IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) NO. 900 OF 2020

S.K.Translines Private Limited } Petitioner
versus
The Union of India and Ors. } Respondents

Mr.Girish Godbole with Ms.Ketki Gadkari, Mr.Ashwin Shete, Mr.Abhay Dhadiwal and Ms.Bhavika Deora I/b. M/s.Jaykar and Partners for the petitioner.

Mr.Niranjan P. Shimpi for respondent no.1.

Mr.B.V.Samant-AGP for respondent no.2.

Mr.A.V.Chatuphale for respondent no.3.

Mr.Prasad S.Dani-Senior Advocate I/b. Ms.Sonali G. Sase for respondent no.4.

CORAM :- S. C. DHARMADHIKARI &
R. I. CHAGLA, JJ.

DATED :- JANUARY 29, 2020

P.C. :-

1. The petitioner before this court is a private limited company engaged in the business of providing service of handling and transportation of goods by road and railway to the Maharashtra State Ware House Corporation (hereinafter referred to as the "MSWC") and other similarly placed corporations. The first respondent to the petition is the Union of India, whereas, the second respondent is the State of Maharashtra. The third

respondent is the MSWC; a Government undertaking. It issued an e-tender for appointment of a handling and transportation contractor at Satara, D5, K4, Jamb Jalgaon. The fourth respondent was one of the bidders and its bid has been accepted by the third respondent. The decision not to accept the petitioner's bid, communicated vide e-mail dated 10th January, 2020 and a communication of the same date addressed in reply to the petitioner's letter of 23rd December, 2019 are sought to be quashed.

2. The premise on which the present petition is filed is that there was a tie between the bids of the petitioner and respondent no.4. That the respondent no. 4's bid was not lower than that of the petitioner. The petitioner says that somewhere in the year 2019, the Co-operation, Marketing and Textiles Department of respondent no.3 issued a tender for similar work. The tender was for unloading/ loading of food-grain bags from and into railway wagons, trucks etc., stacking of food-grain bags and transporting of food-grains from railway to shed/ siding to MSWC's godown or vice-versa or transporting them from any place to any other place in and around Satara. The third respondent uploaded the tender along with its annexures on its website. The tender documents were divided into three parts, namely, tender notice, technical bid and price bid.

3. The tender was a two bid system, inasmuch as, one technical bid and the other price bid. As per the terms and conditions of the tender, the technical bids would be opened first and the price bids of only those bidders shall be opened whose technical bids are in order. The price bid was in two parts, namely, bid for providing services for good-grains to Food Corporation of India (FCI) and bid for providing services for general customs i.e. fertilizer, stock of farmers, traders, cement, etc. The tender consisted of two schedules; one for the different services to be provided for FCI work and one for the different services to be provided for general customs work. The bidders had to quote one uniform percentage for each bid. In other words, one uniform percentage for FCI work and one uniform percentage for general customs work. The bid for FCI work was to be submitted in the form of a bill of quantity in an Excel Sheet and the price bid for general customs work was to be submitted by filling the form Appendix-IX(B) annexed to Part 'B' of the tender documents and uploading the same in pdf format on the third respondent's website.

4. Clause 12 of the tender notice provided that the lower (L-1) bidder would be decided on the basis of the rate quoted for FCI work, even if the rate quoted for general customs work is higher and that the respondent no. 3 had a right to negotiate with the L-1

bidder to lower the rate quoted by them for general customs work. The said provision was made in the tender as the work in general customs was considerably lower than the work required for FCI. Clause 11 of Part 'B' of the tender documents also contained similar provision. Thereafter, reliance is placed on Clause 9.3(c) of part 'A' of the tender documents to urge that in case there was a tie between two bids, the winning bid would be selected by way of drawing lots.

5. The argument is that the petitioner agreed to provide services for FCI at the rate of 153% and for the service to be provided for general customs, the petitioner agreed to provide it at the rate of 603%. The petitioner states that the bid documents submitted for the tender are not being annexed, as that is a bulky record.

6. On 27th November, 2019, the technical bid for the tender was opened and 4 out of 6 bidders qualified at the technical bidding. On 13th December, 2019, the third respondent addressed a letter to the 4 bidders whose technical bids had been qualified, which included the petitioner, informing them that the price bids would be opened on 16th December, 2019 at 3.00 p.m. and the parties can remain present, if they so desire. On 16th December, 2019, the price bids were opened. Thereafter, there was a disclosure made to all the

parties. The details of the price quoted are set out in the petition at pages 6 and 7.

