
(2015) 11 DEL CK 0028
In the Delhi High Court
Case No : W.P. (C) 7201/2015

Shree Gee Enterprises

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-11-2015

Acts Referred:

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

Citation : (2015) 224 DLT 445 : (2015) 153 DRJ 346

Hon'ble Judges : Badar Durrez Ahmed and Sanjeev Sachdeva, JJ.

Bench : Division Bench

Advocate : Rohit Agarwal and Malavika Lal, for the Appellant; Suparna Srivastava and Neelmani Pant, for the Respondent

Final Decision : Allowed

Judgement

Sanjeev Sachdeva, J.

WP(c) 7201/2015 & Cm No. 13229/2015(stay)

1. The petitioner has filed the present petition challenging the award of tender by Respondent No. 2/Indian Oil Corporation Limited to Respondent No. 3/M/s. Bansal Brothers. The contention of the petitioner is that the Respondent No. 2 has awarded the contract to the Respondent No. 3 applying clause (vii) of the tender document of the Notice Inviting Tender (NIT), which provides for giving preference to Micro and Small Enterprises (MSEs).

2. The contention of the petitioner is that the tender envisaged a "works contract" and "works contract" simpliciter is not covered under the Micro, Small and Medium Enterprises (MSME) Procurement Policy 2012 of the Respondent No. 1 and as such, the preference given to the Respondent No. 3 was invalid and the contract could not have been awarded to the Respondent No. 3.

3. Respondent No. 2 had issued the Notice Inviting e-tender (NIT for short) for first phase of replacement of sewer, waste water lines of residential flats of

Indian Oil Nagar, site-I and II, Sector-55, Noida. Clause (iii) of the NIT stipulated that the work was indivisible and shall be awarded to single successful bidder. Clause (vii) of the NIT stipulated as under:-

(vii) IOCL will allow Purchase Preference to NSIC/MSE/IOCL JVs etc as per applicable Govt./Company Policy, for detail refer Instruction to Bidders (ITB) section of Tender Document.

4. As per the petitioner, Respondent No. 2 received only two bids; one bid from the petitioner and the second bid from the Respondent No. 3. Both the bidders were declared technically qualified after the opening of the technical bids. As the financial bids of the petitioner and the Respondent No. 3 were not disclosed by the Respondent No. 2, the petitioner made inquiries from the Respondent No. 2 about the same. In response to the queries raised by the petitioner, the Respondent No. 2 informed the petitioner that benefit of the Public Procurement Policy for MSE dated 26.03.2012 (hereinafter referred to as the policy) was given to the Respondent No. 3, who was an MSE bidder.

5. The petitioner has filed the present petition challenging the preference given by the Respondent No. 2 to the Respondent No. 3 as per the Public Procurement Policy for MSEs 2012. The grievance of the petitioner is two-fold. First of all, the subject contract was a works contract and the Policy was not applicable to works contracts, The policy was only meant for goods produced and services rendered by MSEs. Secondly, it was contended that only 20% of the contract could be given to an MSE and since the contract was indivisible, the entire contract could not have been awarded to the Respondent No. 3 by applying the MSE policy.

6. Respondent No. 2 sought to defend its action by contending that it is bound by the procurement targets fixed under the Policy issued by the Respondent No. 1. It is further contended that in terms of the Policy, the public sector undertakings are bound to procure a minimum of 20% of their annual value of goods and services from MSME. It is contended that the Respondent No. 2 is primarily engaged in refining crude oil, distribution and marketing the products of such refining and consequently, the types of contract awarded by it are primarily of three types, i.e., supply contracts, works contracts and service contracts. It is contended that the pre-dominant portion of the supply contracts awarded by the Respondent No. 2 generally relate to highly specialized sophisticated machinery, equipment and instruments such as machinery and equipment for refining, transportation, for transporting crude oil and/or petroleum product, to marketing terminals and given the highly specialized nature of such equipment and machinery, MSMEs cannot qualify for such supplies. It is further contended that pure service contracts of the Respondent No. 2 are limited to supply of specialized professional services such as engineering, consultants, doctors, lawyers and the like and form a minor portion of the procurement.

