

(2019) 11 PAT CK 0124

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 10860 Of 2019

Surya Alloy Industries Limited

APPELLANT

Vs

Central Railway Board And Ors

RESPONDENT

Date of Decision : 25-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 142, 226
General Financial Rules, 2017 — Rule 173(xii)

Citation : (2019) 11 PAT CK 0124

Hon'ble Judges : Rajeev Ranjan Prasad, J

Bench : Single Bench

Advocate : Jitendra Singh, Yash Singh, Kamal Kishor Singh, Tej Pratap Singh, S.D. Sanjay, Ramadhar Shekhar, Parul Prasad, Binod Kumar Singh

Final Decision : Disposed Of

Judgement

1. Challenging the action of the Railways in the matter of placement of purchase order to the private respondent no.6 vis-a-vis the petitioner on the ground of arbitrariness, extraneous consideration and violation of the Public Procurement Policy (Make in India) Order, 2017 dated 15.06.2017 issued by the Department of Industrial Promotion and Policy, Ministry of Commerce, and a complete go-bye to the guidelines of the Central Vigilance Commission, the present writ application has been filed invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

2. Petitioner is a Company incorporated under the provisions of the Companies Act, 1956, it is said to be engaged in manufacturing railway track like elastic rail clips, inserts etc. and is engaged in the business of manufacture and supply of commodities like Ferro Silicon, Ferro Manganese etc. It is a RDSO approved manufacturer and claims to have executed contracts of several crores by effectively and successfully supplying track items to the Indian Railways. The petitioner claims that till date no dispute whatsoever has been raised in respect of the supplies made by the petitioner to the railways or by any of its customers.

3. With the aforementioned background, the petitioner participated in the tender floated by the respondent railways being Notice Inviting Tender No. 01161037 published on 30.05.2017, inviting bids for supply of Ferro Silicon from various categories of supplies as specified in the tender document. The manufacturers who were unregistered/untried were also eligible to participate in the tender and the respondents reserved their right to treat such vendor as a developmental vendor and place developmental orders not exceeding 20% of the ordered quantity subject to the bidder being the lowest bidder. The petitioner being unregistered/untried as far as the respondent nos.2 to 5 are concerned i.e. the Railway Wheel Plant, Bela (in short 'RWP, Bela') participated in the bid being a manufacturer of the said item/commodity.

4. It is not in dispute that the petitioner's bid was accepted by the respondents as the petitioner complied with all the technical parameters and stood lowest tenderer i.e. L-1. The petitioner was allotted 20% of the tendered quantity and successfully effected supplies under the purchase order dated 08.11.2017. The petitioner claims that having successfully participated in the respondent's tender for the item i.e. Ferro Silicon, it became eligible for participating in the respondent's tender as a regular supplier.

5. It is stated that on or about 07.09.2018 one NIT being number 01181037 was floated by the railways for supply of Ferro Silicon, the total quantity of supply being 443030.66 kgs (Annexure-2). The tender conditions provided the eligibility criteria of the suppliers.

6. According to the petitioner the tender distinguished between a regular and developmental order and provided that a manufacturer or their authorized dealer/agent who have successfully supplied the same item would be eligible to be placed with a regular order, post successful tendering process, under which a minimum 80% of the tendered quantity would be procured from such successful bidder. The petitioner no.1, thus participated in the tender and submitted its bid for supply of the entire tender quantity of 443030 kgs on the conditions contained in its bid vide Annexure-3 to the writ application. The petitioner no.1 stood lowest tenderer (L-1) but at this stage instead of awarding the contract to the petitioner, the respondent nos.2 to 5 called the petitioner to attend the price negotiation vide its communication dated 14.02.2019, the meeting was subsequently fixed on 18.02.2019 at RWP, Bela (Annexure-4). According to petitioner this step taken by the respondent calling upon the petitioner to participate in a price negotiation was against the guidelines/directives of the Central Vigilance Commission (CVC) formulated from time to time. According to such guidelines there should not be any post tender negotiations and only under exceptional circumstances such post tender negotiations can be held and that too with the L-1 vendor only. In this connection the petitioner has also referred Railway Board's letter bearing no.99/RS(G)/779/2 dated 1st March, 2000 clarifying that negotiation is to be conducted only with L-1 bidder who is technically cleared/approved for supply of bulk quantity and whom the contract

would have been placed but for the decision to negotiate.

7. The petitioner submits that although initially the petitioner expressed its inability to attend such post tender negotiation meeting but ultimately it agreed to participate in the price negotiation process and reduced its offered price to Rs.98/- per kg. The petitioner, thereafter was expecting to be awarded the contract for supply of minimum 80% of the tendered quantity, but the grievance of the petitioner is that it was served with communication dated 16.03.2019. The "Counter Offer" by the respondents not only reduced the rate and proposed a rate of Rs.94.20 per kg. (exclusive of GST) but offered the petitioner to supply a reduced quantity of 44,169 kg of the said commodity. It is the grievance of the petitioner that in the said communication the respondents classified the order issued in favour of the petitioner as "Extended Developmental Order". Copy of the communication dated 16.03.2019 is Annexure- '5' to the writ application.

