HON'BLE SRI JUSTICE S.V.BHATT

W.P.No.6558 OF 2015

ORDER:

Heard Sri E.Manohar, learned Senior Counsel for the petitioner and Sri B.Mayur Reddy, learned Standing Counsel for the respondent.

The petitioner prays for Mandamus declaring the action of respondent in not adhering to and following Clause 17 of the Price Evaluation of Tenders and not awarding the contract for 10 (Nos.) TTs of 18 KL and above capacity to petitioner, as illegal and void. The petitioner prays for a consequential relief to direct the respondent to act in accordance with Clause 17 and award contract to petitioner for 10 (Nos.) TTs of 18 KL and above capacity.

The *lis* arises in award of transport contract in tender No.14000004-HD-11770 dated 24.04.2014.

The respondent through the tender dated 24.04.2014 invited sealed E-tenders under two bid system from the tank truck owners for transportation of bulk petroleum products by road from Vijayawada terminal to different locations within the State of A.P., and outside the State. The subject matter of the writ petition is confined to tank trucks with capacity of 18 KL and above.

The tender requirement of vehicles is as follows:

Description	1st to 3rd year	4th year	5th year
Tank trucks with capacity of 18 KL and above	112	11	13

The petitioner claims to be an MSE (Micro & Small Enterprises). The tender dated 24.04.2014 provides for preferential treatment by way of 20% reservation in allotment to MSE applicants. Clause 17 reads as follows:

> **"Preference to Mircro & Small Enterprises:**
>
> In line with the guidelines of Ministry of Micro, Small & Medium Enterprises, (a) 20% of the total number of TTs required, shall be inducted from tenderers registered as MSEs, who have quoted within L1+15% subject to their matching L1 finalized rate, in case they are not already part of the set of L1 tenders above.

(b) 20% of the above 20% in (a) is reserved for SC/ST MSEs, subject to the over all reservation as per Govt. of India directives."

The petitioner in response to subject tender offered to supply 10 (Nos.) TTs with the capacity of 18 KL and above at Rs.1.86 Ps per KL/KM.

L1 rate for 18 KL and above tank trucks is Rs.1.70 Ps per KL/KM. The petitioner alleges that the respondent has not given counter offer to petitioner to match the price of L1 in the 20% quota earmarked for MSE tenderers. The petitioner agrees to match the price of L1 and supply the transport vehicles. According to the writ averments, three tenderers in the category of MSE have offered namely – (i) Haripriya Bulk Carriers (petitioner), (ii) Mohanprabhu Lorry Transport and (iii) Sri Vijayalakshmi Transporters. The other two tenderers viz., Mohanprabhu Lorry Transport and Sri Vijayalakshmi Transporters have also quoted Rs.1.70 Ps per KL/KM (L1) price and hence acceptance of Mohanprabhu and Sri Vijayalakshmi could not be under Clause 17 of tender, as they are given contract according to the price offered by them. The award of contract to other two MSEs is based on the competitive price offered as
L1 and petitioner remains for consideration under 20% earmarked for MSEs under Clause 17 of the Tender dated 24.04.2014 and the respondent committed illegality by not extending counter offer to petitioner to match the price of L1. Therefore, the failure to issue counter offer has vitiated the selection and finalization of tenders is illegal and liable to be declared accordingly. Hence, the writ petition.

The respondent filed counter-affidavit opposing the writ prayer. Having regard to the short point for consideration viz., the operation and applicability of Clause 17 of tender document to the issue on hand, I am not considering in detail the reply filed by the respondent. The counter affidavit does not dispute the details stated in the writ affidavit till the date of submitting the tenders.
The respondent explained the circumstances under which counter offer to MSEs for supply of tank trucks with capacity between 12 KL and 18 KL are stated. In the category of 12 KL was the requirement of respondent for 137 (Nos.) TTs. The respondent received qualified bids for supply of 107 (Nos.) TTs with capacity of 12 KL to 18 KL.
As the qualified bids received are less than the requirement of the Corporation, the Corporation gave counter offer by following Clause 17 of tender dated 24.04.2014.

