

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 12837 of 2023

**Thermax Babcock & Wilcox Energy Solutions Limited
and another**

Vs.

Steel Authority of India and another

For the petitioners	:	Mr. Rajarshi Dutta, Ms. Radhika Mitra, Mr. Shounak Mukhopadhyay, Ms. Akshita Bohra
For the respondent no.1	:	Mr. Chayan Gupta, Mr. Sayantan Chatterjee, Mr. Dwip Raj Basu, Mr. Roumyadip Sahu
Hearing concluded on	:	23.06.2023
Judgment on	:	07.07.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner was the L-1 bidder in a tender floated by the respondent no.1-Authority, the Steel Authority of India (SAIL) with regard to supply of certain boiler spares and parts to the IISCO Steel Plant of the respondent no.1. Clause 2 of the Conditions of such tender stipulates that if the L-1 bidder is not an MSE (Micro and Small Enterprises) and MSE Seller(s) has/have quoted price within L-1 + 15% (selected by Buyer) of margin of purchase preference/price band defined in relevant policy, such Seller shall be given opportunity

to match the L-1 price and contract will be awarded for 25% (selected by Buyer) of total quantity.

2. It is submitted by learned counsel appearing for the petitioners that, in the present case, the petitioner was the L-1 bidder and was the successful bidder after the reverse auction. However, in pursuance of Clause 2 of the NIT (Notice Inviting Tender), the respondent no.2 was granted opportunity to quote price within 15% and, having matched the price of the petitioner, was awarded the entire work, contrary to the stipulation of 25% in Clause 2.
3. Learned counsel for the petitioner places reliance on the Procurement Policy for MSMEs *vide* order dated March 23, 2012 passed by the Ministry of MSMEs and contends that the same, as amended till date, clearly stipulates that in cases such as the present one, after matching the price of the L-1 bidder, the MSME shall be allowed to supply “up to 25% of the total tendered value”. Contrary to the same, the entire work was awarded to the respondent no.2, which is *de hors* the Procurement Policy as well as contrary to the NIT.
4. Learned counsel appearing for the respondent no.1 argues that as per the clarification in the FAQ (Frequently Asked Questions), in cases where the tender item cannot be split, the full/complete supply of the total tendered value may be awarded to the MSME, “considering the spirit of the Policy for enhancing Government Procurement from MSEs”. Hence, it is submitted that in view of such clarification by the concerned Ministry itself, the Procurement Policy has to be read in such light. Such an interpretation of the policy, it is argued,

impliesthat Clause 2 of the NIT permitted SAIL to grant the work order totally in favour of the MSE, that is, respondent no.2 herein.

5. The question which falls for consideration is whether the respondent no.1 was justified and acted in terms of law in awarding the entire contract to respondent no.2, an MSE.
6. The relevant Clause in the NIT is found at page 34 of the writ petition. The said Clause, that is, Clause 2 provides that if the L-1 is not an MSE and MSE Seller(s) has/have quoted price within L-1 + 15% (selected by Buyer) of margin of purchase preference/price band defined in the relevant policy, such Seller shall be given opportunity to match L-1 price and contract will be awarded for 25% (selected by Buyer) of the total quantity.
7. It is also relevant to mention that under the heading “Splitting” on the same page, it is stipulated that Bid Splitting is not applied.
8. Clause 2 has to be construed in the perspective of the relevant policy of the Government. In the order dated March 23, 2012 issued by the Ministry of MSME, pertaining to the Public Procurement Policy for MSEs Order, 2012, there is a clear indication, throughout the Policy, that the same is intended to encourage MSEs and ensure procurement of *minimum of 20%* of their annual value of goods or services from MSEs. In the subsequent order dated November 9, 2018 published in the Gazette dated November 9, 2018, the figure “20%” has been increased to 25%.

