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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

* * *

CWP-13178-2020
Date of Decision: 9th December, 2020

M.S. Enterprises

Petitioner

Versus

Chairman-cum-Deputy Commissioner Ambala District Information Technology Society (DITS) and others

Respondents

CORAM: JUSTICE S. MURALIDHAR
JUSTICE AVNEESH JHINGAN

* * *

Present: Mr. Parminder Singh, Advocate for the Petitioner.

Mr. Aman Bahri, Additional Advocate General, Haryana.

None for the Respondent No. 5.

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Dr. S. Muralidhar, J.

1. This writ petition by M.S. Enterprises seeks the quashing of an order dated 13th August, 2020 passed by the CTM-cum-Member Secretary, District Information Technology Society, Ambala ('DITS'), awarding a contract for supply of manpower to M/s Ram Solutions, Ambala Cantt. (Respondent No. 5).

2. This Court has heard the submissions of Mr. Parminder Singh, Advocate for the Petitioner and Mr. Aman Bahri, Additional Advocate General, Haryana appearing for Respondents 1 to 4. Despite service, none has appeared for Respondent No. 5.

3. The background facts are that the aforementioned contract was awarded pursuant to the bids submitted following a short term tender notice floated

by the DITS on 13th July, 2020 inviting online tenders from "registered outsourcing agencies". It was indicated in the short term tender notice that "the details of the terms and conditions for bidding can be seen on http://ambala.gov.in"

4. The aforementioned website of the DITS Ambala sets out the terms and conditions of the tender. Among 42 such terms and conditions, condition No. 24 speaks of Earnest Money Deposit ('EMD'). It states that "EMD is not required to be submitted by those bidders who have registered the same item/range of products/ goods and services with Central Purchase Organization". There is no indication in the terms and conditions as to how a tie among the bidders should be resolved.

5. 20 online tender applications were received and 18 were short-listed on the same financial bid i.e. 2.01%. The financial bids were opened on 28th September, 2020 at 2:30 pm. Relevant to the present case is the fact that both Respondent No. 5 and the Petitioner had submitted identical financial bids at 2.01 %.

6. The admitted position, as is evident from the reply filed by the Respondent No. 2, is that Respondent No. 5 was preferred over the other bidders who had submitted identical financial bids, including the present Petitioner, on two criteria. First, on the basis of past experience of the firm and good service provided to DITS in the previous years. The second criteria adopted was an order dated 23rd Marc, 2012 issued by the Ministry of Micro, Small and Medium Enterprises ('MSMEs'), requiring central ministries/departments to take necessary steps "to develop appropriate vendors by entering into rate contract with MSMEs for a specific period in respect of periodic requirements".

7. As rightly pointed out by Mr. Parminder Singh, learned counsel for the Petitioner, the criteria on the basis of which Respondent No. 5 was preferred over the Petitioner, in spite of both entities having submitted identical financial bids, was not disclosed as a part of terms and conditions of the e-tender.

8. While Mr. Aman Bhari, learned Additional Advocate General for Respondents 1 to 4 was unable to dispute the said fact, he sought to justify the decision on the basis of the aforementioned order dated 23rd March, 2012 of the Ministry of MSMEs. He further submits that the said notification has been in the public domain for long and should be deemed to be in the knowledge of the Petitioner.

9. The Court is unable to agree with the above submission. The fact that notification issued more than 8 years ago on 23rd March, 2012 was going to be deployed to prefer one party for the award of the contract over others who have submitted identical financial bids could hardly be said to be self-evident, particularly when the terms and conditions of the e-tender do not make any reference to the said circular. For that matter, the terms and conditions do not indicate the manner in which Respondent No. 2 will proceed in the event of there being two identical financial bids and a decision having to be taken with regard to preferring one over the other. The criteria deployed in such circumstances have to be made known in advance. In other words, the Respondent No. 2 cannot arbitrarily deploy undisclosed criteria in deciding why one party, which tenders an identical financial bid as another, would be preferred.

10. By adopting criteria, not already disclosed as part of the terms and conditions of the tender, and eliminating the Petitioner on that basis and awarding the contract to Respondent No. 5, when both have submitted identical financial bids, Respondent No. 2 has undoubtedly acted arbitrarily. On this ground its impugned decision to award the contract to Respondent No.5 cannot be sustained in law.

11. As already noticed despite service, none has appeared for Respondent No. 5.

12. In the circumstances, impugned order dated 13th August, 2020 awarding the contract to Respondent No.5 is set aside. It will be open to the Respondent No.2 to now invite fresh bids clearly spelling out the criteria on

the basis of which bids would be evaluated keeping in view the possible contingencies, including the possibility of there being a tie in the bids submitted by two or more parties.

13. The petition is disposed of in above terms.

[S. MURALIDHAR]
JUDGE

[AVNEESH JHINGAN]
JUDGE

9th December, 2020
pankaj baweja

Whether speaking / reasoned: Yes / No

Whether reportable : Yes / No