(2019) 04 BOM CK 0076

In the Bombay High Court

Case No : Writ Petition No. 11011, 11278 Of 2018

Siddhivinayak Enterprises APPELLANT

Vs

Union Of India And Ors RESPONDENT

Date of Decision : 18-04-2019

Acts Referred:

Micro, Small And Medium Enterprises Development Act, 2006 — Section 11
Indian Penal Code, 1860 — Section 120B, 406, 420, 467, 468, 471, 477A
Essential Commodities Act, 1955 — Section 3, 7

Citation : (2019) 04 BOM CK 0076

Hon'ble Judges : Akil Kureshi, J;Sarang V. Kotwal, J

Bench : Division Bench

Advocate : Prasad Dani, Pankaj Kode, Himanshu Kode, Sanjiv Sawant, Juilee Ghadge, Dharmesh Joshi, Uma Kshirsagar Wagle, S. I. Shah, R. K. Sharma, Darshan Adke, Kishor Patil, Sameer Mhatre, Ajay Patil

Judgement

Sarang V. Kotwal, J

1. Rule. With the consent of the parties, Rule is made returnable forthwith.

2. Both these Petitions are filed by different Petitioners seeking similar relief against the same Respondents in these Petitions. Therefore, these Petitions are disposed of by this common Judgment and Order.

3. The Petitioners in these Petitions are challenging the tenders awarded to the Respondent No.4 for handling and transportation of food grains and allied services. In Writ Petition No.11011 of 2018, the contract was in respect of such services for Central Warehouse at Vashi, Navi Mumbai and in Writ Petition No.11278 of 2018, the contract was in respect of such services for Central Warehouse, Nanded. Both these Petitions are filed by the respective proprietary concerns through their Proprietors. The relevant dates for the tender processes for the subject-matters of both these Petitions are mentioned in the following paragraphs. The Petitioners were the lowest bidders for their respective tenders.

4. For warehouse at Vashi, the Respondent No.2 - Central Warehousing Corporation invited tenders vide e-tender notice dated 31/03/2018 through online e-tendering under two bids system from professionally competent and financially sound interested parties. Similar notice dated 31/03/2018 was issued for warehouse at Nanded. The Schedule for submission of the bids and opening of the bids were different and capacity of these two warehouses and the expected value of contract for these two warehouses were different. However, the eligibility criteria for participation was similar. Contentions were raised in respect of the eligibility criteria and other terms and conditions of the contract. The contentions raised by the Petitioners in both these Petitions were the same. As mentioned earlier, the Petitioner in Writ Petition No.11011 of 2018 had submitted his bid for the contract for Vashi warehouse whereas the Petitioner in Writ Petition No.11278 of 2018 had submitted his bid for the warehouse at Nanded. Respondent No.3 is the Regional Manager of the Respondent No.2.

5. When the tenders were opened, both these Petitioners were the lowest bidders in their respective tender process. However, it was mentioned in the tender notice that as per the public procurement policy of Micro and Small Enterprises (hereinafter referred to as 'MSE'), since it was a non-divisible tender, an MSE quoting in the price band of L1 + 15% would be awarded full / complete work of tender considering the spirit of policy, bringing down price to L1 rate after negotiation, if any, by the MSE concerned. The Respondent No.4 had participated in the tender process as an MSE and their bid was found to be within the band of L1 + 15%. Therefore, after negotiation, the Respondent No.4 was awarded both these contracts. The contract for Vashi was awarded at the rate of 223% ASOR for a period of two years with effect from 05/11/2018 with the provision to extend the contract for further period of three months on same rates, terms and conditions at the discretion of the Respondent No.2 - Corporation; whereas the contract for Nanded was awarded at the negotiated rate of 45% ASOR for a period of two years with effect from 25/09/2018 with the provision to extend the contract for further period of three months on the same terms and conditions at the discretion of the Respondent No.2. The Petitioners have challenged the contract awarded to the Respondent No.4 in these two Petitions. On behalf of the Respondent Nos.2 and 3, Affidavits-in- Reply are filed opposing granting relief in these Petitions.

