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

% **Date of Decision: 03.06.2022**

+ **W.P.(C) 8939/2022 & C.M. No. 26865/2022**

M/S COSMO ENTERPRISE Petitioner
Through: Mr. Manish Raghav and Mr. Rohit
Gour, Advocates.
versus

UNION OF INDIA AND ANR Respondent
Through: Mr. Asheesh Jain, CGSC with Mr.
Adarsh Kumar Gupta, Mr. Keshav
Mann, Advocates with Mr. Sunil
Chaudhary, TSO-1/Northern Railway.

+ **W.P.(C) 9458/2022 and C.M. Nos.28246/2022**

M/S COSMO ENTERPRISE Petitioner
Through: Mr. Manish Raghav and Mr. Rohit
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versus

UNION OF INDIA AND ANR Respondent
Through: Mr. Asheesh Jain, CGSC with Mr.
Adarsh Kumar Gupta, Mr. Keshav
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Chaudhary, TSO-1/Northern Railway.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL)

C.M. No. 28247/2022 (for exemption) in W.P.(C) 9458/2022

Exemption allowed, subject to all just exceptions.



The applications stand disposed of.

W.P.(C) 8939/2022 and C.M. No. 26865/2022 (for ex-parte stay)

W.P.(C) 9458/2022 and C.M. Nos.28246/2022 (for ex-parte stay)

1. These petitions are directed against the disqualification of the petitioner pursuant to the tender issued by the respondents for manufacturing and supply of certain items to the railways. The relevant product/item in W.P. (C) 8939/2022 is Elastic Rail Clip MK-III, whereas in W.P. (C) 9458/2022, the relevant product is Elastic Rail Clip MK-V. Since both the petitions involve identical issue, in the context of identical facts, the said petitions are being disposed of by this common order.

2. The petitioner participated in the tender as a “Micro-Enterprise” under the Micro and Small Enterprise Act, 2006 (hereinafter referred to as ‘MSME Act, 2006’).

3. Admittedly, the only document furnished by the petitioner to establish its status as “micro enterprise” is “*Certificate of Commencement of Production*” issued by the District Trade and Industries Centre, Raipur. The respondents have not found this document as being sufficient to establish that the petitioner had a valid and subsisting registration as a micro enterprise as on the date of submission of its bid. The relevant instructions to tenderers which contemplates subsisting, valid registration as MSEs is contained in Clause 3.1 of the instructions to tenderers which reads as under:

“3.1 The Public Procurement Policy on MSE, envisages certain benefits/preferential treatment to Micro and Small Enterprises (MSEs) of their participation in Govt. procurement in reference to the Railway Board’s letter No.2010/RS(G)/363/1 dated 05.07.2012 & MSE Gazette Notification No.503 dated 23.03.12 of Govt. of India. In order to avail themselves of such benefits and preferential treatments, the MSEs must be registered with any of the following:

- (i) District Industries Centers
- (ii) Khadi and Village Industries Commission



- (iii) *Khadi and Village Industries Board*
- (iv) *Coir Board*
- (v) *National Small Industries Corporation*
- (vi) *Directorate of Handicraft and Handloom*
- (vii) *Any other body specified by Ministry of MSME.*

4. It can be seen that the aforesaid instructions to tenderers refers to Railway Board letter No.2010/RS(G)/363/1 dated 05.07.2012, para-1.2 of which reads as under:-

“1.2. The Policy envisages extending certain benefits/preferential treatment to MSEs and making efforts for development of appropriate vendors and enhancement of their participation in government procurements. In order to avail themselves of such benefits and preferential treatment, the MSEs must be registered with any of the following:-

- (i) *District Industries Centres*
- (ii) *Khadi and Village Industries Commission*
- (iii) *Khadi and Village Industries Board*
- (iv) *Coir Board*
- (v) *National Small Industries Corporation*
- (vi) *Directorate of Handicraft and Handloom*
- (vii) *Any other body specified by Ministry of MSME”*

5. In the counter affidavit filed on behalf of the concerned respondent, it has been explained that although the bid submitted by the petitioner was initially accepted; however, when the documents of the petitioner were being checked at the stage of evaluation of techno-commercial bid and financial bid, it was noticed that the “UDYAM AAKANKSHA” No.11101629761184 mentioned in “*New Certificate of Commencement of Production*” had since lapsed on 01.09.2018. This information is said to have been discovered upon checking the concerned website of the concerned department of the State of Chhattisgarh.

