

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CIVIL WRIT PETITION NO.8697 of 2015

RESERVED ON: AUGUST 13, 2015

DATE OF DECISION: AUGUST 24, 2015

Central Institute of Plastics Engineering & Technology (CIPET)
50th Stone, NH-1, Murthal, District Sonapat (Haryana).
.....Petitioner

Versus

Indian Oil Corporation Limited, Panipat Naphtha Cracker Complex,
Panipat (Haryana) and others.
.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE TEJINDER SINGH DHINDSA

Present: Mr.Rajeev Anand, Advocate for the petitioner.

Mr.Adarsh Jain, Advocate for respondents No.1 and 2.

Mr.Vishal Aggarwal, Advocate for respondent No.3.

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TEJINDER SINGH DHINDSA, J.

The petitioner-Institute assails the action of the respondent-Indian Oil Corporation Limited in granting benefit of protection and purchase preference to a Micro and Small Enterprise to the extent of the complete work order, i.e. 100%. Challenge has also been raised to a condition contained in the Notice Inviting Tender dated 30.12.2014 regulating preference to MSEs (Micro and Small Enterprises) and wherein it has been stipulated that the “tender cannot be split”.

2. Brief facts and which are not in dispute may be noticed.

3. The petitioner, Central Institute of Plastics Engineering and Technology is an autonomous Institute functioning under the aegis of the Department of Chemicals and Petrochemicals, Ministry of Chemicals and Fertilizers, Government of India. Respondent No.3 – Guru Nanak Engineering Company, Kota, Rajasthan is a registered Micro and Small Enterprise. Indian Oil Corporation through its Chief Manager – respondent No.2 invited E-tenders through a Notice Inviting Tender dated 30.12.2014 for “Rate Contract for Operation and Maintenance of Mechanical Workshop in the Panipat Naphtha Cracker Complex, Panipat”. The E-tenders were invited in two parts i.e. Techno-commercial bid consisting of Sections i) and ii) and the price part. The pre-qualification criterion was duly prescribed. Time schedule for the contract was twelve months. Bids were to be submitted between 13.1.2015 to 20.1.2015. Column 13 of the Notice Inviting Tender specified preference for Micro and Small Enterprises. It was stipulated therein that the tender cannot be split. Details in regard to preference in favour of MSEs were referred to and attached as Annexure 'L'. Clause (VI) of Annexure 'L' along with the Notice Inviting Tender was in the following terms:

“VI. Price Preference – Subject to meeting terms and conditions stated in the tender document including but not limiting to pre-qualification criteria, twenty percent of the total quantity of the tender is earmarked for MSEs registered with above mentioned agencies/bodies for the tendered item. Where the tendered quantity can be split, MSEs quoting a price within a

price band of L1+15 percent shall be allowed to supply upto 20 percent of total tendered quantity provided they match L1 price. In case the tendered quantity cannot be split, MSE shall be allowed to supply total tendered quantity provided their quoted price is within a price band of L1 + 15 percent and they match the L1 price. In case of more than one such MSEs are in the price band of L1+ 15% and matches the L1 price, the supply may be shared proportionately."

4. Petitioner as also respondent No.3 being eligible and qualified as per commercial and technical requirements prescribed in the Notice Inviting Tender gave their bids for the tender in question along with the relevant documents. Bid of the petitioner was the lowest i.e. 'L1'. Bid of respondent No.3 i.e. Micro and Small Enterprise was, concededly, within the 15% parameter of the price given by the petitioner. As respondent No.3 agreed to match the price of the petitioner, it has been allotted the tender.

5. Learned counsel appearing for the petitioner would contend that the action of the respondent-Indian Oil Corporation in allotting the complete work order to respondent No.3 cannot sustain. Reliance has been placed upon the Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012 (for short 'the Public Procurement Policy, 2012') to argue that a protection in respect of award of tender to a participating Micro and Small Enterprise who has quoted the price within the price band of 'L1' plus 15% is available to supply a portion of the tender i.e. to supply upto 20% of the total tendered value. Learned counsel has submitted that in the facts of the present case, the

