THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION No. 17853 OF 2019

O R D E R:

Complaining that Respondents 1 and 2 – Union of India and Government *e*-marketplace (GeM), Ministry of Commerce and Industry had conducted Bid No. GEM/2019/B/297062, dated 27.07.2019 contrary to the bid conditions and without providing equal opportunity in the bidding process, the petitioner approached this Court seeking a *mandamus* to set aside the declaration of Respondent No. 5 as L1.

The brief facts are:

The petitioner is a company involved in the business of sales and service of Out Board Motor for Boats, Marine Accessories, different types of Boats and allied activities and it is a regular supplier to various government departments apart from defence establishments. The 2nd respondent is a government *e*-market place (GeM) of Ministry of Commerce primarily engaged in procurement of different goods and services required by the government itself and other Public Sector Undertakings. The bid documents of the government departments and Public Sector Undertakings would be put up on the website www.gem.gov.in. Normally, the procedure followed by the GeM portal is, in terms of the notifications, after the technical evaluation by the department, and after identification of the least-quoted price among the technically qualified bidders, it notifies the same as Reference Price for the purpose of Reverse Auction (RA) on GeM's website specifying the date and time *on line* with rules for RA. In the RA procedure, the bidders will have to make counter offers, for which, normally, the minimum variation would be 0.1 to 10% of the Reference Price and if the bid is made 15 minutes prior to RA end time, RA would be extended 15 minutes automatically for others to make bid.

The 1st respondent sought to procure 465 Out Board Motors through RA Process by posting the requirement on GeM portal on 27.07.2019 with Bid No. GEM/2019/B/297062. Along with the specified technical specifications, EMD to be paid was notified as Rs.52,63,707/-. EMD is exempted for firms registered under the 3rd respondent for tendered items subject to the condition that such registration is current and valid. The petitioner paid the EMD and submitted its final bid @ Rs.3,28,500/- per unit totalling to Rs.15,27,52,500/- for 465 units. The bid was to start on 08.08.2019 at 18:07:41 and to end at 11.00 A.M. on 13.08.2019. The petitioner along with the 5th respondent and two others was declared to be technically qualified on 08.08.2019. Further, the petitioner's quoted price was declared to be the Reference Price for conducting the RA. Having come to aware that the technically-qualified bidders have not paid the EMD, on 12.08.2019, the petitioner raised an objection that the 5th respondent and others were wrongly exempted from paying the EMD as exemption is provided only for the units registered with NSIC for the tendered items, under para 12 of the Buyer Specific Additional Terms and Conditions, as notified. The petitioner also raised the objection that the 5th respondent and others were only traders of tendered items and not registered with NSIC for manufacturing of such items. The objections of the petitioner were registered on GeM portal with Ticket No.1722442, however, there was no response.

Six months earlier to the present tender, the petitioner had raised similar query with respect to exemption of EMD and tender process was cancelled and reissued by the 2nd respondent.

On 13.08.2019, GeM Portal developed technical glitches and on RA participation page, no SAVE/SUBMIT button was appearing to update the prices. The deponent immediately called the help desk of GeM at 10.20 A.M. and the call was transferred to senior tech support and the petitioner was informed that its bid is the Reference Price and the same cannot be revised unless competing bid is made by any other qualified bidder. The complaint of the petitioner was registered under Ticket No. 1722935.

At 10.57 A.M., in the GeM Portal, L1 price was mentioned as Rs.15,25,99,050/- without any change in the unit price as offered by the petitioner. The petitioner could not make any counter offer as the GeM portal was struck at that point of time. The petitioner registered its protest that it was not provided level playing field for making a counter offer.

Thus, the petitioner seeks a mandamus *declaring* the 5th respondent as L1 as illegal, arbitrary and violative of Articles 14 and 19 of the Constitution of India, on account of the fact: firstly the 5th respondent was wrongly exempted from payment of EMD as he is not registered with NSIC; secondly there is a technical snag and glitch in GeM Portal thereby depriving the petitioner from making a counter offer for no fault of their own notwithstanding the fact that it quoted the quoted the lowest at the very beginning at the time of opening of bid process.

The counter-affidavit was filed on behalf of Respondents 1 and 2 by the Deputy Inspector General (Provisioning) HQ NDRF rebutting the allegation of the petitioner that the 5th respondent was wrongly granted exemption from payment of EMD and further stating that the exemption from EMD was provided for other technically-qualified firms by the GeM on the basis of Micro and Small Enterprise (MSEs) registered with Ministry of Micro, Small and Medium Enterprises as Medium and Small Enterprises / Vendor assessed and not for the registration with NSIC. This respondent had also enclosed in Annexure-1 & 2, the audit trail of GeM. It is further stated that exemption from paying the EMD for the units registered with NSIC mentioned in the bid documents is an additional terms and conditions selected by the buyer in order to give opportunity to NSIC firms also to participate in the bid in addition to the one provided as per para 4(xi)(n)(i) general terms and conditions (gtc) of the GeM. The credentials of the 5th respondent were validated *on line* through Udyog Adhar, a copy of which has also been attached. Thus, the claim of the petitioner that the 5th respondent has been wrongly given exemption was emphatically denied.

