newer and smaller manufacturers. This scenario may be perceived, and turns out to be, onerous for a few, but it does not single out a particular entity; rather, it applies universally to all bidders who fit the specified criteria. In fact, the Model Tender Document for Procurement of Goods released by the Ministry of Finance, Government of India on 29 October 2021, also prescribes a similar ‘conflict of interest’ clause to be incorporated in NITs. This rather reinforces the impugned condition's objective of ensuring fair competition.

### 5. On doctrine of ‘legitimate expectation’

It is crucial to recognize that the doctrine of legitimate expectation does not operate in a vacuum. It must be judiciously weighed against the overarching imperatives of public interest. In the context of the facts and circumstances, it is important to consider prevailing market conditions, specifically, the noticeable shift in market dynamics, coupled with the ever-present risk of market monopolization. While it is true that business entities benefit from a stable and consistent policy environment, it is important to understand -



**Abinash Agarwal**

Legal Head, MCO Legals

LLB., Faculty of Law,  
University of Delhi, B.Com(Hons.)  
University of Delhi

## Expertise:

Civil Litigation, Commercial Arbitration,  
Legal Due Diligence, Legal Compliances

✉ abinash.a@mcolegals.co.in



**Amit Singhal**

Research Partner

LL.M. and B.A. LL.B. (Hons.),  
National Law Institute University

that policy frameworks are not immutable constructs. Rather, they are designed to be flexible and adaptive to accommodate changes in the socio-economic landscape or to tackle newly emerging issues that were not initially anticipated. This inherent flexibility ensures that policy frameworks remain attuned not only to the interests of a particular segment of stakeholders, but also to the well-being of the broader community.

## 6. Dynamic nature of administrative policies

Policy decisions of administrative authorities are often rooted in the expert understanding and specialized knowledge of those authorities. The doctrine of legitimate expectation does not bind administrative bodies from changing their policies, especially if these changes are in the larger public interest. Policies can be dynamic, adapting to new circumstances and realities. Administrative decisions, especially those related to public procurement, carry with them a presumption of regularity. Such decisions are assumed to be taken after thorough deliberation, considering the broader public good.

## ARGUMENTS: AGAINST THE REVISION OF TENDER

### 1. Mere apprehension

The Supreme Court of India in *Rajasthan Cylinders and Containers Ltd. v. Union of India*, (2020) 16 SCC 615 observed that insertion of tender conditions on a mere apprehension of anti-competitive practices, is impermissible.

It is noticeable, the LPG cylinder market is characterized by an oligopsony, wherein only three buyers wield significant influence over procurement prices. Given the buyer-controlled tender process, bidders like the Petitioners (Silica Udyog and Other sister companies) cannot influence the price. Instead, competition hinges on the volume of orders allocated to each bidder.

### 2. Doctrine of ‘legitimate expectation’

The principle of ‘legitimate expectation’ embodies the notion that when a public authority establishes a certain promise or practice, a reasonable anticipation is generated among affected parties that this promise or practice will continue. This expectation becomes particularly salient in the business context, where enterprises often depend on the stability and predictability of public policy to make long-term investments and strategic decisions. For example, in the *Silica Udyog case* (Supra), considering the past policies set forth by the Government of India, several manufacturing units were established by the Petitioners to support the objectives of PMUY (Pradhan Mantri Ujjwala Yojana). This was done with a well-founded expectation that there would not be abrupt policy reversals causing undue setbacks to manufacturers. The changes in the eligibility conditions unduly curtailed the capacity of each manufacturing unit owned by them to independently participate in the tender process.

## 3. PESO’s Guidelines on Multiple Manufacturing Units

PESO, functioning under the Ministry of Commerce and Industry, Government of India, has meticulously deliberated upon and addressed the issue of having multiple LPG cylinder manufacturing units within the same premises, under unified ownership. Their stance resulted in the release of guidelines for the establishment of multiple LPG cylinder manufacturing units at a single location. The tender conditions in the Silica Udyog case (Supra) were argued to be incongruent with PESO’s guidelines, underscoring a glaring contradiction between the positions adopted by two ministries (Ministry of Petroleum and Natural Gas, overseeing the OMCs, and Ministry of Commerce and Industry, which regulates PESO).

## JUDICIAL RESTRAINT IN ECONOMIC MATTERS

The scope of judicial intervention in decisions related to economic policies is limited. Courts do not act as appellate authorities over administrative decisions, but only intervene when conditions are manifestly whimsical, capricious, or specifically tailored to benefit a certain entity.

Multiple cases such as *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818, *Uflex Ltd. v. Government of Tamil Nadu*, (2022) 1 SCC 165, and *Central Coalfields Ltd. v. SLLSML (Joint Venture Consortium)*, (2016) 8 SCC 622, emphasizes the need for judicial deference to the expertise of Governmental and other specialized bodies in authoring the tender conditions keeping in view the prevailing economic scenario, except in instances of arbitrariness, irrationality, favoritism etc.

## CONCLUSION

The validity of restrictive terms and conditions in a tender must be weighed on the basis of particular facts and circumstances of a case. On the one hand, the restrictive clause must be in line with the prevailing market and economic conditions and on the other hand, the mere apprehension of the anti-competitive practices cannot be allowed for restrictions to prevail.

Further, the mere fact that the bidders might face some hardships or potential reduction in profits does not warrant overturning the restriction in tender. As emphasized in *Tirupati Cylinders Pvt. Ltd. v. Indian Oil Corporation Limited*, 2017 SCC OnLine Del 10606, while the Constitution of India guarantees the right to conduct business under Article 19(1)(g), it does not ensure a ‘right to profit’