

(2023) 04 DEL CK 0057

In the Delhi High Court

Case No : Civil Writ Petition No. 15212 Of 2022, Civil Miscellaneous Application No. 47012, 49358 Of 2022

M/S B G Sleeper Works

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 10-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 21, 226

Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 — Section 11

Citation : (2023) 04 DEL CK 0057

Hon'ble Judges : Satish Chandra Sharma, CJ; Subramonium Prasad, J

Bench : Division Bench

Advocate : Manish, Mukul Singh, Vedansh Anand

Final Decision : Dismissed

Judgement

Satish Chandra Sharma, CJ

1. The instant Writ Petition has been filed under Article 226 of the Constitution of India seeking issuance of a writ in the nature of Mandamus and Certiorari, directing the Respondents to provide true copies of all the documents forming the basis on which the Petitioner was eliminated/ disqualified from participating in the reverse auction in tender bearing notice No. TS225033 floated by the Respondents; to quash and set aside the decision of the Respondents disqualifying the Petitioner from participating in the reverse auction in the said tender and, direct the Respondents to conduct the reverse auction afresh. It has also been prayed that this Court issue a Writ of Mandamus directing the Respondents not to issue a purchase order under tender notice No. TS225033.

2. The Petitioner herein has stated itself to be a partnership firm which is categorised as a Small Enterprise under the Micro, Small and Medium Enterprises Development Act, 2006 ("MSME Act, 2006"). It has been further stated that it is a duly approved vendor of the Research Designs and Standards Organization ("RDSO") for manufacturing and supply of Prestressed Monoblock Concrete

Sleepers.

3. The instant dispute revolves around registrations obtained by the Petitioner under the MSME Act, 2006, the Public Procurement Policy notified thereunder by the Respondent No. 1, and tender bearing notice No.TS225033 which was floated by the Respondents. Before delving into the same, it would be pertinent to outline the Public Procurement Policy notified by Respondent No. 1. On 23.03.2012, Respondent No. 1 had issued Notification No. 503 in exercise of powers conferred upon it under Section 11 of the MSME Act, 2006, thereby notifying the Public Procurement Policy in respect of procurement of goods and services, procured and provided by Micro and Small Enterprises, by its Ministries, Departments and Public Sector Undertakings ("PSUs"). The policy envisaged extending certain benefits/ granting preferential treatment to MSEs by increasing their participation in government procurements and making efforts towards the development of such vendors.

4. Subsequently, on 05.07.2012 Respondent No.1 issued Notification bearing No. 2010/RS(G)/363/1 which revised and superseded the existing policy of price preference and benefits granted to the MSMEs. Relevant portion of the Notification dated 05.07.2012 is reproduced hereunder for reference:-

"No: 2010/RS(G)/363/1 New Delhi, dated: 5.7.2012

The General Manager, All Indian Railways & PUs including NF(C).

The General Manager, CORE, Allahabad.

The General Manager, Metro Railway, Kolkata.

The Director General, RDSO, Lucknow & Railway Staff College, Vadodara.

CAO/Workshop Projects organization, 1st, Floor, Chamber Bhawan, JC Road, Patna-800001.

CAO/DMW, Patiala and COFMOW, New Delhi.

CAO/RCF/RBL, Old TA Building, Kishanganj, Delhi,

MD/AII Railway PSUs, KRCL, MRVC

CAO/AII autonomous entity under Ministry of Railways

Sub: Public Procurement Policy for goods produced and services rendered by Micro and Small Enterprises (MSEs) by Central Ministries/Departments/Public Sector Undertakings (PSUs).

In exercise of the powers conferred on it in Section 11 of the Micro, Small and Medium Enterprises Development (MSMED) Act 2006, the Central Government, by Order, notified the Public Procurement Policy in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries, Departments and Public Sector Undertakings. The copy of

notification No.503 dated 23.3.2012, as printed in the Gazette of India, is enclosed for guidance and compliance.

3. In order to extend the benefit/preferential treatment to eligible MSEs, suitable conditions may be included in the bid document as indicated below:-

(a) "Para 2(i) to 2(iii) above".

