

**GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR**

Course: **Advanced Contracts (Evolving Jurisprudence in Contract Law)**
Semester- VII (Batch: 2019-24)

End Semester Examination: November 2022

Date: 13th Nov, 2022

Duration: 3 hours

Max. Marks: 50

Instructions:

- Read the questions properly and write the answers in the given answer book.
- Do not write anything on the question paper.
- The respective marks for each question are indicated in-line.
- Indicate correct question numbers in front of the answer.
- No questions or clarification can be sought during the exam period, answer as it is, giving reason, if any.
- Bare Act is not allowed.

Answer all the questions

Marks

Q.1 On 12 February 2021, *KVS* issued a notice inviting tender (NIT) on the Government online portal, i.e. Government e-Marketplace (GeM) for supply of 50,000 Tablets. The relevant terms and conditions were as under:

(10)

1. Experience: The Bidder or its OEM [themselves or through reseller(s)] must have regularly manufactured and supplied same or similar Category Products to any Central/State Government Organisation/PSU/Public Listed Company for the preceding three financial years before the bid opening date.

2. Past Performance: The Bidder or its OEM [themselves or through re-seller(s)] must have supplied same or similar Category Products for 60% of bid quantity, in at least one of the preceding three financial years before the bid opening date to any Central/State Government Organisation/PSU/Public Listed Company.

3. The Bidder or its OEM [themselves or through reseller(s)] must have executed project for supply and installation/commissioning of same or similar Category Products during the preceding three financial years as on the bid opening date, as per the following criteria: (i) Single order of at least 35% of estimated bid value; or (ii) Two orders of at least 20% each of estimated bid value; or (iii) Three orders of at least 15% each of estimated bid value.

RT responded to the said NIT and offered its bid for the product, i.e. 'Tablet' manufactured by an Indian company, after having necessary approvals from the manufacturer (OEM). After opening the technical bids on 08 May 2021, *KVS* rejected the bid of *RT* on the ground of 'technical specification mismatch'. The exact reason of rejection stated was as follows: 'RT does not qualify Past Performance Criterion of tender document for any of the FYs: 2018-19, 2019-20 and 2020-21. Work Orders of Smart Phones, Laptops, Aadhar Kits, Printers, Power-bank, etc are not considered as same or similar Category Products of Tablets.' In particular, *KVS* said that during the relevant financial years, *RT* supplied only smart phones to one state government organisation, and the product 'Smart Phone' did not fall within the description of 'same

or similar Category Products' vis-à-vis the product required under the NIT in question, i.e. 'Tablet'.

Being aggrieved by the decision taken by *KVS*, *RT* preferred a writ petition in the High Court with the submissions, *inter alia*, that the process in question was vitiated due to an arbitrary and whimsical decision taken by the tender inviting authority. In essence, the submission of the writ petitioner (*RT*) before the High Court was that a 'Tablet' was an electronic product belonging to the 'same or similar category' as a 'Smart Phone'; and that the decision of *KVS*, excluding 'Smart Phones' from 'same or similar Category Products' was unreasonable and against the principles of fair play and rationality. On the other hand, it was submitted on behalf of *KVS* that the products like tablets, computers and Smart Phones were electronic goods, distinguishable on the basis of their technical, commercial and trade related definitions, norms and regulations. *KVS* further submitted that the expressions 'same' or 'similar' category products in the tender conditions were in reference to different varieties and types of 'Tablets'. On the GeM portal also, 'Smart Phones' and 'Tablets' were placed in different categories. It was also argued that the tender inviting authority was the best person to interpret the terms of tender, and its decision could only be examined in case of it being arbitrary, biased or *mala fide*, and as no such case being alleged, no interference was called for.

The High Court referred to the terms and conditions of NIT and opined that when the expression used were 'category' before the word 'product' and with the qualifying expression 'similar', the intention was not to exclude such products which were of 'similar category'; and the intention was not to insist for 'same' category products only. The High Court observed that it was nobody's case that 'Smart Mobile Phones' were the 'same' category products as 'Tablets'; and that actually the issue was whether under the terms of NIT, 'Smart Mobile Phones' could be called 'similar Category Products' as 'Tablets' or not. The High Court held that the product 'Smart Phone' was definitely a similar category product as 'Tablet'; and the tender inviting authority was unjustified in giving a restrictive meaning to the terms of NIT; and if at all there was any ambiguity, the tender inviting authority could not be left to the option of interpreting the terms contrary to their plain meaning. The High Court, therefore, proceeded to allow the writ petition and disapproved the rejection of the technical bid of the writ petitioner.

Feeling aggrieved by the judgment and order of the High Court, the tender inviting authority preferred an appeal to the Supreme Court.

Based on the afore-stated factual matrix, decide whether or not the High Court was justified in interfering with the view taken by the tender inviting authority (*KVS*), in rejecting the technical bid of the writ petitioner (*RT*) for want of fulfilment of 'Past Performance' criterion about supply of 'same or similar Category Products' of 60% of bid quantity in at least one of the last three financial years? Substantiate your answer with the help of the principles and rules of interpretation of contracts and also the law of tenders. (word limit: 500 words)

Q.2 *PC* was in the business of licensing cloud-based ‘customer relation management’ software to insurance companies managing medicare advantage plans. In September 2008, *PC* and *AM* entered into a License Agreement whereunder *PC* granted *AM* a license to use its ‘MedicareCRM’ software platform for *AM*’s medicare advantage business. *PC* described its software as a cloud-based ‘customer relation management platform’. The License Agreement came with a related ‘End-User Agreement’, attached to the License Agreement and incorporated by reference into that Agreement. Both the License and End-User Agreements included an ‘Arbitration’ clause, which provided the following: (10)

‘Any dispute, claim or controversy of any kind arising in connection with or relating to this Agreement or performance hereunder shall be resolved exclusively by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA).’