6. We have heard Mr. Prasad Dani, learned Senior Counsel for Petitioner in Writ Petition No.11011 of 2018, Mr. Sanjiv Sawant learned Counsel for Petitioner in Writ Petition No.11278 of 2018, Mr.Dharmesh Joshi, learned Counsel for Respondent No.1 in Writ Petition No.11011 of 2018, Ms. Uma Kshirsagar-Wagle learned Counsel for Respondent No.1 in Writ Petition No.11278 of 2018, Mr.R. K. Sharma learned Counsel or Respondent Nos.2 & 3 in both Writ Petitions and Mr. Kishor Patil learned Counsel for Respondent No.4 in both Writ Petitions.

7. Before adverting to the contentions raised by the respective parties, it is necessary to refer to certain terms and conditions of the contract, the eligibility

criteria and the existing policy in encouragement of MSEs.

8. E-tender notice dated 31/03/2018 inviting tenders for handling and transportation of food grains and allied services at Central Warehouse, Vashi, was for rendering such services from Turbhe Railway Siding to various godowns in and around Vashi. The notice dated 31/03/2008 inviting tenders for similar operations at Nanded was meant for such services between Nanded Railway Siding and various godowns in and around Nanded. The eligibility criteria for the bidders and in particular MSEs, were similar in these notices.

9. The MSEs registered with the prescribed agencies were exempted from payment of Earnest Money Deposit (EMD) and cost of tender. The MSEs were required to enclose the proof of their being registered with the specified agencies and they were required to submit copies of valid registration certificate. Such MSEs were required to enclose with their offer, the proof of their being registered for goods produced and services rendered with any of the agencies mentioned in the notification of Ministry of Micro, Small and Medium Enterprises (MSME). These agencies were mentioned as :

(i) District Industries Centres,

(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 Handloom, and

(vii) Any other body specified by the MSME.

It was specifically mentioned in the tender notice that, as per public procurement policy on MSE, considering that it was a non-divisible tender, an MSE quoting in the price band of L1+15% would be awarded for full / complete work of tender, considering the spirit of policy for enhancing the government procurement from MSEs subject to bringing down of price to L1 rate after negotiation, if any, by the MSE concerned.

10. The notice mentions disqualification conditions on which the tenderers could not participate. These conditions were :

(a) The tenderers who had been blacklisted or otherwise debarred by CWC, FCI or any department of Central or State Government or any other Public Sector Undertaking as on last date of submission were ineligible during the period of such blacklisting.

(b) Tenderers' EMD should not have been forfeited by CWC / FCI during the last 3 years as on the last date of submission of the bid.

(c) Tenderers contract should not have been forfeited by CWC / FCI during the last 3 years as on last date of submission of the bid.

(d) If the Proprietor / any of the partners of the tenderer firm / any of the Director of the Tenderer company had been, at any time, convicted by a Court for an offence and sentenced to imprisonment for a period of three years rigorous imprisonment or more, such tenderer would be ineligible. On his acquittal by the Appellate Court, such tenderer would be eligible.

(e) While considering ineligibility arising out of any of such clauses, incurring of any such disqualification in any capacity whatsoever, would render the tenderer disqualified.

11. The Respondent Nos.2 and 3 have annexed to their Affidavits an order dated 23/03/2012 issued by the Ministry of Micro, Small and Medium Enterprises published in the gazette of the Government of India. This order was issued in exercise of the powers conferred on the Central Government in Section 11 of The Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED', for short). This order came into force with effect from 01/04/2012. (The said order is referred to as the '2012 order' hereinafter). Some important clauses of this order are as follows :

"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 percent, of total annual purchases of products produced and services rendered by Micro and Small Enterprises in a period of three years.

6. Price quotation in tenders. % (2) In case of more than one such Micro and Small Enterprise, the supply shall be shared proportionately (to tendered quantity).

16. Removal of difficulty. % Any difficulties experienced during the course of implementation of the above Policy shall be clarified by Ministry of Micro, Small and Medium Enterprises through suitable Press releases which would be kept on the public domain."