As regards 18 KL and above capacity, the respondent received 178 TTs as against the requirement of 112 (Nos.) TTs. Twenty tenderers offered price bid at Rs.1.70 Ps per KL/KM. Mohanprabhu Lorry Transport and Sri Vijayalakshmi Transporters, as noted above, offered price bid at Rs.1.70 Ps per KL/KM and are accordingly included along with qualified bids.

The respondent contends that the construction of Clause 17 by the petitioner is erroneous and that as a matter of fact the respondent has provided 20% reservation to MSE category. In support of the assertion, the respondent would further state that the required number of TTs is 112 in 18 KL and above capacity TTs. Twenty per cent against required capacity i.e., 112 (Nos.) TTs works out to 22.4 (Nos.) TTs rounded off to 23 TTs. MSE transporters viz., M/s Mohanprabhu Lorry Transport offered to supply 17 Nos. of TTs and M/s Sri Vijayalakshmi Transporters 6 Nos. of TTs under MSE category. Therefore, by taking into consideration the offers of all L1 tenders, the preferential treatment by reservation is provided and the consideration of petitioner's bid will be beyond the requirement of 112 TTs. Hence, there is no scope to consider petitioner who was L4. The respondent accepted the requirement of 112 TTs from 178 qualified TTs of 18 KL above capacity. Therefore, it is contended firstly that according to the guidelines, MSEs are accommodated and secondly the petitioner who is L4 cannot expect counter offer from the respondent under clause 17 of Tender dated 24.04.2014. The respondent prays for dismissal of the writ petition.

Sri E.Manohar, learned Senior Counsel, contends that the petitioner has to be considered under MSE category. The inclusion of Mohanprabhu Lorry Transport and Sri Vijayalakshmi Transporters cannot be under the 20% category meant for MSEs. According to learned Senior Counsel, the allotment of tender to Mohanprabhu Lorry Transport and Sri Vijayalakshmi Transporters either by simple consideration of the facts or construction of Clause 17 of tender document dated 24.04.2014 cannot be said as coming under MSE, inasmuch as consideration of MSE arises after finalization of L1 price, but not before. If the price offered by the MSE matches with the price of L1, the consideration of such tenderers is not in the special or reserved category earmarked for MSEs, but on the competitive price offered by these MSEs and ought to be included in open category and counter offer to petitioner should have been given.

The learned Senior Counsel places strong reliance upon the decision reported in **R. K. SABHARWAL AND OTHERS v. STATE OF PUNJAB AND OTHERS**, wherein it was held as under:

> "When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any backward class of citizen which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the backward class/classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular backward class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a backward class has to be filled by way of appointment/ promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the backward class. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/Rules providing certain percentage of reservations for the backward classes are operative the same have to be followed. Despite any number of appointment/promotees belonging to the backward classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same."

Learned Senior Counsel finds fault with the finalization of tender by ignoring the right of petitioner under Clause 17 of tender document as unacceptable.

Sri B.Mayur Reddy, learned Standing Counsel, contends that the circumstances or details for 12 KL and above and less than 18 KL and 18 KL and above are not similar. The fact that counter offer is made to petitioner for supply of 12 KL and above tanks is no precedent to expect counter offer in the subject category, inasmuch as for the first category a number of qualified TTs received by the respondent is less than the requirement of respondent.
The price offered by the petitioner is more than L1 and counter offer is given to all, including the MSEs. On the other hand, the qualified 18 KL TTs offers received by the respondent Corporation are more than the requirement and further as many as 20 tenderers have offered L1 price, including the MSEs. According to the learned counsel, the respondent Corporation has to ensure fair participation of subject category i.e., MSEs by reference to the guidelines issued through SO 581(E) dated 23.03.2012. The learned counsel draws attention of the Court to condition No.6 which is as follows:

> “Price quotation in tenders (1) In tender, participating Micro and Small Enterprises quoting price within price brand of L1+15 per cent 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 a Micro and Small Enterprise and such Micro and Small Enterprise shall be allowed to supply up to 20 per cent of total tendered value.
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> (2) In case of more than one such Micro and Small Enterprise, the supply shall be shared proportionately (to tendered quantity).

