

Ashwini

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7307 OF 2021
WITH
INTERIM APPLICATION NO. 14 OF 2022
IN
WRIT PETITION NO. 7307 OF 2021**

Hayatt Steel Pvt Ltd

...Petitioner

Versus

Oil and Natural Gas Corporation Ltd through K
Venu Gopal & Ors

...Respondents

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Mr Sandesh D Patil, i/b Prithviraj S Gole, for the Petitioner.

Mr AI Patel, Addl GP, with PG Sawant, AGP, for the State.

**Mr Nishit Dhruva, with Prakash Shinde, Niyati Merchant and Yash
Dhruva, i/b MDP & Partners, for Respondent No.1-ONCG.**

**Mr Shailendra Sharma, with Siddharth Bafna, i/b Integrum Legal,
for Respondent No.2.**

**Mr Nikhil Sakhardande, Senior Advocate, with Ashish Venugopal
and Abhineet Sharma, i/b Parinam Law Associates, for
Respondent No.3**

**CORAM G.S. Patel &
 Vinay Joshi, JJ.**

DATED: 11th March 2022

PC:-

1. The Writ Petition is filed by a private limited company which claims to be an Micro, Small or Medium Enterprise (“**MSME**”) . Its fundamental complaint is that the 3rd Respondent, DCM Hyundai Ltd, is not an MSME and was not an MSME at the time of the subject tender opened by the 1st Respondent.
2. The tender in question is a custom bid for services-hiring of cargo container units. This was required at the Nhava supply base.
3. According to the Petitioner, the tender said that purchase preference would be given to an MSME if the difference between the L1 bidder and the MSME was less than or equal to 15%. This is set out at page 26 of the tender document in clause 2. It is in accordance with a purchase preference policy set out at page 56.
4. There is no doubt that both the Petitioner and the 3rd Respondent put in bids. The difference is this. The Petitioner was already an MSME and uploaded its MSME certificate. The 3rd Respondent was not at the date and time when it first submitted its bid, although this bid was incomplete at that time on the GeM portal, in receipt of an MSME registration certificate. This was on 20th September 2021. It seems that the 3rd Respondent did apply for an MSME certification and received it. The documents shown to us indicate that the 3rd Respondent uploaded the MSME certificate to GeM portal well in time by around 11.59 am on 20th September 2021. The tender closed at around 4.00 pm on that day.

5. The price differential band between the Petitioner and the 3rd Respondent is roughly about 1.7 or 1.75% and is therefore, covered by the policy and the tender condition. That is to say, if the 3rd Respondent is *not* a MSME, then it will be knocked out of the bid, preference being required to be given to the Petitioner.

6. This has been the struggle of the Petitioner all along, viz., show that the 3rd Respondent is not, was not, could not and ought not to be an MSME. This presents significant difficulties for a Writ Court. Whether the 3rd Respondent should or should not be an MSME is not only something we cannot examine in a Writ Petition but is also not a challenge before us. The Petition proceeds on the assumption that the 3rd Respondent was never a MSME.

7. The entire argument rests on one assumption, namely, that in the tendering process every bidder has to “choose” whether the bidder is applying as an MSME or in what one may loosely describe as “open category” meaning non-MSME. It is true that the tendering portal asks at the initial stage whether there is an MSME certificate being uploaded. This is a yes/no radio button option. But this does not mean that a bidder is bound to make a choice or having indicated ‘no’ cannot later upload, though within the time specified for closing the tender, a valid MSME document. The no option is only to indicate if a MSME certificate is being uploaded, nothing else.

8. At any rate, how to interpret this clause of the tender is always a matter best left to the tendering authority. It is not shown to us

that the approach of the tendering authority is irrational, perverse or at the level of Wednesbury unreasonableness. The law does not permit us to interfere in situation such as this.

9. The end result today as a matter of record is that the both the Petitioners and the 3rd Respondent have put in documents showing that they are each MSMEs. Both sets of MSME documents are registered and acknowledged on the GeM portal. Between them, the 3rd Respondent is the lower tenderer. The knockout preference policy has no application in a situation such as this.

10. Consequently, the Petition rejected. There will be no order as to costs.

11. All previous ad-interim orders stand vacated.

12. The Interim Application does not survive and is disposed of accordingly.

(Vinay Joshi, J)

(G. S. Patel, J)