

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 151 OF 2023

M/s. Divine Food Industries,
Through its Signatory,
Shri Vishnu Bhagwanrao RaiMule,
Age : 42 years, Occu. : Seerving with
M/s. Divine Food Industries
R/o. Waard No. 4, at Po Pangri Gosavi
Tq. Mantha, Dist. Jalna

.. PETITIONER

VERSUS

1] Department of Food and
Public Distribution, Through its
Deputy Secretary,
Government of India

2] Ministry of Micro, Small and Medium
Entrprises, Government of India

3] The State of Maharashtra
Through its Principal Secretary,
Food, Civil Supplies and
Consumer Protection Department,
Government of Maharashtra,
Mantralaya, Mumbai

4] Principal Secretary,
Industries Department,
Government of Maharashtra,
Mantralaya, Mumbai

.. RESPONDENT

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Advocate for the petitioner : Mr. D.S. Bagul
DSGI for the respondents nos. 1 and 2 : Mr. A.G. Talhar
AGP for the respondents no. 3 and 4 : Mr. S.B. Yawalkar

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**CORAM : MANGESH S. PATIL &
S. G. CHAPALGAONKAR, JJ.**

DATE : 5 JANUARY 2023

ORDER (MANGESH S. PATIL, J.) :

Heard Mr. Bagul for the petitioner and also the learned AGP.

2. The petitioner is claiming following reliefs:

“B) By way of appropriate Writ order or directions in the like nature, the impugned tender notice dated 27.12.2022 bearing REF No. RADS/FRK/196 request for proposal for “Supply for Fortified Rice Kernel (FRKs) with Three (3) Micro Nutrients (Iron, Folic Acid and Vitamin B 12) in Maharashtra for fortification of CMR” be quashed and set aside.

C) By way of appropriate Writ order or directions in the like nature, the qualification criteria provided in clause for (PQ3 in respect of turnover and PQ4 in respect of relevant experience) may kindly be quashed and set aside and the respondent authorities be directed to accept the tender of all the eligible bidders by relaxing qualification criteria as provided in PQ 3 and PQ4 of the tender notice dated 27.12.2022.”

3. The petitioner is praying for quashment of the tender notice published by the respondents for procurement of Fortified Rice Kernel (FRKs) of specified quantity during the seasons, 2022-23 Kharif and 2023-24 Kharif and Rabbi.

4. The petitioner is aggrieved by basically the two qualification criteria PQ3 and PQ4 which stipulate as under:-

#	Basic Requirement	Eligibility Criteria	Documents to be submitted
PQ3	Turnover	The Bidder's turnover should be minimum INR 100 crores (Rs. One hundred Crore only) in any of one financial year out of last three (3) financial years (FY 2019-20, 2020-21 and 2021-22)	Bidder shall submit the following documents - • Audited Balance sheet of the Bidder for the last 3 financial years (FY 2019-20, 2020-21 and 2021-22) • CA certificate stating turnover as per Annexure

PQ4	Relevant Experience	The bidder should have manufactured and supplied micronutrients fortified food/meal/rice kernels of minimum Rs.65,00,000/- (Rupees Sixty five crore only) excluding Tax/GST to any central/state Government /Union territory organization within India in any one financial year out of the last 5 financial years (FY 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22).	Bidder shall submit the following documents - 1. Relevant Work Orders or Contract agreements or Award of contract or Lol 2. Experience or Completion certificates should be submitted clearly stating the scope of work performed 3. CA certificate clearly stating turnover from relevant experience as per annexure 4. Details of supply as per format in Annexure
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Apart therefrom the petitioner is also aggrieved by the fact that the process prohibits consortiums and joint ventures from participating.

5. Mr. Bagul would submit that the petitioner is a micro small and medium enterprise duly registered under the relevant law. It has licence issued by the Food Safety and Standard Authority of India licence under FSS Act, 2006 which is valid up to 2026. It has experience of supplying FRKs to Telangana State. It had supplied 2000 Metric Tonnes of FRKs to Telangana State Civil Supplies Corporation (TSCSC).