7. Apart from the above contracts, it is contended that the third category of contracts involved both supply of goods, machinery and equipment and services

connected with or involving fabrication, utilization and/or installation of the goods provided. It is contended that if the Respondent No. 2 were to achieve the 20% MSME procurement target, then it is only these types of contracts in which preference can be given to MSME and as such, a consistent practice is followed by Respondent No. 2 to grant work contracts as far as possible to the MSMEs, wherever the conditions of the policy can be met so as to meet the requirement of 20% contract to MSMEs.

8. In order to resolve the controversy, reference may be had to the public procurement policy for Micro, Small and Medium Enterprises (MSME) order dated 23.12.2012. The relevant clauses of the same reads as under:-

Whereas, the Central Government Ministries, Departments and Public Sector Undertakings shall procure minimum of 20 per cent of their annual value of goods or services from Micro and Small Enterprises.

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And whereas, the Public Procurement Policy rests upon core principles of competitiveness, adhering to sound procurement practices and execution of order for supply of goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective; and

And whereas, for facilitating promotion and development of micro and small enterprises, the Central Government or the State Government, as the case may be, by Order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its ministries or Departments, as the case may be or its aided institutions and public sector enterprises.

Now, therefore, in exercise of the powers conferred in section 11 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006, the Central Government, by order notifies the Public Procurement Policy (hereinafter referred to as the (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.

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3. Mandatory procurement from Micro and Small Enterprises, - (1) Every Central Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement from Micro and Small Enterprises from the financial year 2012-13 and onwards, with the objective of achieving an overall procurement of minimum of 20 per cent of total annual purchases of products produced and services rendered by Micro and Small Enterprises in a period of three years.

9. Reference may also be had to the office memorandum dated 20.02.2014 issued by the Director of the Office of the Development Commissioner, Ministry of MSME, Union of India, wherein frequently asked questions and their answers had

been circulated to the various Ministries and in particular to question No. 18 and their answers thereto which reads as under:-

Ques.18. Whether this policy is applicable for works/trading activities also?

Ans. Policy is meant for procurement of only goods produced and services rendered by MSEs.

10. A reading of the policy along with the frequently asked questions and the answers, referred to above, clearly shows that the policy is meant for giving preference in respect of procurement of goods produced and services rendered by Micro, Small and Medium Enterprises (MSME). It would not be applicable to a "works contract" simpliciter.

11. Learned counsel appearing for the Respondent No. 1 representing the Ministry of Micro, Small and Medium Enterprises, admitted that the policy was not applicable to works contracts and would be applicable only for procurement of goods produced and services rendered by MSME(s). The learned counsel fairly conceded that the subject tender being for a simpliciter works contract was not covered under the Public Procurement Policy for MSEs Order, 2012.

12. Since the subject contract is a simpliciter works contract, it is not covered by the Public Procurement Policy for MSEs Order, 2012 and as such, the Respondent No. 2 could not have given preference to the Respondent No. 3 by applying the said policy. The petitioner being L-1 was thus entitled to the award of the tender.

13. The contention of the Respondent No. 2 that majority of its contracts entailed highly specialized procurement of goods and services and the MSEs cannot qualify for the same would be of no consequence. As per the procurement policy, the Respondent No. 2 has to provide an opportunity to the MSEs in respect of procurement of goods produced and services rendered by MSEs. If the goods and services required by Respondent No. 2 are of highly specialized nature and the MSEs do not technically qualify, the Respondent No. 2 cannot be faulted for not meeting the target of 20% set by the policy. The Respondent No. 2 has to provide an opportunity to MSEs to participate in the procurement of goods produced and the services rendered by the MSEs. In case the MSEs do not technically qualify, the Respondent No. 2 can certainly award the contract to other bidders, who qualify for the same irrespective of the fact that the minimum procurement targets as prescribed by the policy are not met. Merely because Respondent No. 2 is not able to meet its targets would not entitle Respondent No. 2 to misinterpret the policy and make it applicable to a works contract to which it is not supposed to apply.

14. In view of the above, clearly, the award of contract to Respondent No. 3 is not sustainable. The work order dated 24.07.2015 issued by Respondent No. 2 to Respondent No. 3 is accordingly quashed. Respondent No. 2 is directed to award the contract to the petitioner, subject to the petitioner complying with the other terms and conditions of the tender document.

15. The writ petition is allowed in the above terms. There shall be no order as to costs.