(b) (I) "MSEs who are interested in availing themselves of these benefits will enclose with their offer the proof of their being MSE registered with any of the agencies mentioned in the notification of Ministry of MSME indicated below:

(i) District Industries Centers

(ii) Khadi and Village Industries Commission

(iii) Khadi and Village Industries Board

(iv) Coir Board

(v) National Small Industries Corporation

(vi) Directorate of Handicraft and Hand loom

(vii) Any other body specified by Ministry of MSME.

(II)The MSEs must also indicate the terminal validity date of their registration.

Failing (I) & (II) above, such offers will not be liable for consideration of benefits detailed in MSE notification of Government of India dated 23.3.12".

In order to avail preferential treatment in government procurement, the MSEs need to enclose the proof of their being MSE registered with any of the agencies mentioned in the notification.

5. It has been stated by the Petitioner that it had obtained an UDYAM Registration Certificate bearing No. UDYAM-RJ-11-0000690as required for establishing an MSME, on 03.09.2020. Thereafter, on 24.08.2022 it obtained a subsequent Udyam Registration Certificate bearing No. UDYAM-RJ-21-0019886. It is further stated by the Petitioner that it obtained the relevant registration with the National Small Industries Corporation required for availing beneficial treatment for government procurement as per Notification dated 05.07.2012, for the period of 20.06.2022 – 19.06.2024.

6. It is stated by the Petitioner that it was in this backdrop that it participated in the tender floated by Respondent No. 1 herein, i.e., Ministry of Railways, bearing No. TS225033, for manufacture and supply of Prestressed Mono Block Concrete Sleeper sets, (Pretensioned type) for BG Alt up to date (for general layout) and part drawing thereof to suit 60 kg. Rails as amended up to date as per IRS specification T-45-2021 (4th Revision March '2021) as amended up to date duly

loaded into wagons/ Road vehicles. (i) F/ Shaped T/Out Sleepers for 1 in 8.5 as per RDSO Drg. No. T-4865. (ii) F/ Shaped T/Out Sleepers for 1 in 12 as per RDSO Drg. No. T-4218 ("Tender").

7. It is submitted by the Petitioner that during the technical evaluation of its bid, the Petitioner was wrongly marked 'NO' in the column regarding the classification of the Petitioner as a Micro Small Enterprise ("MSE"). It is the stand of the Petitioner firm that it had submitted all relevant documentation regarding its classification as MSE and despite it, it was incorrectly marked 'NO' in the relevant column regarding classification while its bid was being evaluated.

8. Subsequently, the Petitioner had participated in the financial bid of the Respondents on 30.09.2022 along with other competitors, and it was declared L-8 in the same. Thereafter, the Petitioner was informed that a reverse auction for the Tender would be held on 06.10.2022, however, it was prevented from participating in the same on the ground that it was eliminated.

9. It is submitted by the Petitioner that on 10.10.2022, the Petitioner, after being eliminated, inquired about the reason for elimination. It is submitted that the concerned officer informed the Petitioner that it was eliminated on account of the fact that since the Petitioner's Udyam Registration certificated dated 03.09.2020 stood cancelled, the Government Purchase Enlistment Certificate issued by the National Small Industries Corporation Ltd. for the period of 20.06.2022 to 19.06.2024, has become invalid. It is submitted by the Petitioner that the person who was assigned to check the validity of the concerned production certificate, inadvertently checked the status of the Udyam Aakanksha certificate. Since the Petitioner's Udyam Aakanksha had expired, a 'No' was marked under MSE for the Petitioner while its bid was being evaluated technically, leading to the Petitioner's incorrect disqualification.

10. It is submitted that the action of the Respondents in eliminating the Petitioner firm from participating in the reverse auction held on 06.10.2022 for the Tender in question herein is unjust, arbitrary and violative of the Petitioner's rights under Articles 14, 19 and 21 of the Constitution. It is submitted that though the Petitioner was a holder of a valid certificate issued by the National Small Industries Corporation Limited for the period of 20.06.2022 – 19.06.2024, it has been eliminated in an unjust, improper and arbitrary manner, from the reverse auction.

11. The Petitioner has submitted that the production certificate certifying the Petitioner firm under the MSME Act, 2006 is valid for lifetime and does not expire, thus, elimination of the Petitioner, despite it being eligible for the e-reverse auction by the Respondents is arbitrary and unconstitutional.