12. Clause 16 of this order enables the Ministry of Micro, Small and Medium Enterprises to clarify any difficulties experienced during the course of implementation of this policy. Accordingly, the Ministry has published questions and answers explaining this policy under the caption of 'Frequently Asked Questions on Public Procurement Policy For MSEs, Order 2012' published on 24th October, 2016. Copies of these frequently asked questions and answers provided by the Ministry are produced on record on behalf of the Respondent Nos.2 and 3. Both the parties have referred to this document during their arguments. These questions and answers are published on the official website of the Ministry as required under Clause 16 of the 2012 order.

13. In this background, we now refer to the contentions raised by the parties in these Petitions. Mr. Dani, learned Senior Counsel, submitted that the Petitioners have entered into correspondence with the Respondent Nos.2 and 3 raising their objections for awarding the contract to the Respondent No.4. However, their objections were ignored. Mr. Dani submitted that the Respondent No.4 was not registered with any of the agencies mentioned in the tender notice or the 2012 order viz. District Industries Centres, Khadi and Village Industries Commission, Khadi and Village Industries Board, Coir Board, National Small Industries Corporation or Directorate of Handicraft and Handloom. According to the Petitioner, though the Respondent No.4 claimed to have registered under Udyog Aadhar Memorandum ('UAM'), this agency was not mentioned in the tender notice, though in answer to Question No.3 in the list of frequently asked questions referred to hereinabove, it was mentioned that MSEs registered under UAM were also eligible to avail the benefit under the policy. Mr. Dani submitted that the answers to one of the frequently asked questions can never have any statutory force. He further submitted that the registration with UAM could be easily obtained just by filing an online form without any verification by MSME authority. Mr. Dani further submitted that the provision of permitting an MSE falling within the band L1+15% to negotiate and bring down his bid to the rate of lowest bidder, was highly unfair to such bidder having participated in the bidding process and after having disclosed the most competitive price. He submitted that if at all, even L1 should be given opportunity to negotiate the price by further lowering it. Mr. Dani submitted that such provision was arbitrary and discriminatory and hence was liable to be struck down. He further submitted that, in any case, as per the policy and the order, the Respondent No.2 could have awarded the contract only up to 20% of total tender value and not more. According to Mr. Dani, the slab of 20% was the maximum of the contract which could be awarded.

14. Mr. Sanjiv Sawant supported Mr. Dani's arguments. Mr. Dani and Mr. Sawant further pointed out that the Respondent No.4 was a dubious firm. One of the partners of the Respondent No.4 was an accused in connection with C.R.No.109 of 2018 registered with Kuntoor Police Station, District - Nanded. In this offence, there were serious allegations of commission of offences punishable under Sections 420, 406, 467, 468, 471, 477A and 120B of the IPC read with Section 3/7 of the Essential Commodities Act. The anticipatory bail preferred by one of the partners of the firm was rejected by the learned Additional Sessions Judge, Biloli. It was the case of the investigating agency that the Respondent No.4 was involved in removing government owned food grains stored in government godowns and selling them in black-market in huge quantity. Copies of the FIR and the reply filed by the investigating agency in the afore- mentioned anticipatory bail application were produced by the Petitioners and are taken on record. Apart from this serious case, the Collector, Nanded, had issued a Show-Cause Notice dated 04/09/2018 to the Respondent No.4 calling upon them to show cause as to why penalty should not be recovered from them. It was

mentioned in the Show-Cause Notice that the Respondent No.4 did not transport a large quantity of food grains for distribution to poor beneficiaries. Because of the Respondent No.4's lethargy, huge quantity of food grains was wasted. There was proposed penalty of Rs.70,56,510/-. Mr. Dani and Mr. Sawant, therefore, submitted that the Respondent Nos.2 and 3 should not have awarded the contract to such a person and on this count also, the Petitions should be allowed.

15. As against these submissions of the Petitioners, Mr. R. K. Sharma, learned Counsel appearing for the Respondent Nos.2 and 3, defended their action of awarding the contract to the Respondent No.4. He submitted that the Petitioners being proprietary concern, could not have filed these Petitions. He submitted that it was beyond the scope of powers of this Court to test the correctness or reasonableness of policy of the Government. He further submitted that the Respondent No.4 was registered with UAM and that it was sufficient compliance with the requirement of such registration for participating in tender process.