8. It is the case of the petitioner that on receipt of the communication as contained in Annexure- '5' to the writ application the petitioner was shocked and surprised to find that the counter offer was contrary to the rules, regulations and guidelines on the subject, while expressing its reservations in its letter dated 18.03.2019 (Annexure-6) the petitioner gave its acceptance for supply at reduced price as contained in the counter offer. The petitioner clearly wrote to the respondents that they are surreptitiously attempting to favour another vendor ignoring the settled principles of law by not offering to L-1 vendor despite having fulfilled the required criteria for regular order and all this was done with malafide intention.

9. It is the case of the petitioner that the respondents were bound by the tender conditions and the petitioner being lowest tenderer was entitled to get at least 80% of the tender quantity. It is alleged that the official respondents have favoured the private respondent no.6.

10. In order to substantiate its argument that in similar circumstance in respect of supply of Ferro Manganese the petitioner was treated eligible for regular order at the second instance by the same respondents, the petitioner no.1 asserts that when the petitioner participated in the tender floated in respect of Ferro Manganese i.e. another commodity under tender floated by the respondents being Tender No.01181029 opened on 15.11.2018 and was found to be the lowest bidder, the petitioner was provided a developmental order in respect of Ferro Manganese. The petitioner completed supply of Ferro Manganese successfully, therefore on the second instance when the petitioner participated in the tender for supply of Ferro Manganese, it was placed with regular order. In this regard the petitioner has brought on record Annexure-7 series.

11. It is pointed out that the respondent Railways has placed purchase order for supply of 397518 kgs of Ferro Silicon on one M/s Nalari Ferro Alloys Pvt Ltd. (respondent no.6) on 12th April, 2019. It is for the balance tender quantity in relation to tender no.01181037. The purchase order issued to respondent no.6 is

at the rate of Rs.96 per kg which is higher than the rate on which the petitioner has been asked to supply. The petitioner has highlighted that the rate offered to respondent no. '6' is higher by almost 2% to the rate offered to the petitioner which would create a price variation of about Rs.7,15,532.40. The petitioner therefore challenged the award of tender/purchase order to the extent of 90% of the tender quantity in favour of respondent no.6 and has claimed that a minimum 80% of the tender quantity should be purchased from the petitioner no.1 treating it entitled for regular order.

12. During pendency of the writ application some developments took place necessitating filing of the interlocutory applications seeking amendment of the writ petition. I.A. No.2 of 2019 by which the petitioner sought to amend the writ application to challenge the letter dtd 27.04.2019 issued by the railways in response to the petitioner's letter/representation dated 18.03.2019 had been allowed by this Court on 30.05.2019. It is the contention of the petitioner that letter dated 27.04.2019 has been issued only after the copies of the writ application were served on the learned counsel representing the respondent authorities on 08.05.2019. The petitioner submits that letter dated 27.04.2019 was dispatched for communication on 13.05.2019 but the same was received in the office of the petitioner on 15.05.2019.

13. Although I.A. No.4 of 2019 is another application seeking amendment to the writ application but in view of the order dated 03.09.2019 passed by this Court after hearing learned counsel for the parties, I.A. No.4 of 2019 has lost its significance and hence the same is not under consideration at this stage.

14. I.A. No.5 of 2019 has been preferred seeking modification of the order dated 03.09.2019 wherein the petitioner has expressed its apprehension that the order dated 03.09.2019 may give an impression that the petitioner has for all practical purposes abandoned the adjudication of the issues in the writ petition and thus agreed not to press them, therefore it has been submitted that in the order dated 03.09.2019 the words "subject to the result of the writ petition" be read and recorded so that the issues and the grounds on which the purchase order dated 12.04.2019 issued in favour of the respondent no.6 has been challenged remain the subject matter of consideration.

15. In course of hearing learned senior counsel for the petitioner has while relying upon the judgment of the Hon'ble Supreme Court in the case of Haffkine Bio- Pharmaceutical Corporation Limited Vs. Nirlac Chemicals through its Manager and others reported in (2018) 12 SCC 790 submitted that since the private respondent has completed the transaction and total supplies have been made, the relief may be moulded in similar manner as have been done by the Hon'ble Supreme Court in the case of Haffkine Bio-Pharmaceutical Corporation Ltd. (supra). Reliance in this regard has been placed on paragraph 10, 18 and 19 of the judgment. This Court will deal with this aspect of the matter while considering the desirability to mould the relief in the given facts and circumstances of this case.

16. Mr. S.D. Sanjay, learned A.S.G. assisted by learned advocate on record has appeared on behalf of the Railways (respondent nos.2 to 5). It is their stand that the RWP, Bela is a production unit, set up in the district of Saran, Bihar for the production of cast wheels for Railway wagons and coaches. According to them, the 'Ferro Silicon' is one of the most important items for the safe operations of trains and thus best effort has been undertaken to ensure quality of wheels. They admit that RWP, Bela has been set up on the lines of Rail Wheel Factory (RWF), Yelahanka, Bangalore. It is also admitted in the counter affidavit that the procurement policy at RWP, Bela is on the same lines as RWF, Yelahanka, Bangalore.