Dealing with the specific contention with respect to the mal-functioning of the GeM portal, it was stated that as per the Audit Trail of the GeM, the 5th respondent had put its price on 13.08.2019 at 10:30:53 A.M. Though 29 minutes remained, the petitioner had not chosen to participate in the bidding process thereby the unit price of the 5th respondent had worked out at Rs.3,28,170/- as against Rs.3,28,500/- which was the Reference Price, thus, the 5th respondent emerged as L1 at the total quoted price of Rs.15,25,99,-050/-. Along with the counter-affidavit, GeM Audit Trail is also attached. The 5th respondent's bid with variation of 0.10045% was within 0.1to 10% of the Reference Price as pointed out by the petitioner in para 6 of the writ affidavit. Thus, he prayed for dismissal of the Writ Petition by vacating the interim order.

The 5th respondent also filed a detailed counter-affidavit along with various annexures. The brief averments in the counter-affidavit so far as relevant are: it is admitted, the 5th respondent is not registered with NSIC, but registered as a Micro, Small and Medium Enterprise and to that extent, Udyog Adhar Registration Certificate was also filed. The general terms and conditions are in addition to “Buyers Specific Additional Terms and Conditions”. The very notification categorically states “the bid is also governed by the general terms and conditions”. It is further asserted that Condition No. 4(xiii)(n)(i) provides for exemption for the sellers who are registered with Micro and Small Enterprises.

Dealing with the allegation that the petitioner is not a manufacturer, it was further asserted that they are registered with Udyog Adhar as Micro and Small Enterprise as a manufacturer and they are also authorized to deal with the service of Suzuki-Brand Out Board Motors and Spare parts for and on behalf of the South Indian Federation of Fishermen Societies, Kaamana P.O., Trivendrum who are the distributors of Suzuki Motors Corporation. The allegation that the website was mal-functioning or there was any attachment to block the petitioner from making a counter offer in the RA was denied.

Heard learned counsel for the petitioner, learned counsel for the 5th respondent and learned Assistant Solicitor General for Respondents 1 to 4.

In the light of the facts narrated above, two issues fall for consideration:

1) L1 bid of the 5th respondent is liable to be rejected on the ground L1 had not paid the EMD?

2) Was there a technical glitch preventing the petitioner from offering their revised quote?

At the outset, in the light of the Audit Trail filed by the GeM and there being no material placed before this Court, even remotely to satisfy that there was a technical glitch preventing the petitioner from making a revised offer after submission of the quote by the 5th respondent, the said ground is liable to be rejected as unsubstantiated and being speculative. Even as per the writ affidavit, it is the case of the petitioner that it had called the Help Desk at 10.20 A.M. seeking clarification that on 13.08.2019, Reference Price is the same as quoted by them and thereafter the petitioner had checked the same only at 10.57 A.M by which time, the price appearing on the portal was Rs.15,25,99,050/- as against the offer made by it at Rs.15,27,52,500/-. It may be noted that the bid closing time was 11.00 A.M. and the petitioner still had three minutes to make an offer at less than what has been made by the 5th respondent, however, it had not chosen to do so. Further, there is no denial by the petitioner of the specific assertion on the part of the respondents that based on Audit Trail, the 5th respondent's offer was made at 10:30:53 A.M., and there was about 29 minutes time during which, the petitioner could have made an offer if they were really keen on bagging the contract which they had not done. In the undeniable fact situation, as admitted, there is neither any reason nor substance calling for interference by drawing an inference contrary to the material facts on record against the 5th respondent.

Sofar as the objection of the petitioner with respect to granting of exemption to pay EMD in favour of the 5th respondent is concerned, it is to be seen, the exemption was based on registration granted and executed in Udyog Adhar in Government of India Portal https://mkp.gem.gov.in for the specific products of out board motors, rescue boats, marine-propellers, out board - motor/p-5116877-85919869227 and the bid categorically is classified as Out Board Motor for Rescue Boats (marine propellers). It is not in dispute that the 5th respondent had offered the Marine Propellers of Suzuki DF 30AL and the procuring agency satisfied with the same.

It may be noted that dealing with the objections raised by the petitioner through its letter dated 18.02.2019, the Government of India *vide* letter dated 01.03.2019, in detail, had answered that the TPC chaired by the DG NDRF on the assessment of the past performance of the tenderer will be final; that as per Ministry of Micro Small and Medium Enterprises (MSME) letter No. 21(14)/2016-MA, dated 23.07.2018, all the Micro and Small Enterprises (SMEs) registered with Ministry of MSME under public procurement policy irrespective of relevance of product category and capacity of the Micro and Small Enterprises are exempted in prior experience and turnover clauses; that as per the documents, the 5th respondent is registered with Ministry of MSME as Small Enterprises. Therefore, the eligibility criteria of past performance is not applicable to this firm in the light of the above instructions/ guidelines. Further, the MSME Certificate granted to the petitioner is with respect to the manufacturing activity. In that view of the matter, it cannot be said that the 5th respondent is not eligible for exemption from paying EMD.

Therefore, it is not necessary for this Court to probe into minute details with respect to registration granted in favour of the 5th respondent, as evidenced from Udyog Adhar Memorandum, as the tendering authority is satisfied with respect to the same.

In view of the aforesaid reasons, this Court does not find any reason to issue a *mandamus.* The Writ Petition is accordingly, dismissed. No costs.

Miscellaneous applications, if any pending, shall also stand disposed of.

CHALLA KODANDA RAM, J

20th February 2020.

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