Finally, he contends that the decision relied upon by the petitioner is distinguishable and the ratio laid down by the Apex Court arises under service jurisprudence, cannot be made applicable to evaluation of tenders and the meaning assigned by petitioner is illegal and results in exclusion of qualified L1 tenderers in general category and results in more representation of MSEs in spite of MSEs not qualifying in price bids. The requirement under Clause 17 is to provide 20% reservation in case the MSEs are not part of L1 tenderers and nothing more.

Now, the point for consideration is - whether the non-consideration of petitioner under MSE category or failure to give counter offer is illegal or has vitiated the acceptance of tenders under tender dated 24.04.2014?

The facts and circumstances relevant for the two categories of supply of tank trucks are already stated and repetition is avoided. Briefly referred, under the first category, the respondent received less number of qualified bids for supply of vehicles than requirement of respondent, whereas under the second category, the respondent received more qualified tenders than the requirement of respondent. In this category, as many as 20 tenderers have matched L1 price and the number of vehicles offered for transport contract by the requirements of the respondent is answered. Mohanprabhu Lorry Transport and
Sri Vijayalakshmi Transporters (MSEs) are part of L1 price. The grievance of petitioner is that inclusion of Mohanprabhu Lorry Transport and Sri Vijayalakshmi Transporters in MSE category is erroneous and illegal. According to petitioner, they should be included in the L1 category and separate reservation should be provided to MSE category. The contention, if accepted, results in arbitrary exclusion of qualified/eligible tenderers from general category. The difficulty would be which one of the qualified tenderers should be excluded to make space for MSE supplier.

The Central Government Order dated 23.03.2012 provides for giving opportunity to MSEs to the extent of 20% of required supply through counter offer by matching the price of L1. If more than one such Micro and Small Enterprise is present, the supply in the 20% preferential category shall be shared proportionately to the tenderers (MSE). Clause 17, no doubt, adopts broadly the recommendation of S.O dated 23.03.2012 of Central Government. As per Clause 17, 20% of the total number of TTs required, shall be awarded from tenderers registered as MSEs. Such consideration under 20% category is provided for, subject to such MSE falling within L1+15% rate and agreeing to match the final L1 rate.
The said exercise is required to be undertaken if only such MSEs are not already part of the set of **L1 tenders above** *(emphasis supplied)*. A plain meaning of above requirement is that in case MSEs are not part of the set of L1 tenders, the respondent is required to consider the cases of MSEs who have quoted L1+15% rate to match the price of L1 and accommodate MSE by awarding contract for supply of the 20% work. Applying Clause 17, as noted above, in the category of 18KL and above TTs, the respondent received 178 numbers of qualified bids. All the L1 tenderers including MSEs satisfy the requirement of 112 TTs of respondent under this

category. If the construction placed by the petitioner is accepted, then the respondent will have to eliminate other valid tenders under general category and make room for a further percentage to MSEs. In the opinion of this Court, such consideration is not the object and intent of either Central Government Order or Clause 17 of tender dated 24.04.2014.

The principle of law laid down by the Apex Court in **Sabarwal's** case (supra) is clearly distinguishable and not applicable to the facts and circumstances of Clause 17 of tender document dated 24.04.2014. After perusing the manner of evaluation and grant of acceptance to the tenderers who are L1, including MSEs, I do not see any illegality or irregularity in the action complained against the respondent.

The writ petition is, accordingly, dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

S.V.BHATT, J

1st April, 2015

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