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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 15.07.2019

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W.P.(C) 6410/2019

N C DECORS PVT LTD

..... Petitioner

Through: Mr. Ratnesh Kumar Shukla,
Advocate.

versus

ONGC (A PUBLIC ENTERPRISE) THROUGH
ITS CHIEF MANAGING DIRECTOR & ANR

..... Respondents

Through: Mr. Sunil K. Jain, Ms. Reeta
Chaudhary and Ms. Anusha Agarwal,
Advocates.
Mr. Ramesh Kumar, Sole Proprietor
for R-2.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

G.S. SISTANI, J. (ORAL)

1. The petitioner is a Company duly registered under the Companies Act, 1956 as a Micro and Small Enterprise with Ministry of Micro, Small and Medium Enterprises, Government of India. Respondent no. 1 invited bids through e-bid for annual repair and maintenance contract at Deendayal Urja Bhawan (DUB), Vasant Kunj, New Delhi, for a period of two years in the month of January, 2019. The petitioner submitted its bid online on 4.2.2019 and was found to be qualified in the techno-commercial bid. Respondent no.1

to the petitioner by e-mail on 20.2.2019 that the petitioner had qualified for the tecno-commercial bid. The petitioner claims that on 21.2.2019, the price bid was opened by respondent no. 1 in front of the petitioner and three other bidders who had qualified the tecno-commercial bid. Petitioner was found to be the lowest tenderer (L-1) with a price bid of Rs.2,46,22,362.36, while L-2 was Rs.2,51,99,071.37.

2. The grievance of the petitioner is that the respondent did not inform him about the outcome of the bid, which forced him to file W.P.(C) No. 3030/2019, as the EMD of Rs.7,86,851/- submitted by him was returned. Subsequently, the petitioner learnt that his bid had been rejected on the ground that the petitioner had not submitted MSME certificate. The rejection of the bid of the petitioner led to the filing of the second W.P.(C) No. 6410/2019.

3. Learned counsel for the petitioner submits that the petitioner had already informed the respondents that he was registered as a Micro and Small Enterprises Industry and had an MSME certificate in his possession, although it is not disputed or denied that the certificate was not annexed along with the bid documents.

4. Learned counsel for the respondent has drawn the attention of this Court to para 9 of the bid document with the heading 'Documents Comprising the Bid'. He relies on Clause 9.1(h), which we reproduce below in support of his contention:-

“Copy of valid Registration Certificate, if bidder is a Micro or Small Enterprises (MSE) registered with District Industry Centers or Khadi and Village Industries Commission or Khadi and Village Industries Board or Coir Board or National Small Industries Corporation or

Directorate of Handicrafts and Handloom or any other body specified by Ministry of MSME. The Registration Certificate should clearly indicate the monetary limit, if any and the items for which bidder is registered with any of the aforesaid agencies. In case bidding MSE is owned by Schedule Caste or Schedule Tribe entrepreneur, valid documentary evidence issued by the agency who has registered the bidder as MSE owned by SC/ST entrepreneur should also be enclosed.”

It is contended by the counsel that the said condition of the NIT clearly mandated that the bidder had to submit a valid registration certificate along with the bid and not subsequently.

5. Learned counsel for the respondent explains that in the absence of the MSME Certificate along with the bid, purchase preference cannot be given to the bidder as is evident from a reading of Clause C.1.4, which we reproduce below:-

C	Price Evaluation Criteria		
C.1.4	PURCHASE PREFERENCE TO MICRO AND SMALL ENTERPRISES REGISTERED WITH DISTRICT INDUSTRY CENTRES OR KHADI AND VILLAGE INDUSTRIES COMMISSION OR KHADI AND VILLAGE INDUSTRIES COMMISSION OR KHADI AND VILLAGE INDUSTRIES BOARD OR COIR BOARD OR NATIONAL SMALL INDUSTRIES CORPORATION OR DIRECTORATE OF HANDICRAFTS AND HANDLOOM OR ANY OTHER BODY SPECIFIED BY MINISTRY OF MSME.	CONFIRMED	YES

6. He submits that resultantly the three other bidders were offered the bid and they reduced their bid to a price less than L-1, since no purchase preference could have been given to the petitioner. Thus, the contract now

stands awarded to respondent no. 2. Counsel further submits that this submission is in addition to the submission that the present writ petition has become infructuous as the contract stands awarded on 7.3.2019. The successful bidder has already commenced work and is working for the past four months. He has employed labour and in case the clock is put back, serious prejudice will be caused to his rights.