17. It is the stand of the official respondents that the tender distinguishes between 'regular order' and 'developmental order'. Attention of this Court has been drawn towards the eligibility conditions under the tender and various provisions from the tender conditions have been quoted in the counter affidavit. The main contention of the official respondents is with respect to the capacity cum capability of supply of the tendered item by the petitioner. According to them the petitioner had attached five documents out of which only one document was in support of capacity cum capability, it was a photograph of a receipt note no.011710557 dated 12.02.2018 for 22750 kg against purchase order no.0116103710043 dated 08.11.2017. This purchase order was a developmental order.

18. According to the respondents since the petitioner had not submitted any document in support of the eligibility for having executed any regular order, the tender committee found the offer of the petitioner not eligible for regular order as per eligibility condition no.2 but the petitioner was found eligible for developmental order only as per eligibility condition no.3. The respondents also submitted that the petitioner had put a condition of a minimum order of 4,00,000 kgs and not below that, therefore it was not a clear cut offer but a conditional offer, thus the respondents were not obliged to consider any conditional offer. It is the stand of the respondents that the private respondent no.6 is a regular supplier to RWP, Bela for past three years and is a regular supplier at RWF, Yelahanka, hence, the tender committee found the respondent no.6 eligible for regular order.

19. Referring to clause 4 of the tender document, the respondents have submitted that there are two conditions for the tenderer firm to be entitled for developmental order i.e. (i) the firm which is not being tried and which is unregistered would be entitled for maximum of 20% of the net requirement only if the said firm is the lowest bidder than those applicable to regular orders and (ii) entitlement of developmental order is with the firm which has been tried but yet not cleared for regular order.

20. It is thus the case of the respondents that the petitioner has yet not been cleared for regular order and, therefore, it was eligible only to get a developmental order for supply of 44,169 kg of Ferro Silicon. As regards the

status of petitioner no. 1 being a Micro, Small and Medium Enterprises (in short 'MSME') claiming entitled to get minimum 25% of the tender quantity the respondents have taken a stand that the petitioner has failed to enclose any such statutory guidelines which may make it entitle to get a minimum order of 25% of the tender quantity in case of being the lower bidder (L-1).

21. It is stated that in the eligibility criteria for regular order it is the respondent no.6 who is L-1 whereas the petitioner is L-1 in the eligibility criteria for developmental order. As regards the claim of the petitioner that he is being treated as regular supplier and is getting purchase order as a regular order in case of Ferro Manganese, it is stated that earlier the petitioner was granted developmental order, thereafter it has been cleared and became eligible for regular order in case of Ferro Manganese.

22. The respondents have submitted that as per the Manual for Procurement of Goods 2017 and the General Financial Rules, 2017, Ministry of Finance, Government of India, Rule 173 (xii) the "Bids received should be evaluated in terms of the conditions already incorporated in the bidding documents. No new condition which was not incorporated in the bidding documents should be brought in for evaluation of the bids. Determination of a bid's responsiveness should be based on contents of the bid itself without recourse to extrinsic evidence". The respondents have defended the price negotiation on the same grounds saying that both the petitioner as well as the respondent no.6 being the lowest tenderer in their respective category were called for price negotiation. The respondents have relied upon a judgment of the Hon'ble Supreme Court in the case of R.D. Shetty Vs. International Airport Authority (1979) 3 SCC 489 to submit that once the eligibility criteria is stated in the tender document, Railways could not depart from it. Reliance has also been placed on the judgment of the Hon'ble Apex Court in the case of Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651. Without referring to any specific provision containing the arbitration clause in the tender document a plea has also been raised that all disputes after the contract is formed are to be dealt by the arbitration clause. In course of argument, however, learned senior counsel for the parties have argued on the merits of the case and learned A.S.G. representing the Railways has not pointed out any arbitration clause and no argument has been done on this issue.

23. A supplementary counter affidavit has been filed on behalf of the Railways in which it has been pointed out that the developmental order was approved in favour of the petitioner subject to inspection by RITES vide letter dated 16.03.2019. The petitioner replied to the same vide letter dated 18.03.2019 and also sent a legal notice challenging the proposal of the respondents of offering a developmental order to the petitioner. Thereafter the writ petition was filed and vide order dated 30.05.2019 the operation of the impugned purchase order dated 12.04.2019 (Annexure-9 to the writ petition) was stayed. Referring to the Store Instruction No.01/2016 dated 22.12.2016 (Annexure-R2/F) once again the respondents have shown that the eligibility criteria for regular order and

developmental order have been clearly laid down in the said Store Inspection. It is stated that the officials of the respondents inspected the factory premises of the petitioner for judging the capacity and capability to supply Ferro Silicon but on the date of inspection i.e. 04.09.2019 the petitioner did not make available the required documents. In this connection Annexure-R2/G has been brought on record to submit that by this letter the petitioner had been called upon to make available the mentioned documents. It is submitted that on 05.09.2019 again after inspection a joint inspection report was prepared (Annexure-R2/H to the supplementary counter affidavit of respondent nos.2 to 5). Some documents were shown to the respondents and regarding some of the documents petitioner said that it will be provided in consultation with the headquarter officials at Kolkata. Referring to the copy of the tour report dated 07.09.2019 and 12.09.2019 (Annexure-R2/I series) the respondents have submitted that no finished Ferro Silicon was found in the factory premises and the inspecting team did not find manufacturing process going on in the factory premises. At this stage, it is also alleged that in such circumstance it cannot be accepted that the petitioner has got capacity and capability to manufacture Ferro Silicon.