6. When confronted with the aforesaid averments contained in the



counter affidavit of the concerned respondent, and also contentions of the Mr. Asheesh Jain, CGSC to that effect, learned counsel for the petitioner has sought to explain as to how reference to the Udyam Aakanksha number in its certificate on commencement of production has no bearing on its status as a micro enterprise, since the purpose of Udyam Aakanksha registration was different. During the course of hearing, the petitioner has also sought to rely upon further documents to establish its status as a duly registered micro enterprise. The petitioner has sought to specifically rely upon “*Udyog Aadhar Memorandum Certificate*” issued by Ministry of Micro, Small and Medium Enterprise”. The said “*Udyog Aadhar Memorandum Certificate*” is shown to be valid till 30.06.2022.

7. Conspicuously, the aforesaid Udyog Aadhar Memorandum Certificate issued by Ministry of Micro, Small and Medium Enterprises was never submitted by the petitioner to the respondents as part of its bid, despite the fact that Clause 3.1 of the instructions to bidders clearly contemplated submission of such documents.

8. The only question that arises for consideration is whether the respondents were justified in not accepting the “*Certificate of Commencement of Production*” issued by the District Trade and Industries Centre, Raipur, as a valid document, to support the petitioner’s bid as a bidder falling in the category of Micro & Small Enterprises (hereinafter referred to as ‘MSE’)

9. We agree with the submissions advanced by Mr. Asheesh Jain, learned CGSC that the “*Certificate of Commencement of Production*” only establishes that the petitioner has commenced commercial production as per the details contained in the said certificate. The certificate itself also records



that the same is based on information supplied by the petitioner itself. The said document cannot be equated with a valid and subsisting registration certificate conferring upon the petitioner the status of a subsisting MSE.

10. Moreover, the said certificate refers to Udyam Aakanksha Registration no. 11101629761184 assigned to the petitioner at address 50/3, 51/2, Jarway, Hirapur, Raipur, Chhattisgarh. The said Udyam Aakanksha number was also issued by the District Trade and Industries Centre, Raipur, and has been filed as annexure P-1 to the writ petitions.

11. The said Udyam Aakanksha certificate itself mentions that the issue date thereof is 02.09.2016, and the validity is till 01.09.2018. Clearly, a conjoint reading of the “*Certificate of Commencement of Production*” (annexure P-3) and the Udyam Aakanksha Registration, (annexure P-1) leads to the irresistible inference, that these documents did not clearly establish that the petitioner was a subsisting MSE. The explanations and the further documentation which the petitioner has now sought to produce, were not before the tendering authorities when the techno-commercial evaluation was carried out.

12. Accordingly, based on the material placed before the tender authorities, the petitioner could not have possibly been allowed to participate as an MSE, and could not claim a right to participate in the e-reverse auction process, as the occasion thereof would arise only if the petitioner is treated to be a bidder having valid MSE status in the light of the fact that the petitioner’s financial bid was not amongst the lowest.

13. It is pointed out that the petitioner could have qualified for e-reverse auction irrespective of being a non-MSE, if its quoted rate fell within the range of rates quoted by lowest 50% bidders. The petitioner’s bid did not



fall in the said range and, therefore, the occasion did not arise to permit the petitioner to participate in e-reverse auction.

14. In *Meerut Development Authority vs Association of Management Studies and Anr., 2009(6) SCC 171* the Supreme Court has clarified the rights of a Tenderer participating in the Tender Process as under:

*"17. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. **The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.**"(emphasis supplied)*

15. The law is also well settled and while exercising jurisdiction under Article 226 of the Constitution of India, this Court is concerned only with the decision making process. Also, the action of the tendering authorities has to be assessed in the light of the materials placed before the said tendering authorities, and not on the basis of materials/documents subsequently produced.



16. It was not open for the respondents to infer and assume on the basis of “*Certificate of Commencement of Production*” submitted by the petitioner, that the petitioner continued to have a valid registration as a micro-enterprise under the MSME Act. This position is reinforced by the fact that the petitioner itself has sought to rely upon certain documents produced for the first time in these proceedings, to establish its status as a duly registered and existing micro-enterprise.

17. The petitioner clearly has to take the consequence of not placing the aforesaid documents before the tendering authorities at an appropriate stage of the tender process. We reiterate that the petitioner’s bid was liable to be assessed on the basis of materials/documents placed on record before the tendering authorities by the petitioner itself during the tender process, and not with reference to any fresh documents/materials which are now sought to be belatedly produced and relied upon by the petitioner.

18. In the facts of the present case, no fault can be found with the decision making process in respect of the impugned tenders.

19. In the circumstances, we find no merit in these writ petitions and the same are, accordingly, dismissed, however, there shall be no orders as to costs.

SACHIN DATTA, J.

VIPIN SANGHI, ACJ.

JUNE 3, 2022

CI/ATK