7. The argument is that the rate quoted by the petitioner and respondent no.4 for providing services for FCI was identical, namely, 153% and therefore, there was a tie between the petitioner and respondent no.4. Therefore, Clause 9.3(c) of Part 'A' of the tender documents ought to have been adhered to. However, no notice/ letter was received by the petitioner inviting them to attend the office of the third respondent for drawing lots. On 23rd December, 2019, the petitioner addressed a letter to respondent no.3 annexing therewith bill of quantity chart and informing that as per clause 12, there was a tie in the price bids of the petitioner and respondent no. 4 and therefore, as per Clause 9.3(c) of the tender documents, the selected bidder ought to have been identified by respondent no. 3 by drawing lots. The petitioner received a letter/ e-mail attaching therewith the decision, inasmuch as, the rate for FCI and general customs had been invited for the tender separately. Since the petitioner had quoted the rate 153% for FCI work and 603% for general customs work and the fourth respondent quoted 153% for FCI work and 437% for general customs work, there was no tie between the petitioner and the fourth respondent and therefore, there is no question of resorting to the clause in relation to tie.

8. Mr.Godbole learned counsel appearing for the petitioner would submit that though it is well settled that the right to carry on any profession or to carry on any occupation, trade or business guaranteed under Article 19(1)(g) of the Constitution of India does not include a fundamental right to trade or contract with the Government, yet, when the Government or governmental agencies float a tender, they must be held accountable, inasmuch as, they have to abide by the mandate of Article 14 of the Constitution of India. All governmental actions have to be fair, just and reasonable and non-discriminatory in character. Article 14 guarantees equality before law. Once a decision of the authority is arbitrary and it deviated or departed from the settled principles, then, we should interfere in our writ jurisdiction.

9. Mr.Godbole has pointed out that respondent no.3 had invited two similar tenders in the past. One for providing services of handling and transportation services at Ahmednagar and the other for providing services of handling and transportation services at Chandrapur. There as well, the bidders had to follow the same practice. The petitioner submitted its bid for both and qualified in the technical round. Pertinently, in the said tenders, an aggregate of the price bid submitted by the petitioner for FCI and for general customs work was lower than the aggregate of the

price bids submitted by other bidders. However, the bid of the petitioner was rejected by the third respondent on the ground that as per the terms of the tender, only the bid submitted for FCI work was taken into consideration to arrive at the L-1 bidder. Since the price bid of the petitioner for FCI work was higher than the bid submitted by other bidder for FCI work, the petitioner's bid was rejected. If the aggregates were taken into consideration, the petitioner's bid was lowest. The Ahmednagar work was also allotted to the fourth respondent. Thus, there is a deviation and this enables the petitioner to invoke this court's jurisdiction.

10. Mr.Godbole contended that the third respondent erred in taking into consideration the rates quoted for general customs work by the petitioner and respondent no.4. The terms and conditions of the tender make it amply clear that the rate quoted for FCI work was the only factor to be considered by the respondent. Mr.Godbole relies upon Clauses 11 and 12 of the tender notice. Mr.Godbole submits that if, in the past, the third respondent rejected the bid of the petitioner even though, in aggregate, the petitioner was the lowest one and the rejection was based on the rate quoted for FCI work, it cannot be permitted to take a contradictory stand. Now, there is a gross error in rejecting the petitioner's bid without drawing lots. There was a clear tie and

therefore, Clause 9.3(c) of Part 'A' of the tender document would have to govern the field.

11. On a perusal of the petition, its annexures and the affidavit in reply of the third respondent, we are unable to agree with Mr.Godbole. Mr.Godbole fairly brings to our notice the contents of the communication dated 10th January, 2020. That is at page 21 of the paper book (Exhibit 'C'). The same reads as under:-

"**MAHARASHTRA STATE WAREHOUSING CORPORATION**
(Govt. Undertaking Public Enterprise)
583/B, Market Yard, Gultekadi, Pune-411 037
Tel. 020-24262951, 24206800,
Email:- mswcinfo@mswarehousing.com, info@mswc.in,
mswc2k@yahoo.com, bdbranch.ho@mswc.in
Website: mswarehousing.com

No/MSWC/BDQC/H&T/126 Date:-10/01/2020

To,
M/s.S.K.Translines Pvt. Ltd.
1st Floor, 17-19, Sureshdada Jain Complex,
Ajanta Road,
Jalgaon 4255003.

Subject: Regarding Tender ID 2019_CMTDM 505044_1 Satara Tender we selected as L1.

Reference: Your letter dated 23.12.2019"

Sir,

We are in receipt of above referred letter for the purposes of "Lucky Draw of Lots".

This is to inform you that interpretation of condition No.9.3(c) on page No.13 as put forward by you for the purposes of requesting us to call upon you for Luck Draw of Lots is completely misconceived. The rates for FCI work and General Customs have been called separately. M/s.Gade Transport has quoted 153% for FCI work and 437% for General Customs work and you have quod 153% for FCI work and 603% for General Customs. There is no

"Tie" in the Bid Prices quoted by both the parties so as to draw lot. MSWC cannot resort to condition NO.9.3(c) as stated by you because there is no tie.

Therefore, there is no question of Draw.