24. It is contended that the respondent no.6 has brought on record the purchase order from Meghalaya with one GST invoice issued by Sri Sakambari Ferro Alloys Pvt. Ltd. of Meghalaya along with E-way bill with respect to the said invoice dated 26.08.2019 for quantity of 25 M.T. which gives rise to a strong inference that the petitioner does not manufacture Ferro Silicon but purchases the same from market. It has been submitted that in absence of availability of any raw material for Ferro Silicon i.e. Ore for manufacturing Silicon, or even a single bag of finished product and the failure of the petitioner to furnish any document coupled with the tax invoice and the E-way bill showing purchase of Ferro Silicon by the petitioner, it becomes a disputed question about the production capacity of Ferro Silicon in the factory premises of the petitioner and, therefore, this fact has to be taken note of.

25. The respondents submits that the 'Ferro Silicon' and 'Ferro Manganese' are two prime raw material for manufacture of wheel for railway and all the raw materials are very costly and if per any chance inferior quality of Ferro Silicon is supplied then it may cause huge loss to the Railways because in such situation the wheel cannot be used as it may develop cracks in the wheel which will be resulting in failure of the wheel which may even cause accident of the train.

26. Mr. Binod Kumar Singh, learned counsel for the respondent no.6 has in fact while endorsing the arguments of Mr. S.D. Sanjay, learned A.S.G., mainly contended that this petitioner is engaged in purchasing the Ferro Silicon from other manufacturers. He has relied upon the statements made in his counter affidavit saying that the petitioner was not a manufacturer in order to make bulk supply of tendered item and in this connection the respondent no.6 has enclosed invoice no.126 dated 26.08.2019 (Annexure-R/1series). It is submitted that the petitioner cannot give bulk supply of Ferro Silicon from his own manufacturing

unit and as such no fault may be found with the action of the Railways in not granting him order for bulk supply as a regular order. Learned counsel submits that in terms of the purchase order dated 12.04.2019 the petitioner has already supplied the quantity of Ferro Silicon.

27. As regards the contention of Railways questioning the capacity and capability of writ petitioner to manufacture the Ferro Silicon, the petitioner has come out with a rejoinder. It is submitted that the respondent authorities at Bela do not deny in their counter affidavit that the petitioner is a manufacturer of Ferro Silicon. It is submitted that the reliance placed by one purchase invoice dated 26.08.2019 for 25 MT of Ferro Silicon from Sri Shakambharee Ferro Alloys Private Limited, Mehgalaya is only misleading inasmuch as the petitioner has categorically stated that it is an RSDO approved manufacturer as also a merchant exporter of amongst others, Ferro Silicon from its factory/unit located at Bajora, District Bankura, West Bengal with a production capacity of approx 1000 MT tons of Ferro Silicon per month. The petitioner asserts that in order to meet the export obligations and adhering to the relevant timelines for supply, it also purchases Ferro Silicon from other manufacturers. It is submitted that the respondent nos. 2 to 5 had inspected the production unit of the petitioner earlier while issuing purchase order for supply of 22750 kgs of Ferro Silicon against tender no.01161037 as contained in Annexure-1 to the writ application and the supply was successfully made to the respondents. It is stated that in the recent inspection held on 04.09.2019 it has been in fact confirmed that the petitioner is indeed a manufacturer having a manufacturing line for production. In paragraph '24' of its rejoinder the petitioner has stated that pursuant to the joint inspection dated 04.09.2019 and 05.09.2019 a purchase order dated 07.09.2019 for supply of 44169 kgs of Ferro Silicon has already been issued in favour of the petitioner. It is submitted that in the joint inspection no inconsistency or infirmity was found and the contention on behalf of the respondents that the respondent authorities at Bela were not made available documents showing production of Ferro Silicon in last six months is wholly incorrect inasmuch as the petitioner had made available the documents with regard to production in the last six months. In this regard the petitioner has stated that the petitioner received a purchase order (Developmental) dated 28.02.2019 from RWF, Yelahanka for supply of 31,455 kgs of Ferro Silicon after due inspection of the manufacturing line of the petitioner and even the said supplies have already been completed. It is submitted that there is no complaint whatsoever with regard to the quality of the Ferro Silicon manufactured by the petitioner, therefore, the contentions on behalf of the respondents expressing apprehension with regard to the quality etc. are totally misplaced and have been made just to create a kind of confusion and to justify their own arbitrary decision in the matter of award of work to the private respondent no.6 at a higher rate. The petitioner has brought on record the purchase order dated 28.02.2019 issued by the RWF, Yelahanka, Bangalore which provides a special condition for inspection pre- dispatch product by the consignee at firms works located at village-Ghutghoria, Barjora, District-Bankura,