6. Mr. Bagul would further submit that the Government of India has floated centrally sponsored scheme for distribution of FRK through Public Distribution System (PDS) for a period of three years. It has issued operational guidelines. The State Government has also adopted guidelines by earmarking Gadchiroli district for the pilot project. He would submit that in spite of the fact that it is a procurement by the State, an attempt has been made to deprive the

entities like the petitioner by providing for the afore-mentioned two criteria which are certainly cumbersome inasmuch as only the entities which has the turnover of more than 100 crore would now be eligible to participate. The qualification criterion has been tailor-made to suit the contractors like Maharashtra State Consumer Federation. It is the only entity throughout the State which would fit in this criteria. No other State has indulged and provided for such an eligibility criterion. It is contrary to the operational guidelines particularly clause no. 1.2. Instead of resorting to de-centralization, a comprehensive tender on State level is being floated. It is suspected that such a stringent eligibility criteria has been provided to suit certain type of contractors.

7. We have carefully considered the submissions of Mr. Bagul and even the learned AGP.

8. The petitioner is aggrieved by the terms which provide for eligibility criterion of the intended bidders. The invitation to offer is for procurement of FRKs for a period of next two years of a specified quality and quantity across the State to enable the State Government to distribute it through PDS. It is the stand of the petitioner that the impugned conditions have been incorporated objectively to suit certain entities like the Maharashtra State Consumer Federation. However, pertinently the petitioner does not specifically aver in the petition that

only the Federation would be eligible to apply. The relevant averment can be found in ground no. 2 of the petition which reads as under:-

“II) In the impugned tender conditions, the respondent authorities are demanding annual turnover of Rs.100,00,00,000/- (Rupees one hundred Crore only) in any of one financial year out of last 03 years. Even the respondent authorities further introduced the relevant experience by which, the respondent authorities provided that the bidder should have manufacture and supply micronutrients fortified food/mill/rice kernel of minimum Rs.65,00,00,000/- (Rupees Sixty five Crore only) excluding tax/GST to any Central/State Government/Union Territory Organization within India in any one financial year out of the last 5 financial years. The eligibility criteria / qualification criteria provided in PQ3 and PQ4 are arbitrary and irrational. The said qualification criteria is _____ to the particular class of contractor like Maharashtra State Consumer Federation and other similarly situated contractors like that only.”

9. The petitioner is alleging that the eligibility criteria is arbitrary and irrational but the averment is too vague to justify it. There is absolutely no material on the record how and why stipulating that the turnover of the bidder should be more than 100 Crore rupees in any one financial year out of last three years and also providing for experience of manufacturing and supplying *inter alia* of FRKs of minimum of 65 Crore in any one financial year out of the last five financial years can be regarded as arbitrary and irrational, merely because it would keep away the smaller suppliers.

10. Again, as can be noticed, though the petitioner has named Maharashtra State Consumer Federation, conspicuously it is not the

avermment that it is the only entity which would now be eligible to bid. Even according to the petitioner, there can be similarly situated contractors like the Federation. The petitioner having not furnished any statistics or details, there is nothing before us to demonstrate that the impugned conditions have been put objectively so as to enable only the Maharashtra State Consumer Federation to participate.

11. Again, there is no specific and precise averment anywhere in the petition and even Mr. Bagul could not point out any precise allegation attributing mala fides on the part of the State to incorporate the impugned eligibility criteria.

12. So far as the operational guideline no. 1.2 is concerned, component no. I referred to and relied by Mr. Bagul and guideline no. 1.3 laying down timelines read as under:-

“1.2 KEY COMPONENTS UNDER THE SCHEME:

The key components under the proposed scheme are briefly described as below :

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Component I : Fortification of rice in the PDS at the State level

The core elements for production of fortified rice are the Fortified Rice Kernels and its blending with regular rice in a ratio of 1:100. Fortification should not in any way interfere with the regular supply and availability of rice in the Fair Price Shops and this Scheme will therefore involve Supply Chain Management as well.

There are States which undertake MSP based procurement operations of paddy on behalf of Government of India, get it milled and also store and distribute rice under TPDS and Other

Welfare Schemes. This arrangement of Government of India with States is termed as Decentralized Procurement Scheme and currently there are 15 States/UTs participating in the DCP scheme for rice. These are Andhra Pradesh, A&N Islands, Bihar, Chhattisgarh, Gujarat, Jharkhand (5 Districts), Karnataka, Kerala, Madhya Pradesh, Maharashtra, Odisha, Tamil Nadu, Telangana, Uttarakhand and West Bengal.

In other States, termed as non-DCP states, procurement of paddy and its milling is handled mostly by the State Government agencies on behalf of FCI and the expenses borne by them are reimbursed by the Central Government. Rice so procured is handed over to FCI, which becomes part of Central Pool. FCI on its own procures only a small proportion of Paddy directly and gets it milled. FCI therefore basically plays the role of an aggregator.