9. Accordingly, throughout the procurement policy, the figure 20% is to be read as 25%. Hence, the amended Policy provides for procurement of minimum 25% of total annual purchases from MSEs.
10. Clause 4 of the same provides that out of the 25% target of annual procurement from MSEs, a sub-target of 25% shall be earmarked for procurement from MSEs owned by Schedule Caste and Schedule Tribe entrepreneurs. Hence, it is clear from a composite reading of the policy that the entire endeavour of the policy is to procure a minimum of 25% from MSEs.
11. The relevant Clause in the present context is Clause 6 of the Procurement Policy, which reads as follows:

“6. Price quotation in tender. – (1) *In tender, participating Micro and Small Enterprises quoting price within price band of L1+15 per cent shall also be allowed to supply a portion of requirement by bringing down their price to L1 price in a situation where L1 price is from someone other than a Micro and Small Enterprise and such Micro and Small Enterprise shall be allowed to supply up to the 25 per cent of total tendered value.*

(2) In case of more than one such Micro and Small Enterprise, the supply shall be shared proportionately (to tendered quantity).”
12. Thus, a bare reading of the said Clause indicates that in cases such as the present one, the MSEs quoting price within the stipulated price band shall also be allowed to supply a portion of requirement by bringing down their price to the L-1 price and such MSEs shall be allowed to supply up to 25% of total tendered value.

- 13.** Thus, there is no ambiguity regarding the restriction being limited “up to” 25% of the total tendered value.
- 14.** In this context, it has to be kept in mind that the same is a forced bias towards MSEs, where it is otherwise not entitled to get the contract, in consonance with the Government Policy to procure a minimum of 25% of the goods and services from such enterprises. However, it must be kept in mind that the same restricts and curtails the right of a legitimate L-1 bidder.
- 15.** Of course, in the event there is any ambiguity, it can be argued that the interpretation should be in favour of the beneficiary of the Policy, that is, the MSE. However, in Clause 6(1) of the Policy, there is no ambiguity to the effect that the MSE concerned, after failing to be the L-1 bidder, is permitted to match the L-1 bidder + 15% and bring down their price to the L-1 bidder, thereby gaining an additional advantage in consonance with the Policy, for the specific purpose of being supplied a part of the total work.
- 16.** The expression “also” be allowed to supply, in Clause 6(1), clearly shows that the MSE would be entitled to get a fraction of the work and not the entire work.
- 17.** Such position is further clarified by the last part of sub-clause (1) of Clause 6 which stipulates that the MSE shall be allowed in such cases to supply “up to” 25% of total tendered value.
- 18.** In fact, sub-clause (2) of Clause 6 provides that in case there are more than one such MSEs, the supply shall be shared proportionately to the tendered quantity. Hence, there is no iota of doubt that the

maximum benefit which can be reaped by the MSE in such circumstances is up to 25% of the total tendered value and not more.

- 19.** That apart, a further factor operates in the present case in favour of the petitioner, which is the L-1 bidder. It is well-settled that tenders are floated to bring about transparency in allotment of Government largesse which is, after all, public money, and fairness and impartiality are integral features of the same.
- 20.** Although, for the sake of equity and in order to advance the Government Policy of encouraging MSEs, a fraction of the total work has to be awarded as per the Policy to the MSE by artificially putting on weight behind the MSE and permitting it to match the price of the L-1 bidder, even as per Clause 2 of the Tender Agreement itself, it is clearly stipulated that in such case, the contract will be awarded for 25% of the total quantity to the MSE. Within parentheses, it has also been stipulated in sub-clause (2) that the particular 25% out of the total quantity, which is to be allotted, shall be selected by the Buyer, that is, the tender issuing authority/respondent no.1 herein.
- 21.** After having declared such condition in no uncertain terms in the NIT itself, the respondent no.1 cannot “change the goal posts after the game has begun”, as has been often held by the Supreme Court and other High Courts in tender matters. All participants took part in the tender process knowing fully well the conditions thereof and after the entire tender process is over and reverse auction is held, the L-1 bidder cannot suffer a total rejection even in terms of Clause 2 of the NIT.