West Bengal. Petitioner has also brought on record the inspection certificate dated 15.04.2019 of the Indian Railways, RWF, Yelahanka, Bangalore as Annexure-33 series. There are also copies of tax invoices showing supply of Ferro Silicon to Steel Authority of India Ltd. (SAIL) vide contract no.SAIL/207/Ferro/2019- 20/dated 16.08.2019. As regards the document brought by the respondent no.6 showing that the petitioner has purchased 25 MT of Ferro Silicon from Sri Shakambharee Ferro Alloys Private Limited, the petitioner has brought on record tax invoice (Annexure-34 series) to show that the petitioner is engaged in export business also and this document would show that the petitioner had exported 50 MT of Ferro Silicon to Bangladesh Steel Re-Rolling Mills Ltd., Block-B, 12th Floor, Shanti Niketan Building, 8 CAMAC Street (Arabindra Nath Thakur Sarani), Kolkata-700017. It is thus submitted that no doubt may be raised as regards the capacity and capability of the petitioner and there being no complaint whatsoever till date in the matter of supply of Ferro Silicon to the respondents, there was no reason for them to indulge in doubting the capacity and capability of the petitioner.

Consideration

28. Having heard learned counsel for the parties and on a careful perusal of the records, this Court is of the considered opinion that the respondent Railways having placed purchase order(s) with the petitioner both from RWF, Yelahanka, Bangalore and the RWP, Bela accepts that the petitioner no.1 company is engaged in manufacturing of Ferro Silicon, therefore being a manufacturer the petitioner no.1 company has been found eligible to participate in the tender. Clause 4 of the tender document provides the eligibility conditions and it would be necessary to take note of clause 4 containing special eligibility criteria in its entirety as under:-

S.No.

Description

Confirmation Required

Remarks Allowed

Documents Uploading

1

Only Manufacturer of this tendered item or their tender specific authorized dealer/agent are eligible to quote. Brokers and middlemen are not eligible.

Yes

Yes

Not allowed

2

Regular order: RWP reserve the right to procure minimum 80% or entire quantity from manufactures or their authorized dealers/agents who have successfully supplied the same item or with superior specification equal to or

Yes

Yes

Not allowed

more than full tendered quantity against single order to erstwhile integrated steel plant OR plant having Electric Arc Furnace of 20 Ton or more capacity in the last 3 years from the date of tender opening, by enclosing satisfactory performance report of that single order from user after using it. OR manufacture or their authorized dealer/agent who have successfully supplied the same item OR with superior specification to RWP/RWF against regular orders in the last 3 years from the date of tender opening and performance is satisfactory.

3

Development order: RWP reserve the right to place developmental order for small quantity upto 20% of the net requirement within requirement on unregistered/untried manufacture or their authorized dealer/agent OR tried firm against developmental orders of RWP/RWF but not yet cleared for regular order, where the rate received from such firms are lower than those applicable to regular orders and prima facie unregistered/untried manufacture or their authorized dealer/agent, based on enclosed credentials, seem to be capable of executing the order subject to successful capacity cum capability assessment.

Yes

Yes

Not allowed

4

The Technical Parameter of this item is Si: 70 percent minimum, C:0.15 percent max, S:0.05 percent Maximum. Any offer which are better in this leading technical parameter will be considered as same or superior specification.

Yes

Yes

Not allowed

5

The tenderer shall enclose required documents s stated in para 9 of the instructions to the tenderers of the tender document to show that they are meeting the given eligibility criteria for regular and developmental order.

Yes

Yes

Not allowed

6

Quantity to be ordered:- The Purchaser (RWP) reserve the right to distribute the procurable quantity for regular orders amongst the tenderers with due consideration to various constraints and conditions mentioned in the tender documents and in such a manner that would ensure timely supply of material in requisite quantity to meet the needs of operation, maintenance, safety etc. of RWP, regardless of inter-se ranking of the tenderers and in fair and transparent manner with due conformity to the Principles of Natural Justice and Equity.

Yes

Yes

Not allowed

29. A bare reading of the eligibility conditions would show that only manufacturer of this tendered item or their tender specific authorized dealer/agent are eligible to quote. The petitioner has submitted his tender as a manufacturer and the same has been accepted, therefore this Court has no hesitation in concluding that so far as the status of the petitioner no.1 as a manufacturer is concerned, the same is not in question.