7. Respondent no. 2 who is the successful bidder is represented by its proprietor, namely, Mr.Ramesh Kumar, who is present in person in Court today.

8. We have heard learned counsels for the parties. We have also examined the terms of the bid.

9. The basic facts are not in dispute that bids were invited by respondent No. 1 for annual repair and maintenance contract at Deendayal Urja Bhawan (DUB), Vasant Kunj, New Delhi for a period of 2 years i.e 2019-2021. The petitioner had participated but his bid had been rejected. The reason for rejection as set out in the letter of the respondent is that the bid of the petitioner was not accompanied with MSME certificate. In the absence of the certificate, purchase preference could not be given to the petitioner. He was thus considered in the General category and the L-2 bidder, who has submitted the MSME certificate, was offered to match his price to L-1. The petitioner had given the certificate much after conclusion of the tender and award of the contract and thus could not be considered as a MSME bidder.

10. We agree with the contention of the learned counsel for the respondent that as per the tender conditions, the MSME certificate had to be enclosed with the bid documents. Had the petitioner done so, he would have been

entitled to the benefits that enure to MSME bidders. Since the petitioner did not file the certificate with the bid document, in our view, there is no infirmity in the action of the respondent in not considering him as a MSME bidder. Since the petitioner could not avail the purchase preference, the other bidder with an MSME certificate was rightly offered to match its price. Since the price of the successful tenderer became lower than that of the petitioner, the respondent was justified in awarding the contract to the said bidder. There is no arbitrariness in this action of the respondent, which calls for interference by this Court.

11. Additionally, we may also notice that the tender had been awarded even prior to the first writ petition of the petitioner, which was filed in March 2019. As of today, the successful tenderer, who has been awarded the contract, has worked for over four months and has deployed labour for the entire period. We do not deem it appropriate to set the clock back, in the facts of this case, where the petitioner has himself lapsed in not submitting the MSME certificate along with the bid documents, which was a requirement of the notice inviting tender.

12. At this stage, learned counsel for the petitioner submits that in fact the contract is not a service contract but a works contract, and the submission of MSME certificate would not apply to a works contract. Reliance is placed on para 9 of the judgment of this Court in the case titled as ***M/s Shree Gee Enterprises Vs. Union of India and Anr.*** bearing W.P.(C) 7201/2015 decided on 2.11.2015, which we reproduce below:-

“9. Reference may also be had to the office memorandum dated 20.02.2014 issued by the Director of the Office of Development Commissioner, Ministry of MSME, Union of India, wherein frequently asked questions and their answers had been circulated to

the various Ministries and in particular to question No. 18 and their answers thereto which reads as under:-

Ques. 18. Whether this policy is applicable for works/trading activities also?

Ans. Policy is meant for procurement of only goods produced and services rendered by MSEs.”

He also submits that since the petitioner had been registered with the Ministry itself, it was not necessary to file the certificate. We find no force in these submissions. A reading of the contract itself would show that it is not a works contract but it is a service contract. Tenderer was to provide services for maintenance of the building and no work had to be carried out in the building. Thus, the judgment relied upon by counsel for the petitioner would be of no avail to him. As regards the submission that the petitioner being registered with the Ministry was not required to file the certificate, we find that no Rule, Policy or tender condition in this regard has been brought to the notice of the Court. In the absence of the petitioner substantiating this argument, we cannot grant any relief to the petitioner on this ground.

13. For the reasons aforesaid, we do not find any merit in the writ petition and the same is hereby dismissed.

G.S.SISTANI, J

JYOTI SINGH, J

JULY 15, 2019/AMK.