The fortification of rice in PDS supply chain at District level by the State Governments has been found to be the most feasible approach for distribution of fortified rice through PDS. Under this approach, fortification of rice will be done at milling stage, both in DCP and Non-DCP States. This will enable the District Collectors and other authorities to visit the mills more frequently to ensure better implementation and quality control. Further, it would be easier to track the source of fortified rice with appropriate markings when the fortification is undertaken at the milling stage.

For purpose of systemic efficiencies and cost effectiveness, the blending of the fortified rice kernels with the rice will take place as a continuous process during the rice milling stage. As per existing practice paddy procured from farmers in DCP States is sent to the government empanelled rice millers for processing and milling. Milled rice is then transported back to government godowns for storage and distribution under PDS. In non-DCP States, milled rice is sent to the FCI godowns and transported therefrom to the State storage depot or directly to Fair Price Shops in some cases. In all the States, therefore, fortification will be done at the rice mills. FCI will, however, make arrangements in case of non-DCP States to keep the fortified rice separately in its godowns for distribution. The payment to the rice mills against the cost of fortification shall be routed through State Government/UT Admn.

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1.3 Timelines for Implementation of the rice fortification scheme :

Given the size of the country, sheer volumes of rice involved in the food based safety nets; a phased approach towards integration of fortified rice in the PDS has been adopted. Accordingly, fortification of rice would be taken up on Pilot basis in one district in each State/UT with large rice consumption. To begin with, the States/UTs have the option to implement the Pilot Scheme in part of the selected District. While identifying a District for Pilot, it should be ensured that it is pre-dominantly a rural District. Districts can be identified with high prevalence of anaemia amongst children and women, for which reference to NFHS-4 data can be made. In case an Aspirational District meets the above conditions, then preference should be given to the Aspirational District. The selected districts in the States/UTs will create the much needed momentum on rice fortification in the country along with the necessary experience and will add to the readiness of States for the roll-out of the universal rice fortification at a larger scale.”

13. We fail to understand as to how the impugned invitation to offer is in violation of the afore-mentioned guidelines. Both these guidelines basically provide for supply of FRKs through the PDS at district level and does not relate to the procurement policy. Besides, at the most these guidelines would be applicable in respect of Gadchiroli district which is found to be eligible for such a distribution of FRKs through PDS which has been earmarked for the pilot project. We fail to comprehend as to how these guidelines issued by the Central Government would deprive individual States from devising its own policy as far as procurement of FRKs. Therefore, according to us, this ground in the petition to impugn the on-going process of procurement is also not sustainable.

14. Mr. Bagul relied upon the decision of this Court in the matter of ***M/s K.K. Vidyut, Ahmednagar Vs. Union of India*** (writ petition no. 10696 of 2014 and connected matters decided on 29-01-2015).

15. As can be seen from the judgment, different electrical contractors had filed the petition objecting to the eligibility condition contained in clause no. 12.2 of the tender notice on the ground that it was discriminatory and was aimed at restricting competition. It was a matter involving laying down optical fibre base network for broadband connectivity to Panchayats. This Court had interfered and held that the tender condition in clause no. 12.2 was illegal and quashed and set it aside having noticed that it is only in the Ahmednagar district the competition was restricted to a specified class having work experience only in telecom sector and with the department of Telecom / BSNL / MTNL or experience with other PSUs authorized by DOT or PSUs of Government of India or State Government. It was found that there was no nexus in providing for such condition with the object sought to be achieved. It was also observed that the BSNL which was a project implementing agency throughout the State was expected to apply the same terms and conditions across the entire State and not different criteria for different districts. Obviously, there is no similarity in the facts and circumstances of the matter in hand with the matter that was under consideration in *M/s K.K. Vidyut, Ahmednagar* (supra).

16. We need not burden this order with the catena of judgments of the Supreme Court laying down criteria in the matter of judicial review in case of the contractual matters. The petitioner is objecting to certain terms and conditions providing for eligibility criteria but in the absence of specific and precise pleadings and material to demonstrate that the decision has been prompted by *mala fides* or has been tailor-made to suit a specific entity or a class of entity for some extraneous reasons, this Court should exhibit inhibition in exercising the powers under Article 226 of the Constitution.

17. The writ petition is dismissed in *limine*.

[S. G. CHAPALGAONKAR]
JUDGE

[MANGESH S. PATIL]
JUDGE

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