30. To this Court what appears to be the bone of contention is that as to whether or not the petitioner having successfully supplied 22750 kgs of Ferro Silicon being 20% of the tendered quantity of the first tender floated on 30.05.2017 pursuant to NIT No.01161037, has made itself entitled to get regular order. The answer has to be found from clause 4(2) and 4(3) of the eligibility conditions. It appears that so far as the developmental order is concerned, it has to be placed in small quantity upto 20% of the tender price. The unregistered/untried manufacture or their authorized dealer/agent or tried firm against developmental orders of RWP/RWF but not yet cleared for regular order is also fit for consideration for developmental order provided the rate received from such firm(s) are lower than those applicable to regular orders. This is also subject to satisfaction of the employer that on the basis of enclosed credentials, such firm(s) seem to be capable of executing the order and in this regard a capacity cum capability assessment may be made, subject to which developmental order may be issued. In this case the petitioner no.1 firm when participated in the first tender, it was an unregistered/untried manufacturer but had successfully completed the earlier supply, therefore, it has to be accepted that the developmental order issued to the petitioner no.1 at first instance succeeded the test of successful capacity cum capability assessment. The question is as to whether the successful completion of the first transaction alone would make the

petitioner no.1 entitled for regular order? In this regard a careful reading of clause 4 (3) would show that the developmental order may be placed not only with unregistered/untried manufacturer but also on the tried firm against developmental orders who have not yet been cleared for regular order. The writ petitioner was definitely a tried firm against developmental order but the bone of contention is that the petitioner's firm had not yet been cleared for regular order.

31. Thus the next question which the Court is required to consider is as to how and with whom the regular order is to be placed. In this regard when clause 4(2) of the eligibility conditions is carefully read, it may be found that 80% of the entire tendered quantity may be procured from the manufacturers or their authorized dealers/agents who have successfully supplied the same item or with superior specification equal to or more than full tendered quantity against single order to erstwhile integrated steel plant or plant having Electric Arc Furnace of 20 Ton or more capacity in the last 3 years from the date of tender opening. In this regard the tenderer has to produce satisfactory performance report of that single order from user after using it.

32. In the writ application, the writ petitioner has not come out with any statement or material to show that the petitioner no.1 Company has successfully supplied the 'Ferro Silicon' in equal to or more than full tendered quantity against single order to an integrated steel plant or plant having Electric Arc Furnace in the last 3 years. Therefore, so far as this condition is concerned, the petitioner company does not seem satisfying this condition. Alternative condition under clause 4(2) is that the tenderer/manufacturer or their authorized dealer/agent should have successfully supplied the same item or with superior specification to RWP/RWF against regular orders in the last 3 years from the date of tender opening and performance is satisfactory. As regards this condition the petitioner no.1 though claims that it has been supplying the Ferro Manganese to RWF, Yelahanka as a regular supplier but as per the tender conditions, it should be the same item i.e. the Ferro Silicon which should have been successfully supplied by the manufacturer against regular order, thus, the contention of the petitioner that because it has supplied 'Ferro Manganese' as a regular order to the Railways, it has to be taken entitled for regular orders in respect of 'Ferro Silicon' also cannot be accepted by this Court. The tender conditions are to be adhered to is a settled proposition of law and in the opinion of this Court if this Court comes to a conclusion that because the petitioner is getting regular order of Ferro Manganese, therefore it should be treated as entitled for regular orders of Ferro Silicon, it would amount to changing the terms of the tender conditions which this Court would not do sitting under Article 226 of the Constitution of India. The petitioner is supplying the Ferro Silicon to RWF, Yelahanka, Bangalore in form of a developmental order and, therefore, again it cannot be said that the petitioner has successfully supplied Ferro Silicon to RWF, Yelahanka, Bangalore against regular orders. This Court is, therefore, of the considered opinion that the claim of the petitioner to be treated entitled for regular order cannot be accepted on the face of the special eligibility conditions contained in clause '4' of

the tender document.

33. The claim of the petitioner that it is eligible for regular orders under Clause 4(6) of the tender document cannot succeed on the face of the discussions made hereinabove. In the present case, the special eligibility criteria as contained in Clause 4 of the tender document are not under challenge and those are not subject matter of discussion from that point of view in this case.

34. Once this Court finds that the petitioner was considered for developmental order in terms of clause 4(3) of the eligibility conditions of tender document, this Court would also be of the considered opinion that, ordinarily, it is not for this Court to dwelve into an inquiry as to how much quantity of 'Ferro Silicon' should have been purchased from the petitioner but then the petitioner has brought on record certain facts which would show that the petitioner is falling in the category of 'MSME'. In the first transaction the petitioner was allotted 20% of the tendered quantity by issuing developmental order dated 08.11.2017 as contained in Annexure-1 to the writ application. The petitioner has successfully made supplies of the said quantity. Annexure-10 to the writ application is the document issued by the Government of India in its Ministry of Micro, Small and Medium Enterprises which shows that the petitioner no.1 company is a Private Limited Company and is engaged in manufacturing activity of various items.

35. In order to deal with the aforesaid claim of the petitioner for its entitlement to get at least 25% of the tender quantity, the submission of the Railways in their counter affidavit would be required to be considered. They have brought on record Annexure-A which is the specification for Ferro Silicon. Annexure-B to the counter affidavit is the 'Instructions To The Tenderers'. It contains General Tender Conditions. Under this part Clause 7.1 deals with Public Procurement Policy on Micro and Small Enterprises (MSEs). Clause 7.1, 7.2, 7.3 and 7.4 are extracted hereunder for a ready reference:-

"7.1 Public Procurement Policy on Micro and Small Enterprises (MSEs).