16. Mr. Kishor Patil, learned Counsel for Respondent No.4, supported submission of Mr. Sharma. Both of them further submitted that neither of the partners of the Respondent No.4 was convicted for an offence punishable with three years or more. They submitted that though the Show-Cause Notice was issued by the Collector of Nanded, the proceedings were still pending and there was no clear finding of any violation of conditions of any contract. They further submitted that the FIR pending against one of the partners of the Respondent No.4 was merely in investigation stages and that it was easy to make allegations to target a particular person. They submitted that pendency of investigation could not be equated with the conviction and sentence which entail disqualification from participating in the tender process. They submitted that the Respondent No.4 did not fall in any of the categories mentioned for disqualification from participating in such process.

17. We have considered the rival contentions carefully. Mr.Dani has raised a contention that the Respondent No.4 was not eligible to be treated as an MSE because he was not registered with any of the agencies mentioned in the tender notice or the 2012 order. Both these documents i.e. the tender notice as well as the 2012 order mention that apart from the agencies named therein, registration with any other body specified by Ministry of MSME was also good enough to satisfy this particular eligibility criteria. The Respondent Nos.2 and 3, in their Affidavits-in-Reply, have stated that the Respondent No.4 was registered under UAM and a document relating to such registration was submitted by the Respondent No.4 along with their tender. It is also mentioned in the said Affidavit and is evident from the frequently asked questions and answers downloaded from the website of the Ministry of MSME, that MSEs registered under UAM were also eligible to avail the benefit under the policy. It is clarified by the Ministry that with effect from 18/09/2015, as part of ease of doing business, UAM had been introduced through dedicated portal on self-certification basis. A copy of the said Notification dated 18/03/2015 is produced by the Respondents as directed

by us. The 2012 order was passed by the Ministry of MSME under the powers conferred by Section 11 of the MSMED Act. Clause 16 of the 2012 order clearly mentions that any difficulties experienced during the course of implementation of the above Policy could be clarified by the Ministry of MSME through suitable Press releases which would be kept on the public domain. Under such powers conferred by Clause 16 of the 2012 order, the Ministry can explain the policy for better implementation. The frequently asked questions and their answers published on 24/10/2016 were thus in the nature of such clarifications. Mr. Sharma, learned Counsel for the Respondent Nos.2 and 3 has submitted that this document is downloaded from the official website of the Ministry. Thus, this document was on the public domain and gives explanation in respect of the various doubts. Such publication is recognized under Clause 16 of the 2012 order which, in turn, is issued under the exercise of powers conferred under Section 11 of the said Act. Therefore, these explanations offered through answers to frequently asked questions do have legal force and they have to be given due effect. These clarifications flow from the Government of India Notification dated 18/09/2005. Therefore, the registration under UAM thus satisfies one of the eligibility criteria of registration with specified agencies. Therefore, we are not inclined to accept the contention raised by Mr.Dani that the Respondent No.4 did not satisfy the basic criteria of eligibility of being registered with any specified agency.

18. The next contention raised by Mr. Dani was that the provisions permitting an MSE falling within the band of L1+15% to negotiate and bring down his bid to the rate of lowest bidder was highly unfair. Such provision was arbitrary and discriminatory. This contention has to be decided in the light of objects and reasons for which the said Act was enacted. One of the objects for such enactment was to extend policy support for the small enterprises so that they are able to grow into medium ones adopting better and higher levels and technologies and are able to achieve higher productivity to remain competitive in the fast globalization area. The very purpose of such enactment was to help smaller enterprises to grow and compete with bigger industries. The 2012 order is issued in furtherance of such objects. The 2012 order, as mentioned earlier, was issued under the powers conferred by Section 11 of the MSMED Act. The tender notice is also issued in consonance with the 2012 order which provides for the price band of L1+15%. Therefore, we do not think that the said provision is arbitrary or discriminatory. On the contrary, the order is issued and the policy is embodied in such order to further the very object of enacting the said Act. The very existence of this sound policy gives fair chance to smaller enterprises to grow and work efficiently in today's competitive world. Therefore, even this contention raised by Mr. Dani is not acceptable. Suggestion of Mr. Dani that even the L1 should be given an opportunity to further reduce the price would destroy this object. Idea behind this policy is to give an opportunity to an MSE to perform the work at the rate of L1 if the MSE's offer in the tender was in the band of 15% higher the L1 offer. Idea is not to squeeze out the MSE's profitability by permitting the L1 to bring its offer further down.