- 22.** In the event the interpretation sought to be lent by the FAQ relied on by the respondent no.1 was to be adopted in the disputed tender-in-question, the same had to be clearly mentioned in the conditions of the NIT itself. There is no mention anywhere that in the event the work cannot be split, the entire work can be awarded to the MSE under such conditions as the present one.
- 23.** In any event, the said FAQ, even if taken on its face value, merely indicates that in certain cases, the contract can be awarded entirely to the MSE. However, nothing in the FAQ modifies the Policy to the extent that such interpretation can be implemented even if there is no such specific indication in the NIT itself. Moreover, even the Government, in an administrative capacity while issuing “FAQ”s, cannot alter its own policy decision, except by a declared alteration to the policy or by adopting a fresh policy formally.
- 24.** In the present case, the NIT does not afford any such deviation, having not indicated the same in any form whatsoever. The parties having participated, knowing the NIT conditions to be the latest, cannot be deprived of an equal playing field (within the scope of the policy) by arbitrarily awarding the entire work in favour of the MSE.
- 25.** Insofar as the “splitting” argument of the respondent no.1 is concerned, the said Clause can be read harmoniously with Clause 2 of the NIT. The bids splitting contemplated in the NIT, which cannot be applied as per the NIT itself, obviously refers to the splitting of quotations by a single bidder in respect of the different components of the work.

- 26.** However, such “splitting” qualifies the noun “Bid” and not the work to be awarded after the bidding is over. Hence, the concept of bid splitting cannot be imported at the stage when the tender process is done and the work is to be awarded.
- 27.** Hence, on a comprehensive reading of all the documents produced by the parties, only one interpretation of Clause 2 of the NIT is possible, which is that in cases as the present one, where the respondent no.2 (MSE) is allowed to artificially match the quotation of the successful L-1 bidder (the petitioner), 25% of the work, at the most, as per the choice of the Buyer, out of the total quantity of work could be allotted to the respondent no.2. By obvious implication, the rest of the work, that is, 75%, had to be awarded to the writ petitioner. At the most, the respondent no.1, as the Buyer, has the option of selecting which 25% of the work, in terms of the quantity, could be awarded to the respondent no.2.
- 28.** In such circumstances, the impugned action of the respondent no.1 in awarding the entire contract to the respondent no.2 deserves to be set aside. Accordingly, **WPA No.12837 of 2023 is allowed**, thereby setting aside and quashing the Contract No. GEMC-511687707723686 dated May 06, 2023 (Annexure P-10 to the writ petition). The respondent no.2 shall remain restrained from undertaking any further work in terms of the contract awarded to it, if any, for a fortnight. In no event, even thereafter, shall the respondent no. 2 complete more than 25% of the total work to the awarded as per the tender. The respondent no.1 shall, within a fortnight from date,

indicate in clear terms the specific 25% work out of the total quantity of the purchases which is to be allocated to the respondent no.2. Accordingly, a fresh contract shall be entered by the respondents with petitioner no.1 regarding the balance 75% of the work in terms of quantity, the specific portion of which shall be at the choice of the respondent no.1.

- 29.** The respondent no.1 shall evaluate, through appropriate experts, the portion of the work already done by the respondent no.2 out of the total tendered work. Immediately thereafter, the respondent no.1 shall indicate to the respondent no.2 the balance work to be concluded by the respondent no.2 thereafter, keeping the outer limit of the quantity of such work within 25% of the total tendered work, to be specifically stipulated by the respondent no.1.
- 30.** If necessary, the respondent no.1 shall enter into a fresh contract with the respondent no.2, accommodating the work already done by the respondent no.2 and allocating the balance, if any, out of the 25% of the work as per the direction given herein to the respondent no.2. On the other hand, a fresh contract in respect of the balance 75% of the total tendered work shall be awarded by entering into an independent contract with the petitioner no.1. The fresh contract with the respondent no.2, if any, and the contract with the petitioner no.1 shall be entered into by the respondent no.1-Authority within a month from date.
- 31.** There will be no order as to costs.

- 32.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)