"Price preference will be given to NSIC/KVIC/WDC units upto 15% on merit subject to their fulfilling the quality/specification criterion. The quantum of preference will be decided depending on the item and with a view to give further encouragement to SSI units to develop this item and this decision of quantum of preference will be decided in consultation with finance subject to the fact that price preference cannot be taken for granted and vendor will make attempt to bring down cost and achieve competitiveness." Price preference shall be allowed to Micro and Small Enterprises (MSEs) registered with agencies listed below at Para 7.5 to extend certain benefits for making efforts for development and enhancement of their participation in Government procurements on merit subject to their fulfilling the quality/specification criterion in order to achieve competitiveness, adhering to sound procurement practices and execution of orders for supply of goods or services.

7.2 Tender documents shall be provided free of cost to Micro and Small

Enterprises (MSEs) registered with the above agencies for the item tendered.

7.3 Micro and Small Enterprises (MSEs) registered with the above agencies for the item tendered will be exempted from payment of Earnest Money.

7.4 In tenders, participating MSEs quoting a price within a price band of L1+15% shall be allowed to supply a portion of the requirement by bringing down their price to L1 price in a situation where L1 price is from someone other than MSE and such MSEs can be together ordered upto 20% of the total tendered value."

36. It is evident from the aforesaid conditions that the Railways agreed to extend certain benefits to MSEs in its' effort to develop and enhance the participation of MSEs in Government procurements but those benefits are to be provided on merit subject to the MSEs fulfilling the quality/specification criteria in order to achieve competitiveness, adhering to sound procurement practices and execution of orders for supply of goods or services. Clause 7.4 clearly states that the MSEs can be together ordered upto 20% of the total tendered value. While it is true that Clause 7.4 does not fix the minimum level of 20% and confers some discretion to the Railways as according to Clause 7.4 the order may vary upto 20% of the total tendered value, considering the Public Procurement Policy which has an object to achieve and the said object is to enhance the participation of the MSEs in Government procurements, such discretions must be applied judiciously. In absence of any plausible reason shown in the counter affidavit, this Court is of the considered opinion that the Railways has restricted the supply order to the petitioner awarding it only 10% of the total tendered value by deviating from the Public Procurement Policy of MSEs. Earlier the petitioner was given order for 20% of the total tendered value which he had successfully executed. The fact that the petitioner has been awarded 10% of the tendered value in the present tender goes a long way to show that even the Railways does not dispute that the petitioner is a manufacturer of Ferro Silicon. Regarding the capacities and capabilities of the petitioner, no clinching material has been placed before this Court to show that the petitioner could not have supplied 20% of the tendered quantity. This Court is, therefore, of the considered opinion that while considering the tenders, the Public Procurement Policy of MSES has not been adhered to in its terms and spirit.

37. The petitioner has raised certain issues alleging violation of the statutory guidelines and circulars/orders of the Central Vigilance Commission and Election Commission of India, the Railways has controverted those allegations. It is the contention of the Railways that the negotiation was done with the lowest acceptable bidder (L1) i.e. Nalari Ferro Alloys Pvt. Ltd., Guwahati (respondent no.6), for bulk supply. The rate offered by the respondent no.6 was Rs.96/- per kg +GST 18% which is equal to total unit rate (TUR) being Rs.113.28. Thus the rate was lower than the rate offered by the petitioner. This petitioner was called for negotiation in the category of developmental sources, as the rate of the developmental source cannot be more than that of a regular source. The Railways has specifically stated in paragraph 24 of their counter affidavit that the

petitioner was never called for negotiation as the lowest acceptable bidder for bulk supply (regular order), L1 as defined in Manual for Procurement of Goods 2017, Ministry of Finance, Government of India, paragraph 7.5.9 and General Financial Rules 2017, Ministry of Finance, Government of India, Rule 173(xii). The Railways has also relied upon the Instructions of Railway Board as contained in Annexure-F to the counter affidavit. It is thus their specific case that the CVC Circular cited by the petitioner would not be applicable. This Court has gone through Annexure-F to the counter affidavit which deals with the procedure for conducting negotiations. The Instructions (Annexure-F) has been issued with the concurrence of Finance Directorate of Ministry of Railways and it provides for a negotiation only with lowest acceptable tenderer (L1) who is technically cleared/approved for supply of bulk quantity and on whom the contract would have been placed but for the decision to negotiate. This Court is satisfied that the respondent Railways has fully explained the steps taken by them for negotiations and at this stage this Court does not find any reason to record any finding/observation against the Railways on these issues.

38. Now coming to the prayer of the petitioner to mould the relief as has been done by the Hon'ble Supreme Court in the case of Haffkine Bio-Pharmaceutical Corporation (*supra*). Paragraphs 10, 18 and 19 of the judgment on which reliance has been placed by learned senior counsel for the petitioner are quoted hereunder for a ready reference:-

"10. Even before us no record could be produced to show that the bid of Bionet was opened in the presence of the representatives of Nirlac. In this view of the matter, we are clearly of the opinion that the entire tender opening process is vitiated since the CVC guidelines have not been followed. We may also add that opening of the tender without showing the documents is also meaningless. When a technical bid is opened, it is the right of the rival bidders to see whether the documents attached by a bidder meet the technical requirements or not. This can only be done if the documents attached to the bid are shown to the other side. According to us, the violation of CVC guidelines is itself sufficient to vitiate the entire tender process. We, therefore, find no merit in the appeals filed by Haffkine and Bionet.