19. In the case of Michigan Rubber (India) Ltd. Vs. State of Maharashtra & Ors. reported in (2012) 8 SCC 216, it was held and observed by the Supreme Court that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted. This line of Judgment is consistently followed by the Supreme Court and the High Courts.

20. Mr. Dani has further submitted that Clause 6 of the 2012 order provides that Micro and Small Enterprises quoting price within price band of L1+15 percent should be allowed to supply a portion of requirement by bringing down their price to the price offered by the lowest bidder and that such MSE should be allowed allowed to supply up to 20 percent of total tendered value. According to Mr. Dahi, the contract up to maximum of 20% should be allowed to the MSEs and not more. Again here, we are unable to agree with Mr. Dani. The scheme of the 2012 order shows that it was mandatory for the Central Government Ministry, the Department and the public sector undertaking to procure 'minimum' 20% of their annual value of goods and services from micro and small enterprises. Thus, it is difficult to achieve this object if a ceiling of maximum 20% is applied to the contract awarded to any MSE falling within the band of L1+15%. Secondly, the position is further clarified in Question No.8 from the frequently asked questions (dated 24/10/2016, as mentioned earlier).

Such question and answer reads thus :

"Q.No.8 Whether there is price match making facility for procurement from MSEs over large scale ?

Ans. In tender, participating MSEs quoting price within the band of L1+15% shall also be allowed to supply a portion of requirement by bringing down their price to L1 price in a situation where L1 price is from someone other than an MSE. Such MSEs shall be allowed to supply atleast 20% of total tendered value. In case of more than such MSE, the supply will be shared proportionately (to tendered quantity)."

21. As discussed earlier, such explanation does have its own force and therefore, the clarification offered that in such cases, the MSE should be allowed to supply 'atleast' 20% of the total tendered value, makes it clear that the figure of 20% was referred to as the minimum of the contract which could be awarded and not the maximum limit. In any case, the tender notice itself mentions that the contract was non-divisible and an MSE quoting in the price band of L1+15% would be awarded full / complete work of tender. Having participated in the tender process initiated pursuant to this notice, the Petitioners cannot now challenge this condition.

22. The next contention raised by Mr. Dani was in respect of pending offence against one of the partners of the Respondent No.4 and the Show-Cause Notice issued by the Collector of Nanded for causing damage to the Government by not

transporting huge quantities of food grains. Here again, the disqualification conditions mentioned in the tender notice assumes importance. The said conditions are already mentioned in the foregoing paragraphs.

Though there are serious allegations in the FIR as well as in the Show-Cause Notice, the Respondent No.4 does not fall in any of the conditions mentioned in the tender notice as submitted by Mr.Sharma. Mr. Kishor Patil appearing for the Respondent No.4 submitted that pending investigation cannot be equated with conviction by a Court for an offence of sentence of imprisonment for a period of three years or more. There is nothing on record in this Petition to show that the Respondent No.4's contract had been terminated by the CWC or FCE during the last three years as on last date of submission of bid. Neither it is shown that the Respondent No.4 has been blacklisted or otherwise debarred by the CWS, FCE, Central or State Government of any other public sector undertaking on the last date of submission. Therefore, in the instant tender process, there is nothing to show that the Respondent No.4 was disqualified from participating.

23. Hence, it can be seen that the Respondent No.4 was found eligible by the Respondent Nos.2 and 3 and he was not disqualified on any of the conditions mentioned in the tender notice. Therefore, we do not find that the tender was wrongly awarded to the Respondent No.4.

24. In any case, the communication dated 22/09/2018 issued by the Respondent No.3 to the Respondent No.4 mentions that, in case any adverse report was received from FCI on any department of Central or State Government or any other Public Sector Undertaking, further action, as appropriate, would be taken.

Thus, the Respondent Nos.2 and 3 are sufficiently empowered to protect public money and take action against the Respondent No.4 in case such eventuality arises.

25. As a result of the above discussion, the Petitions are dismissed and the Rule is discharged.

