04.01.2022
Court No.13
Sl.6
pk

W.P.A. No. 18003 of 2021

New Luxmi Press and another
Versus
The State of West Bengal & Ors.

(Through Video Conference)

Mr. Rudraprasad Matilal
...for the petitioners.

Mr. Samrat Sen,
Mr. Nilatpal Chatterjee
...for the State

The writ petitioner no. 1 is aggrieved by order dated 09.11.2021 whereby its tender for printing and supply of printed IEC materials to the National Health Mission under the Health and Family Welfare Department, Government of West Bengal was declared to be technically ineligible. The ground of disqualification was that Earnest Money Deposit (EMD) was not furnished.

Counsel would argue that the petitioner no. 1 is an MSME within the meaning of MSME Act, 2006. It is submitted that MSMEs, in terms of a policy of the Government, are exempted from putting Earnest Money Deposit in Government Tenders.

It is therefore submitted that the rejection of its bid for absence of EMD is illegal and arbitrary.

The State is represented by Mr. Samrat Sen, learned Senior Advocate. Mr. Sen places Clause (d) of the Notice Inviting e-Tender dated 11.08.2021 which is set out herein below:

> *"(d) The item wise list of printed materials along with detailed specification, proposed to be printed & supplied to the Districts is given in Annexure A. The bidders are to quote rates in the designated cells of Price Form given at Annesure C. Different agencies will be selected for each of the items (e.g. Leaflet, Brochure, Paper Poster, Vinyl Board, Card, Manual/Book, Booklet, Register, Flex, File Folder, Record Book/coupon, SAM Chart, MAP Card book, MEC wheel, NCD Dairy, MCP Card, Passport). Selection of bidder will be based on the aggregated cost for sub-items of an item."*

By reference to the above Clause, it is argued that the materials to be supplied under the NIT was tailor-made and/or bespoke to the NHM. Manufacture of the items by the tenderer was a pre condition. In terms of Section 194C of the Income Tax Act, 1961, the aforesaid activity and job under the NIT, would attract TDS and hence the tender was for a "works contract" and not a "supply contract".

This Court is inclined to accept the contention of Mr. Sen, learned advocate for the State.

A plain reading of Clause (d), set out herein above, would indicate that the NHM was seeking to procure bespoke stationary of particular specifications. Only manufacturers of such stationary materials were eligible to participate in the tender process. The contract is, therefore, clearly a "works contract" and not one of Supply.

The writ petitioner no. 1 would not be entitled to exemption from deposit of EMD since the MSME Act keeps “works contracts” outside its purview. The disqualification of the petitioner’s bid is therefore justified and in order.

Reference to the decision of the Supreme Court in the case of **Afcons Infrastructure Limited Versus Nagpur Metro Rail Corporation Limited and another** reported in **(2016) 16 SCC 818** by Mr. Sen need not be addressed.

For the reasons stated herein above, the writ petition fails and is hereby dismissed.

There will be no order as to costs.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(*Rajasekhar Mantha, J.*)