18. From the above discussion it is obvious that the tender was wrongly awarded to Bionet. However, we are clearly of the view that the tender could not have been awarded to Nirlac and as such, we find no merit in the appeal of Nirlac.

19. At the same time, we feel that the manner in which the tender has been awarded by Haffkine in favour of Bionet was not proper and therefore, we must mould the relief accordingly. Bulk polio drug is required to manufacture polio vaccine, which is essential for the health of the children. It is for this reason that the High Court permitted Haffkine to take supplies from Bionet till fresh tender is awarded. Before us Haffkine has stated that it was to procure bulk drug from Bionet to produce 600 million doses. Supplies have been made for about 540 million doses. According to the affidavit filed by Haffkine, it has orders for about

53 million doses of finished vaccines. As per the contract entered into between Haffkine and Bionet, Bionet was to buyback 70 million doses out of which 4 million doses have already been supplied to them. Mr Harin P. Raval, learned Senior Counsel appearing for Bionet stated before us that a confirmed order has been placed for supply of remaining 66 million doses. Therefore, the total number of doses for which orders are pending with Haffkine amount to 119 million doses, which can be rounded off to 120 million doses."

39. In the aforesaid case, the Hon'ble Supreme Court was considering a case where it was alleged that the tender of the successful tenderer was not opened in accordance with the guidelines of the Central Vigilance Commission. The Hon'ble High Court having examined the submissions of unsuccessful tenderer, came to a conclusion that the Haffkine who had floated the tender had violated the CVC guidelines and the tender of the Nirlac who was the unsuccessful tenderer had been wrongly rejected. The Hon'ble High Court though quashed the contract awarded in favour of Bionet who was the successful tenderer, Haffkine was permitted to purchase the bulk drug from Bionet, in public interest till a fresh tender was finalized. The Hon'ble Supreme Court agreed with the view of the Hon'ble High Court that the violation of CVC guidelines is sufficient to vitiate the entire tender process. In Paragraph 12 of the judgment, the Hon'ble Supreme Court rejected the claim of Nirlac for compensation for the loss suffered by it. Their Lordships held that "..... a party can only claim restitution when its bid is technically qualified and wrongly rejected.

According to us, the High Court erred in holding that Nirlac satisfied all the tender conditions....." (emphasis supplied). The Hon'ble Supreme Court went into the conditions of the tender notice and in paragraph 16 of the judgment, their Lordships observed as follows:- "..... It is for the party issuing a tender to decide what conditions should be incorporated in the tender. The party floating a tender is the best judge of its own requirements and there is nothing wrong if Haffkine wanted that the successful tenderer, who supplied the raw material, should take responsibility to sell or generate business for sale of some portion of the finished product." (emphasis supplied).

40. Thereafter the Hon'ble Supreme Court exercised its power under Article 142 of the Constitution of India and in paragraph 20 of the said judgment, their Lordships directed Haffkine to take bulk supply of drugs if supplies made by the Nirlac is as per price quoted by Nirlac, for the manufacture of 120 million doses of oral polio vaccine. This order was passed taking note of the fact that the Haffkine was to procure bulk drug from Bionet to produce 600 million doses and the Bionet had already made supplies for 540 million doses. The Haffkine had also ordered for about 53 million doses of finished vaccines. Taking both the figures and by rounding off the same it came to 120 million doses which the Hon'ble Supreme Court ordered to take supply from Nirlac on the conditions mentioned in paragraph 20 of the judgment.

41. In the opinion of this Court, the reliance placed by petitioner on the aforesaid

judgment seems to be misplaced inasmuch as in the present case this Court has held that the petitioner would not be covered under the category of bulk supplier (regular order) and the procurement policy confers a discretion upon the authorities of the Railways to place the orders with MSEs up to 20% of the tendered quantity. In the present case the entire tender quantities have already been supplied by the respondent no.6 and the petitioner has also supplied as per the order made available to it. The facts of the case are, therefore, totally different and this Court does not find any reason to mould the relief which the Hon'ble Supreme Court has done in the case of Haffkine by exercising its power under Article 142 of the Constitution of India.

42. This Court would, however, direct that in future tenders, while considering the tenders of the petitioner as MSEs, the Railways would be obliged to abide by its procurement policy and shall take all efforts towards development and participation of the MSEs in the terms and spirit of its procurement policy and subject to the conditions which have been discussed hereinabove, all endeavours be made to award orders for supply to the maximum extent provided under the policy i.e. 20% of the tender value. It is only for the reasons to be recorded with respect to capacity and capability or any other reason in terms of its policy that any deviation may be made by the Railways authorities in the matter of procurement of supplies from the MSEs.

43. This writ application is, thus, disposed off with the aforesaid observations and directions.