At some point in 2018, *AM* decided to replace *PC* as its CRM (customer relationship management) platform provider and contracted with another company (i.e. *SF*) to provide a replacement CRM product. As part of this transition, *AM* needed to transfer customer information stored on *PC*’s platform to the new *SF* platform. Typically, in such situations, *PC* provided its customers with the stored information in an electronic format requested by the customer. *PC* would not allow customers to discover, transfer, or export the unique characteristics of the *PC* Medicare CRM platform. This time, however, *AM* insisted on engaging *NTT* to transition its historical data. In order to do so, it granted *NTT* a sub-license to access *PC*’s software. This sub-licensing was contemplated by the License Agreement, which authorised *AM* to sub-license use of *PC*’s software to ‘its employees, independent contractors or agents’, who the Agreement defined as ‘End-Users’. The same provision specified that such ‘End Users shall be bound for the benefit of *PC* to the terms of the End-User Agreement. On 26 November 2018, *AM* sent *PC* a letter providing notice that it intended to authorise *NTT* to access *PC*’s software. Specifically, the letter advised *PC* that *NTT* was ‘authorised to act on behalf of *AM* with regard to the products and/or services that are owned, leased, or licensed by *AM*, including supporting and operating the products and/or services provided to *AM* from *PC* under the current agreements between *PC* and *AM*. On 11 March 2019, *NTT* began accessing *PC*’s software platform to identify *AM*’s historical customer data and transfer it to *SF*. Each time *NTT* employees accessed the *PC*’s software platform, they were directed to a secure log-in page, which required them to enter their individual user ID and password to access the software. The secure log-in page stated the following: ‘Use of *PC* software platform constitutes acceptance of the End User License Agreement’. Clicking on the ‘End User License Agreement’ hyperlink would take the user to the same End-User Agreement referenced in the License Agreement entered into between *AM* and *PC*. This language was displayed on the log-in page each time it was visited and accessed by an *NTT* employee (or any other user). And, *PC*’s software could not be accessed without first visiting the log-in page.

At some point, *PC* discovered that *NTT* employees, while reviewing the platform, copied its customised and proprietary workflows and functionalities and recreated them on a

generalised CRM platform (such as *SF*) for *AM* or other clients. After making this discovery, *PC* initiated AAA arbitration by filing a demand for Arbitration against *AM* and *NTT* on 19 July 2019. *PC* sought reliefs for: *NTT*'s alleged breach of the End-User Agreement and its alleged theft of *PC*'s trade secrets. After *NTT* refused to participate in arbitration, *PC* filed a lawsuit to compel arbitration. In the said lawsuit, *PC* sought to compel the sub-licensee (*NTT*) to arbitrate trade secret claims arising from their use of *PC*'s software. *PC* argued that *NTT* was bound by its License and End-User Agreements, which each included an identical arbitration clause. Also, *NTT* accepted the End-User Agreement by accessing and using *PC*'s software in the nature of an enforceable browse-wrap contract. Opposing *PC*'s suit, *NTT* argued that it never contracted with *PC*, and thus never agreed to arbitrate anything at all because it was not a signatory to the License or End-User Agreements.

Based on the afore-stated factual matrix, decide whether or not *NTT* was bound to the arbitration agreement by equitable estoppel and its acceptance of the browse-wrap End-User Agreement? (word limit: 500 words)

- Q.3 a) 'Although it is well settled that in the absence of a special contract to that effect a physician will not be held to warrant the success of his treatment, nevertheless, even courts which are reluctant to do so, will, where the promise to cure is clear, not refrain from regarding such a contract as valid.' Elucidate the contractual liability of a physician/doctor in the light of the foregoing observation. (word limit: 300 words) (5x2= 10)
- b) Examine the legal soundness of the reasoning given by the Supreme Court in *Adani Power (Mundra) Ltd v Gujarat Electricity Regulatory Commission* [(2019) 19 SCC 9] while holding the notice of termination of the PPA (dated 28 December 2009) to be legal and valid. (word limit: 300 words)
- Q.4 a) Draft a 'Default' clause in a contract using the following facts: (word limit: 50 words) (5x2= 10)
- The Tenant should have the right to sue for all remedies, which are available to him under the law, in the three situations: if the Landlord makes a misrepresentation; if the Landlord breaches a covenant; if the Landlord does both, i.e. makes a misrepresentation and also breaches a covenant.
- b) What purpose does the 'Warranty' clause serve in a contract? Explain the important points which one should bear in mind while drafting this clause. (word limit: 300 words)
- Q.5 Answer **any two** of the following: (word limit: 300 words each) (5x2= 10)
- (a) Elucidate the correct legal position as to the enforcement of option clauses in a shareholders' agreement (SHA).
- (b) Discuss the bare essential contracts which are entered into between the various participants in the development of an infrastructure project.
- (c) Critically analyse the Surrogacy (Regulation) Act, 2021 strictly from a contract law perspective.