price protection having been granted to respondent No.3, respondent No.2-Indian Oil Corporation has gone a step ahead in having awarded the complete work order i.e. 100% to the Micro and Small Enterprise. Such an action is contended to be in violation of the Public Procurement Policy, 2012 and even against the concept of competitiveness, fairness and equity. Even the condition contained in the Notice Inviting Tender stipulating-"tender cannot be split" while extending protection and preference to Micro and Small Enterprise is stated to be arbitrary. In this regard, it has been submitted that there would be an inherent division and split in the maintenance and operations of a mechanical workshop i.e. the work for which the tender was invited. The instance of fabrication and mechanical works being distinct was furnished by the learned counsel and it was argued that the condition as regards tender not being open to split cannot work to the prejudice of the petitioner being the lowest bidder and just to unduly benefit the Micro and Small Enterprise while awarding the complete work order.

6. Per contra, learned counsel appearing for the respondent-Indian Oil Corporation has referred to the joint written statement filed on behalf of respondents No.1 and 2 to submit that since the tender price of respondent No.3- Micro and Small Enterprise was within 15% of the price quoted by the lowest bidder i.e. the petitioner, and respondent No.3 had agreed to match the price of the lowest bidder, accordingly, the work order has been allotted in terms of letter of acceptance dated 20.4.2015. It has been submitted that the tender has been

allotted strictly in terms of the conditions contained in the notice inviting tenders and there has been no deviation therefrom.

7. Having heard learned counsel for the parties, we are of the considered view that there is no infirmity in the action of the respondent-Indian Oil Corporation in having allotted the complete work order in favour of respondent No.3.

8. The Micro, Small and Medium Enterprises Development Act, 2006 (for short 'the 2006 Act') was enacted to provide for facilitating, promotion, development and enhancing the competitiveness of micro small and medium enterprises.

9. Chapter IV of the 2006 Act provides for measures in furtherance of the object of the Act. Sections 9 and 11 of the 2006 Act would be relevant insofar as the controversy involved in the present case and read in the following terms:

“9. Measures for promotion and development –
The Central Government may, from time to time, for the purposes of facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises, particularly of the micro and small enterprises, by way of development of skill in the employees, management and entrepreneurs, provisioning for technological upgradation marketing assistance or infrastructure facilities and cluster development of such enterprises with a view to strengthening backward and forward linkages, specify, by notification, such programmes, guidelines or instructions, as it may deem fit.

11. Procurement preference policy –
For facilitating promotion and development of micro and small enterprises, the Central Government or the State Government may, 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.”

9. In exercise of the powers conferred under Section 11 of the 2006 Act, the Ministry of Micro, Small and Medium Enterprises, Office of Development Commissioner (MSME) has notified the Public Procurement Policy, 2012 and the same has been made effective from 1.4.2012. Clauses 3 and 6 of the Public Procurement Policy, 2012 are in the following terms:

“Clause 3. Mandatory procurement from micro Small and 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.

(2) Annual goal of procurement also include sub-contracts to Micro and Small Enterprises by large enterprises and consortia of Micro and Small Enterprises formed by National Small Industries Corporation.

(3) After a period of three years i.e. from 1st April 2015, overall procurement goal of minimum of 20 per cent shall be made mandatory.

(4) The Central Ministries, Departments and Public Sector Undertakings which fail to meet the annual goal shall substantiate with reasons to the Review

Committee headed by Secretary (Micro, Small and Medium Enterprises), constituted in ministry of Micro, Small and Medium Enterprises, under this Policy.

Clause 6. Price quotation in tenders. - (1) In tender, participating Micro and Small Enterprises quoting price within price band 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 upto 20 per cent of total tendered value.

(2) In case of more than one such Micro and Small Enterprise, the supply shall be shared proportionately (to tendered quantity)."

10. A conjoint reading of Sections 9 and 11 of the 2006 Act as also Clauses 3 and 6 of the Public Procurement Policy, 2012 would clarify that there is a mandate to every Central Ministry/Department/Public Sector Undertaking to achieve an overall procurement of minimum of 20% of the total annual purchase of products produced and services rendered by Micro and Small Enterprises in a period of three years. Such mandate would be towards a purchase preference in favour of a Micro and Small Enterprise. The price preference is envisaged in Clause 6 of the Public Procurement Policy, 2012 whereby in a tender process, a participating Micro and Small Enterprise quoting price within the price band of 'L1' (lowest bid) plus 15% shall be allowed to supply a portion of the requirement by bringing down their price to 'L1' price and such Micro and Small Enterprise is to be allowed to

supply upto 20% of the total tendered value.

