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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 29.05.2018

\+ **W.P.(C) 6001/2018 and CM APPL. 23378/2018 (stay)**

DEZHOU SHENGLI PIPELINE CROSSING ENGINEERING INDIA PVT LTD. ..... Petitioner

Through: Mr.Raman Gandhi, Advocate.

versus

MINISTRY OF PETROLEUM AND NATURAL GAS AND ORS. ..... Respondents

Through: Mr.Vivek Goyal, CGSC with Mr.Harsh Pandit, Advocate for UOI/R1 & R2 with Mr. Parmeet Jha, G.P.
Mr.Anish Dayal, Advocate with Mr.Rupam Sharma, Adv. for R-3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)
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1. The petitioner's complaint is with respect to its alleged unfair bid rejection by the Indian Oil Corporation Limited ('IOCL'). The IOCL had issued a notice inviting tender ('NIT') for the installation of 18"/16"/14" OD pipeline across major river/canal/nala crossing of product pipeline from Paradip to Hyderabad by Horizontal Directional Drilling (HDD) Technique and associated works. The NIT was issued

on 05.04.2017. The various tender conditions and the instructions to the bidders, especially Clause 13, were not clear. The main part of the condition stood deleted; yet the surviving conditions contained a reference to the bids by Micro, Small and Medium Manufacturing Enterprises ('MSME').

2. Apparently, on 24.07.2014 a pre-bid meeting was organised by the IOCL in which the petitioner participated. Thereafter on 01.05.2017 the condition that referred to MSME bidders was deleted. During the hearing the Court was shown the original file which also indicated that the deletion was brought to the specific notice of the petitioner through a letter received by it on 02.05.2017. The second pre-bid meeting was thereafter held on 09.05.2017. Technical bids were opened on 25.05.2017. Later, the petitioner apparently addressed a letter on 14.07.2017 to the IOCL urging that it was entitled to MSME benefit. The IOCL did not respond and thereafter the price bids were opened on 27.11.2017. The petitioner was determined to be L2. Its request that it be given the concession of price loading to match the L1 bidder's quotation was however not accepted. The IOCL apparently awarded the contract to the successful L1 bidder.

3. Mr. Raman Gandhi, learned counsel for the petitioner urges that the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter 'MSMED Act') enactment, in fact, applies to the circumstances of the case. He has placed reliance upon the Central Government's clarifications especially the policy clarification through

letters dated 05.01.2016, 24.12.2016, 09.11.2016 and 29.03.2017 to say that the IOCL's position that since the NIT related to a works contract and was therefore indivisible did not attract the provisions of MSME Act is untenable. He also relied upon another tender's specifications by the IOCL eliciting bids but whose specifications indicated the applicability of the MSME Act. The relevant condition in that NIT [for hot tapping, HDD & Rerouting of existing cross country pipelines from JR to Dumad (Baroda-Savli road crossing)] read as follows:-

> *"6. In case MSE bidder is L-1 entire value of tender is to be ordered on the L-1 MSE bidder. If it is mentioned in the Tender /NIT the job/tender quantity can be split and the price quoted by MSE bidder is within band of L-1+15%, 20% of the tender value is to be ordered on MSE subject to matching L-1 price. If it is mentioned in the Tender /NIT the job/tender quantity cannot be split and price quoted by the MSE bidder is within a band of L-1+15%, entire value of the tender is to be ordered on L-1 MSE bidder subject to matching L-1 price. For further clarity in this regard a table is furnished below:*

Type Of Tender	*Price Quoted By MSE*	*How To Finalize Tender*
Can be split	*L-1*	*Full order on MSE*
Can be split	*Not L-1 but within L-1+15%*	*20% order on MSE subject to matching L-1 price*
Cannot be split	*L-1*	*Full order on MSE*
Cannot be split	*Not L-1 but within L-1+15%*	*Full order on MSE subject to matching L-1 price.*

4. Mr. Anish Dayal, learned counsel for the IOCL had produced the original records. They bear out the IOCL's position that the petitioner was made aware that the MSME Act's provisions would not *per se* apply to the facts of this case, given that the NIT related to a works contract. It was urged that this Court in a previous decision [*M/s Shree gee Enterprises vs. Union of India and Anr.*, W.P.(C) 7201/2015] had clarified that the provisions of the MSME Act do not *per se* apply to award of works contracts. He also submitted that the issue with respect to the applicability of MSME Act to works contracts has not yet been finally clarified by the Central Government and that in the absence of a definitive direction in that regard, the mere citing of past instances where MSME benefits might have been provided in works contracts, cannot afford a precedent.

5. The relevant provisions of MSME Act were considered in M/s Shree Gee Enterprises (supra). Furthermore, the Act (a Parliamentary enactment of 2006) defines "goods" under Section 2(f) of the Act however there is no definition of services. Section 11 of the Act states that to facilitate promotion and development of micro and small enterprises, the Central Government can by order notify from time to time the preference policies in respect of the procurement of goods and services produced and provided by small enterprises by its ministries, departments, agencies etc. It is therefore clear that whether a works contract falls within the definition of goods and services is as yet not certain.

6. Furthermore, the obligation cast upon the Central Government undoubtedly is to promote micro and small enterprises; yet at the same time, the Central Government is enabled to take a broad sectoral approach. Having regard to these facts and the IOCL's position that a works contract, being inherently indivisible cannot be the subject matter of the MSME Act, cannot be termed as a patent or manifest illegality, calling for the exercise of discretion under Article 226 of the Constitution. The petitioner's arguments to the contrary are not persuasive much less compelling.

For these reasons the writ petition lacks merits and the same is dismissed along with the pending application.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MAY 29, 2018
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