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

Date of Decision : 28.01.2020

\+ **W.P.(C) 1362/2019 & CM Nos.6211/2019, 14252/2019, 14269/2019**

SHREE DURGA INDUSTRY & ANR ..... Petitioners

Through: Mr.Yashvardhan, Mr.Piyush Singh, Ms.Kritika Nagpal, Advs.

versus

UNION OF INDIA & ANR ..... Respondents

Through: Mr.M.K.Bhardwaj, Mr.K.C.Dubey, Advs. for R-1-2.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed by the petitioners challenging the order dated 24.01.2019 passed by the respondent no.2, blacklisting the petitioners for all BSF Public Procurements for a period of two years from the date of issuance of the Impugned Letter.

2. The respondent no.2 had floated a tender for procurement of 'Ply Board (synthetic RESIN Bonded Grade BWR, Type AA, 19 mm x 11 Ply) with (2100 x 900 mm) fitting material and fitting charges for Steel Cots Folding Qty.-9645 Nos. to various HQrs.' vide tender notice dated 11.07.2017.

3. Clause 11.1 of the Tender document required the tenderer to deposit two pieces of ply wood along with a test report from any NABL accredited Lab.

4. The petitioner submitted its tender along with a certificate dated 25.07.2017, which it claimed to have been issued by the Indian Ply wood Industries Research and Training Institute, Kolkata (hereinafter referred to as the 'Institute').

5. The respondent, on 19.04.2018, cancelled the tender with the intent to invite better competition for more participation of firms. EMD submitted by the petitioners was also returned to the petitioners on 12.06.2018. Thereafter, the respondent no.2 issued a Show Cause Notice dated 16.08.2018 to the petitioner alleging that on an inquiry conducted with the Institute, the Institute had reported that the said certificate is not issued by the Institute and even the unique sample identification number mentioned on the same does not match with their data of samples received. The Show Cause Notice was issued to call upon the petitioners to show cause as to why it should not be banned from the business dealings with the respondent no.2.

6. The petitioner by its reply dated 20.08.2018 stated as under:

> *"(1) Lab Test Report dated 25.07.2017 was sent to you inadvertently by our staff vide our letter of*

even No. dated 12.07.2017 which was not related at all in connection with the aforesaid Tender. Being a human error please condone us.

(2) Actually we intended to enclose the photo copy of Lab Test Report which we was submitted originally against the on-line Tender floated by FTR HQ BSF, Jammu for the same identical stores and on receipt of AT from them, we had also executed the same successfully. Photo copies of said Lab Test Report and Acceptance of Tender (AT) are enclosed herewith for your kind perusal. However, you have full liberty to confirm the genuineness of the same from the concerned Lab as well from IG, BSF, Jammu who had placed the AT on us if you so desired.

(3) Our intention was only to convince you by providing the photocopy of abovementioned Test Report that we are quite capable to manufacture the TE stores as because we had no original Lab Test Report for the TE stores and for which we could not furnish the same to you in line of Tender conditions."

7. A reading of the above would show that the petitioners did not deny that the certificate submitted by it along with the tender was fake. It, in fact, stated that the same was inadvertently sent by its staff as the petitioner firm was not in possession of any original lab certificate as was required in the tender document.

8. Considering the reply submitted by the petitioner, the respondent no.2 has passed the Impugned Order.

9. The learned counsel for the petitioner submits that the tender having been cancelled by the respondent no.2 and the Earnest Money Deposit (EMD) amount also having been returned, the Impugned Order could not have been passed thereafter.

10. I do not find any merit in the said contention. The cancellation of the tender was on the ground of not having received adequate number of bids. It does not absolve the petitioner from the consequence of it having submitted a false and fake certificate.

11. Clause 2.1 of the tender further made the provisions of the DGS&D Manual applicable to the tender. Clause 5.18.3(iii) of the DGS&D Manual empowers the Authority to pass an order banning the contractor for future tenders on *inter-alia* the following ground:

> *"5.18.3* ***GROUNDS FOR BANNING OF BUSINESS DEALINGS****: The grounds on which banning may be ordered are:-*
>
> *xxxx*
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> *(iii) If there is strong justification for believing that the proprietor or employee or representative of the firm has been guilty of malpractices such as bribery, corruption, fraud, substitution of tenders, interpolation, mis-representation, evasion or habitual default in payment of any tax levied by law; etc."*

12. Clause 5.18.3(iii) was, therefore, rightfully invoked by the respondent no.2 which passing the Impugned Order. Mere

cancellation of tender on account of non-receipt of adequate number of bids, cannot absolve the petitioner of its actions or relieve it of the consequences of such actions.

13. The learned counsel for the petitioner further submits that in terms of the tender document, the DGS&D Manual was to apply to the tender. Relying upon Clause 5.18.4 of the DGS&D Manual, he submits that before passing the Impugned Order, the procedure as prescribed in the above Clause has not been followed.

14. I do not find any merit in the said submissions of the learned counsel for the petitioner. Clause 2.2.3 of the tender document read as under:

> *"2.2.3 Under Clause 2 (c)-page 5 of DGS&D Conditions of contract, the word "Director General of Supplies & Disposals or heads of his concerned regional offices" may be replaced by Director General, Border Security Force, Ministry of Home Affairs. Similarly the reference to DGS&D wherever appearing may be suitably modified."*

15. A reading of the above would clearly show that for the tender document, the Director General of Supplies and Disposals has been replaced by the Director General Border Security Force as the tender has been floated by the respondent no.2 and the procurement was for the respondent no.2 only.

Clause 5.18.4 of the DGS&D would therefore, have to be read in accordance with this amendment. The decision to ban the petitioner has been taken by the Directorate General BSF, that is the Competent Authority in terms of Clause 5.18.4 as modified for the purposes of the tender document. I therefore, find no infirmity with the Impugned Order.

16. The learned counsel for the petitioners further submits that the submission of the certificate being an inadvertent error by the staff of the petitioner, the penalty imposed by the Impugned Order is highly disproportionate and is therefore, liable to be set aside by this Court.

17. I again do not find any merit in the said submissions.

18. The allegation made against the petitioner is of grave nature of having interpolated and submitted a false document to the respondent no.2. In such cases, no leniency can be shown to the defaulting party. As has been held by the Supreme Court in ***Chief Executive Officer, Krishna District Cooperative Central Bank Ltd. and Ors. v. K. Hanumantha Rao & Ors.***, (2017) 2SCC 528, the Court can interfere with the quantum of punishment only when the punishment imposed by the competent Authority is found to be so shocking in nature so as to render it totally disproportionate to the offence alleged. In the present case, I do not find the penalty imposed to be disproportionate in any manner.

19. The petition is therefore, dismissed. The parties shall bear their own costs.

NAVIN CHAWLA, J

JANUARY 28, 2020
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