11. Adverting back to the facts of the present case, in the notice inviting tender dated 30.12.2014, Annexure 'L' was appended along with, containing tender conditions for benefits/preference for Micro and Small Enterprises (MSEs). Clause VI of Annexure 'L' provided for price preference and stated clearly that where the tendered quantity cannot be split, the Micro and Small Enterprise shall be allowed to supply total tendered quantity provided its quoted price is within a price band of 'L1' plus 15% and upon matching the 'L1' price. In case of more than one such Micro Small Enterprise being in the price band of 'L1' plus 15% and upon matching the 'L1' price, the supply may be shared proportionately amongst such MSEs. Column 13 of the Notice Inviting Tender dated 30.12.2014 regulating preference to MSEs categorically stipulated that "this tender cannot be split".

12. In our considered view, the action of respondent No.2, Indian Oil Corporation in awarding the complete work order (100%) to respondent No.3, a registered Micro and Small Enterprise conforms to the terms and conditions of the Notice Inviting Tender dated 30.12.2014 and does not even fall foul of the Public Procurement Policy, 2012. The Public Procurement Policy, 2012 carries a mandate to provide purchase preference in favour of a Micro and Small Enterprise so as to achieve an overall procurement of **"minimum of 20%"**. Clause 6 of the the Public Procurement Policy, 2012 providing for price preference would hold the field in a situation where the work order can be split and

as such, a participating Micro and Small Enterprise quoting price within price band of 'L1' plus 15% would be allowed to supply a portion of the requirement and upto 20% of the total tendered value. In the Notice Inviting Tender dated 31.12.2014, while providing for preference to MSEs, it was stipulated that the "tender cannot be split". In such an eventuality, it was open for respondent No.2, Indian Oil Corporation to have granted purchase preference as also price preference in favour of respondent No.3, a registered Micro and Small Enterprise as regards the complete work order as it had quoted a price within the price band of 'L1' plus 15% and has thereafter matched the 'L1' price.

13. The issue raised on behalf of the petitioner-Institute as regards the condition contained in the Notice Inviting Tender stipulating "tender cannot be split" to be unreasonable and arbitrary would be beyond the scope of writ jurisdiction. Judicial review in contractual matters is confined to the manner in which the decision is taken rather than the decision itself. The Courts would interfere if the decision is arbitrary, unreasonable or actuated by malafides. This Court would not enter into technical issues as regards a work order being open to a division/split as it does not have the expertise to deal with such issues. The Government or a public sector undertaking must have freedom in formulating such conditions. This Court cannot sit as a Court of appeal to review and modify administrative decisions unless the same are shown to be suffering from the vice of arbitrariness or favouritism.

14. In **Sterling Computers Ltd. v. M & N Publications Ltd.**,

AIR 1996 SC 51, it was held as under:

“While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'. By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time ... the courts can certainly examine whether 'decision-making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then court cannot as an appellate authority by substituting its opinion in respect of selection made for entering into such contract.”

15. Even otherwise, the petitioner had responded to the Notice Inviting Tender dated 30.12.2014 and as such, was bound by the terms and conditions contained therein. The purchase as also the price preference in favour of a Micro and Small Enterprise stood enumerated therein. Having participated in the tender process and having remained unsuccessful, it would not be open for the petitioner to now turn around and raise a challenge to any of the terms and conditions contained in the Notice Inviting Tender.

16. For the reasons recorded above, the allotment of

complete work order to respondent No.3 cannot be termed as arbitrary or unreasonable. Rather, we find the same to be in conformity with the terms and conditions contained in the Notice Inviting Tender dated 30.12.2014 as also in consonance with the Public Procurement Policy, 2012. No interference, as such, is warranted under Article 226 of the Constitution of India.

17. Writ petition is dismissed.

(S. J. VAZIFDAR)
ACTING CHIEF JUSTICE

(TEJINDER SINGH DHINDSA)
JUDGE

AUGUST 24, 2015
SRM

Note: Whether referred to Reporter? (Yes/No)