Thanking you,

Yours truly,

(Suvas Mohanty)
Deputy General Manager (BDQC)"

12. To find out whether this is the correct conclusion or the conclusion in consonance with the terms and conditions of the tender, we must refer to the tender notice. This is an e-tender for appointment of handling and transport contractor for Satara. Clause 11 of Part 'B' of the tender notice, copy of which is at page 27 of the paper book, says that if L-1 is different for rates quoted for FCI work and general customs work, the L-1 tenderer for FCI work will be considered as L-1 for whole tender. So the tenderer should quote the rate considering this aspect of calculation while arriving at L-1 rate. The MSWC reserves the right to finalise the general customs rate by negotiations with L-1 of FCI or reserve the right to call separate tender for general customs depending upon the storage of general customs of respective centre as the case may be.

13. This makes it clear that there are two agencies. The work is being handled by MSWC. The Food Corporation of India is one

entity and the General Customs is the other. Identical services have to be provided to both. Mr.Godbole does not dispute that the volume of work handled by the third respondent for FCI is higher than the work of similar nature undertaken for the general customs. Therefore, Clause 12 says that the MSWC is inviting tenders for handling and transportation work. The price has to be quoted separately. However, the tenderers are required to fill the percentage rate while submitting the price bid for FCI work in electronic form and bid for general customs work by uploading in pdf format. If the rate quoted for general customs work is higher than the rate quoted for FCI work, then, the rates quoted for FCI work will be taken into consideration for comparison of rates. However, the third respondent is within its rights to negotiate with the winning tenderer for lowering rates for the general customs. This provision is made because in most cases, the turnover of general customs is very low as compared to the turnover of FCI. Mr.Godbole emphasises the words in Clause 12, which, he says, are pertinently absent in cases of other tenders. Clause 12 says that L-1 bidder would be decided on the basis of the rates quoted for FCI in Annexure IX(A). Now, Mr.Godbole would rely upon the instructions to the tenderers and particularly the clauses therein in relation to the technical bid and price bid. Mr.Godbole would submit that we must also note the condition appearing at page 63.

That is a condition which appears in and as a part of the price bids. The petitioner submits that Clause 11 says that the tenderers are required to quote separate rates. L-1 tenderer will be decided considering the transactions of last two years in case of FCI. If L-1 is different for rates quoted for FCI work and general customs work, the L-1 tenderers for FCI work will be considered as L-1 for whole tender/ in the tender process. Further, the MSWC reserves the right to finalise general customs rates by negotiations with L-1 of FCI or reserves the right to call separate tender for general customs work depending upon the storage of general customs of respective centre as the case may be.

14. We do not see any reason to agree with the petitioner when Clause 11 is worded as aforesaid. The third respondent is handling a larger volume of work for FCI in comparison to general customs. Therefore, the bidders should quote their price bid depending upon this volume. If the rates quoted are lowest for FCI, then, they can be considered for whole tender. That is how separate rates are required to be quoted for FCI work and general customs work. The caution administered to the tenderer is that it would be in a better position to obtain the contract or the work-order in its favour if it bears in mind this volume of work.

15. Mr.Godbole says that this understanding of the MSWC would mean wherever the rates for FCI are equal, necessarily the tie must follow. We do not agree with him for the simple reason that Clauses 11 and 12 of the tender notice have been perused by us. Clause 11 of Part 'B' (price bid) is also perused and there is no occasion, therefore, to fall back on Clause 9.3(c) (technical bid). That says that in the event two or more tenderers quote the same bid price, the authority shall identify the selected tenderer by draw of lots. Now, there is difference between the words "bid price" and the "price or rate quoted for FCI work". There is no stipulation that if the rates for FCI work of two tenderers are identical or same, the drawing of lot is necessary. Clause 9.3(c) has no application, according to us, for the simple reason that there was no tie. Here, the petitioner quoted may be the same price for FCI work, but the general customs work was also handled and separate rate was to be quoted for it. In comparison to respondent no.4, the petitioner's rate was much higher for general customs work. Therefore, an informed and rationale decision has been taken by the third respondent consistent with the wording of the tender notice. Pertinently, the tender was for providing handling and transportation services. The third respondent had to pay the price for procuring these services. The services were procured for FCI work and general customs work. Depending upon

the work handled for these two agencies, the MSWC decided to accept the price bid of respondent no.4 as that was competitive and lower in comparison to the petitioner. That is how the evaluation process has gone by and we do not see anything arbitrary, discriminatory, irrational or unreasonable, much less unfair and unjust in this process and the ultimate decision based thereon.

16. As explained in the affidavit in reply, for instance, the work handled at Ahmednagar and Chandrapur and the tender process for the same is not comparable. There, the petitioner was not considered as a lowest bidder for the reasons which have been set out in the affidavit in reply. These reasons once again are based on the wording of the tender notice. The explanation in paras 3 to 5 of this affidavit, therefore, enables us to hold that no assistance can be taken of those instances so as to press for any relief in the present petition.

17. In our view, the petitioner has failed to make out a case for our intervention in writ jurisdiction. The writ petition has no merit and it is, therefore, dismissed, but without any order as to costs.

(R.I.CHAGLA, J.) **(S.C.DHARMADHIKARI, J.)**