12. It is submitted that in terms of Clauses 7.10.2(a) and 7.10.2 (a) Note (ii), all MSEs found qualified for Bulk/ Development Orders/ Awards of Contract who could not be selected for reverse auction, but are within the range of 15 % of lowest initial price offer of the bidder qualified for the bulk order, shall be

permitted to participate in the reverse auction, irrespective of their inter-se ranking based on initial price offer.

13. It is submitted that the Petitioner firm was within the range of 15 % of lowest initial price offer of the bidder qualified for bulk order and the same is evident from the document of its commercial bid. Thus, eliminating the Petitioner firm from reverse auction is arbitrary. It is submitted that in the year 2019, on the basis of the same certificate, the Petitioner was allowed to participate in a reverse auction for the same product was declared L-1 subsequent to the reverse auction. It is submitted that as the Respondents have themselves awarded the Petitioner works of a similar nature and declared it L-1 in a prior tender on the basis of submission of the same documents, thus, disqualifying the Petitioner from even participating in the reverse auction in the Tender in dispute herein, is in complete violation of the Petitioner's fundamental rights.

14. It is submitted that the Respondents failed to even intimate the Petitioner regarding its elimination and that the Petitioner was eliminated without due notice.

15. Per contra, Respondent No. 2 herein has submitted that a perusal of Clause 3 of the Instructions to the Tenderers and General Conditions of Tender for Supply Contract of the Tender document provides certain specific benefits/ preferential treatment to MSEs. Further, that Clause 3.1 clarifies that the benefit/ preferential treatment to MSEs of their participation shall be in reference to the Railway Board's letter No. 2010/ RS(G)/363/1 dated 05.07.2012 and MSE Gazette Notification No. 1875 dated 26.06.2020 issued by the Government of India. It is submitted that instructions contained in Gazette notification dated 26.06.2020 have thereafter been amended vide Gazette notifications dated 05.03.2021, 16.06.2021, 19.01.2022 and 06.05.2022. It is submitted that the benefits to MSEs as per Public Procurement Policy on MSE are given as per Clause 3.0 of the Tender document. Also, conditions and procedure to be followed for selection of bidders for conduct of reverse auction has been mentioned in Clause 7.10.2. It is submitted that the procedure for conduct of reverse auction has been adopted in its entirety from the said clauses of the Tender document. Thereafter, only in accordance with the relevant provisions of the Tender document governing reverse auction has the tender been finalised and relevant works allotted to qualifying firms.

16. It is submitted by Respondent No. 2 that as far as the Petitioner's submissions regarding its UDYAM registration certificate are concerned, the Petitioner has uploaded a Certificate bearing No. UDYAM-RJ-11-0000690 along with the bid. It is submitted that the said Certificate was only checked/ verified, once it was uploaded on the website of Respondent No. 1. Upon verification, the UDYAM registration number was found to be cancelled or marked as "Z Category" i.e., that it does not exist. Thus, it is submitted that the Respondents were well within their rights to reject the bid of the Petitioner, since it was deficient in material requirements stipulated in the tender document. It is submitted that the

Respondents have acted in a fair and just manner, and the MSE status of the Petitioner was duly checked, and not found in order.

17. It is submitted that the Petitioner has only submitted the document bearing No. UDYAM-RJ-11-0000690 along with the bid and not UDYAM-RJ-21-0019886. Moreover, the tender closing date was 12.08.2022 and UDYAM-RJ-21-0019886 was registered only on 24.08.2022. The same itself means, that the said document was not available at the relevant point in time and the claims of the Petitioner are false. It is submitted that the Petitioner is not laying the correct facts in front of this Court and is misleading this Court through false information.

18. It has been submitted by the Respondent No. 2 that the Petitioner herein does not fulfil the criteria as laid down in the notification of the Government as it does not have the necessary certificates and thus it was not eligible to participate in the reverse auction as an MSME. It is submitted that as far as the Petitioner's contention that it is eligible to participate in the reverse auction on the basis of the provisions of the Tender document are concerned, it is the stand of the Respondents that if the quoted rate is competitive and falls within the range of consideration incorporated in the algorithm of the reverse auction, i.e., if the quoted rate falls within range of rates quoted by lowest 50 % bidders, the Petitioner could have qualified to participate in the reverse auction irrespective of whether it was an MSE or not. It is submitted that the Petitioner herein is however attempting to claim price benefit prescribed for MSEs, i.e., L-1 + 15% on the basis of a certificate which was scrutinised properly during the process of the Tender, and not found valid at the relevant point in time, in order to be eligible to qualify for the reverse auction.

19. As far as the Petitioner's contention that it was allowed to participate in a reverse auction for an earlier tender of same works issued in 2019 on the basis of the same documentation submitted in this Tender, it is submitted by the Respondents that if due to some inadvertent error, the Petitioner was allowed to participate in an earlier tender, the Petitioner cannot harp on the same error to lay claim to a fresh Tender. Further, no vested right accrues on the Petitioner so as to entitle it to participate in the reverse auction for the Tender herein and claim all the benefits as are available to any MSE, despite failing to provide requisite proof of being a valid MSE at the relevant point in time, in order to avail benefits accruing to the category of companies/ firms.

20. Heard Ld. Counsel for the parties and perused the material on record. In a nutshell, it can be understood that the stand of the Petitioner is that it was eligible to participate in the reverse auction conducted by the Respondents for the Tender in question as it is a Small Enterprise bearing a valid registration under the MSME Act, 2006 at the relevant point in time. Further, placing reliance on the benefits granted to MSEs under Clauses 3, 7.10.2(a) and 7.10.2 (a) Note (ii) of the Tender document, it submits that it was well within the range of 15 % of lowest initial price offer of the bidder qualified for bulk order, thereby rendering it eligible for participation in the reverse auction.

21. The short question which arises for consideration is as to whether the Petitioner held a valid registration certificate rendering it eligible for participation in the reverse auction for the Tender. In the opinion of this Court, the submissions of the Petitioner cannot be accepted and the Petitioner had not filed a valid Udyam Registration Certificate at the relevant point in time in order to avail benefits under the Public Procurement Policy of Respondent No. 1 and relevant clauses of the Tender document. A perusal of the Udyam Registration Certificate bearing No. UDYAM-RJ-11-0000690 annexed with the Petition would itself show that the mentioned Udyam Registration number was cancelled or marked as 'Z Category (unit does not exist)' by District Industries Centre or MSME-DI. The aforesaid has also rightly been pointed out by the Respondent No.2, subsequent to scrutiny of the Petitioner's documents annexed with its bid. On the basis of the aforesaid finding, any benefit available to MSEs under the provisions of the Tender document, as claimed by the Petitioner should be available to it, would not hold water.

22. In the opinion of this Court, it has rightly been submitted by the Respondent No.2 herein that the Petitioner is attempting to claim price benefit prescribed for MSEs i.e., L-1 + 15% on the basis of a certificate which was scrutinised properly during the process of the Tender, and not found valid at the relevant point in time, in order to be eligible to qualify for the reverse auction.

23. The Respondent No. 2 was further correct in stating that if the rate quoted by the Petitioner was competitive and fell within the range of consideration incorporated in the algorithm of the reverse auction, i.e., if the quoted rate falls within range of rates quoted by lowest 50 % bidders, the Petitioner could have qualified to participate in the reverse auction, irrespective of whether it was an MSE or not. Since the Petitioner did not fall within the aforesaid parameters, the Petitioner was rightly not allowed to participate in the reverse auction.

24. In the opinion of this Court, it is not correct on the part of the Petitioner to state that the Registration Certificate obtained under the MSME Act, 2006 is valid for lifetime. The document submitted by the Petitioner itself shows that the said registration certificate stood cancelled at the relevant point in time, thus, the Petitioner was not entitled to claim the benefits available to MSEs under the Tender document.

25. As far as the Petitioner's contention regarding the second Udyam Registration Certificate bearing No. UDYAM-RJ-21-0019886 obtained by it, it was rightly pointed out by Respondent No. 2 that the same was obtained subsequent to the Tender being closed, i.e., 24.08.2022.

26. Further, the Petitioner certainly does not have any vested right to participate in the reverse auction on the basis of it allegedly being declared L-1 in a tender for a similar work floated by the Respondents in 2019. The said averment would be irrelevant to the considerations to be given in light of the facts and disputes in question in the present case.

27. In light of the aforesaid, this Court does not find any reason to interfere in the decision of the Respondents in eliminating the Petitioner from participating in the reverse auction for the Tender in question herein.

28. The Petition is dismissed in terms of the above stated findings along with any pending application(s), if any.