



Neutral Citation Number: 2023:DHC:5032- DB

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

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Date of Decision: 19.07.2023

% **W.P.(C) 4474/2023 and CM APPL. 17151/2023, 35852/2023 & 36087/2023**

KAILASH CHEMISTS AND ORS

..... Petitioners

Through: Mr. Ankit Jain & Mr. Mohit Gupta,
Advocates.

versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Mr. Asheesh Jain, CGSC with Mr. Tarveen Nanda, Mr. Gaurav Kumar, Ms. Ankita Kedia & Ms. Ria Khanna, Advocates and Dr. Leisha Dharan, Nodal Officer, CGHS, for respondents No.1 & 2/ UOI.
Mr. Saurabh Kirpal, Senior Advocate with Mr. Vinay Kumar Dubey, Mr. Abhinav Agnihotri, Mr. Prateek Tiwari, Ms. Priya Dubey & Mr. Shivam Tiwari, Advocates for M/s Prakash Medicos.
Mr. Jayant Mehta, Senior Advocate with Mr. Kunal Mittal, Advocate for M/s Grownbury Pharmaceuticals P. Ltd.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA



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SATISH CHANDRA SHARMA, C.J. (ORAL)

1. The petitioners before this Court have filed the present writ petition under Article 226 of the Constitution of India in respect of a tender dated 04.01.2023 issued by the respondents for procurement of drugs to CGHS Wellness Centres in Delhi/ NCR (subject tender).
2. In the writ petition, it has been stated that all the five petitioners are Chemists carrying out trade in the city of Delhi-NCR and they are also s Non-MSE (Micro and Small Enterprises) bidders in respect of the E-tender published by the respondents.
3. The petitioners submitted their bids, however, filed the instant petition during the pendency of the tendering process being aggrieved by Clause 4.2 of the Notice Inviting Tender (NIT) which is detailed as under:

“4.2 In compliance with Public Procurement Policy for MSE:

a) Participating bidder who is a registered MSE, and who is quoting price within price band of L1+15 %, shall be empaneled as ALC for a unit by bringing down their price to L1 price in a situation where L1 for the equipment is a non MSE entity. In case of ALC discount, the chosen bidder would be the one quoting the highest discount (H1), in place of lowest price (L1). Hence purchase preference would be given to MSE bidder who is quoting discount within the range H1-15% and is willing to bring up the quoted discount to match H1, where H1 is a non MSE entity.

Explanation to 4.2(a): if a non MSE H1 bidder quotes 25% for a WC, then purchase preference would be given to all MSE bidders who have quoted a discount of 25- (15% of 25) = 25- 3.75=21.25 All MSE bidders who have quoted discount between 21.25 and 24.9 will be asked to match the 25%



discount quoted by the H1 bidder.

b) Bid Splitting is not possible in case of ALC empanelment. Hence, if an MSE quoting in the requisite discount range matches a non MSE H1 discount, then the entire contract shall be given to the said MSE. Similarly, as bid splitting is not possible, the 3% preference to women MSEs and 4% preference to SC/ST MSEs also shall not be applicable.

c) In case there are more than 02 MSEs who fall in the range H1-15% and both agree to bring up their discount to match H1 and, since bid splitting is not possible, 'GeM system generated MSE' among the two would be given the contract for that Wellness Centre. (i.e., automated system generated bidder shall be declared as the successful bidder).

d) There is likelihood of MSE bidders in the range of H1-15%, being selected as successful bidders on their matching the non-MSE H1 bidder's discount. Since only a single discount quotation is allowed for a bidder for a city (Delhi/NCR), such MSEs would be required to agree to provide medicines to all WCs where they are H1, at the highest discount at which they have been empanelled in CGHS Delhi/NCR.

E.g., Bidder A who is a non MSE is the H1 at 16.1% in we A, bidder B who is non MSE is H1 at 16.2% in weB, bidder c who is non MSE is the H1 at 16.3% in we c.

Bidder X an MSE has quoted 15% and agrees to match 16.1% for we A, 16.2% for we B and 16.3% for WC C and becomes H1 for these 3 WCs. Bidder X is allowed to quote a single discount for all WCs and hence has to agree for 16.3% discount for WC A, WC Band WC C."

4. The aforesaid clause provides certain benefits to the Micro and Small Enterprises (MSEs) and weightage/ preferential treatment which was being given to the MSEs. The petitioners being aggrieved by Clause 4.2 came up before this Court raising various grounds challenging the NIT itself.



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5. The first ground raised by the petitioners in the writ petition is that the respondents have erroneously granted benefit/ weightage to Trader-Chemists contrary to the Public Procurement Policy for MSEs keeping in view the Office Memorandum dated 25.03.2022 which contains FAQs issued by the Government of India in respect of the Public Procurement Policy for MSEs.
6. The petitioners have raised another ground stating that the allegedly illegal beneficial clause to MSE Chemists renders the entire bidding process redundant and, therefore, the tender document is liable to be quashed.
7. The petitioners further state that bidders with more than Rs.50 crores turnover are at a direct disadvantage on account of benefits given to MSEs under the subject tender as despite having the capacity and experience to supply medicines to beneficiaries of a large area, the chance of their bids getting accepted is negligible. Other grounds have also been raised by the petitioners in their writ petition.
8. However, the fact remains that the petitioners came up before this Court being aggrieved by Clause 4.2 of the tender document on the ground that favouritism is being done to the MSEs by the respondents.
9. During the pendency of the present writ petition, Letter of Intent (LOI) has been issued and an application has been filed on behalf of Union of India (UOI) stating on affidavit that petitioners No.1, 2 & 3 have been empanelled; petitioner No.4 does not have a drug license and, therefore, his bid was rejected; and the petitioner No.5 was an unsuccessful bidder and, therefore, the question of granting relief does not arise. The petitioner No.5 – the only person remaining in the race, was the unsuccessful bidder as the



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discount quoted by them was not H-1. It has been stated in the counter-affidavit that the respondents have not extended any benefit to MSEs and Clause 4.2 of the NIT has become inoperative, therefore, MSE & Non-MSE bidders now stand on an equal footing.

10. In spite of the aforesaid fact that three out of the five petitioners have been awarded the work, no application for withdrawing the writ petition has been filed on their behalf before this Court by the learned counsel. However, the fact remains that the petitioners No.1, 2 & 3 are satisfied as they have been awarded the work. So far as petitioner No.4 is concerned, it has been disqualified in the Technical bid as it does not have a drug license.

11. The prayer clause in the present writ petition reads as under:

“It is, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to:

1. Issue a writ of mandamus or any other appropriate writ, order or direction thereby quashing tender notification entitled "scope of work" dated 04.01.2023 and all processes arising out of it, being arbitrary, irrational and extending illegal benefit to MSE bidder traders contrary to public procurement policy for micro and small enterprises; or

2. Issue a writ of certiorari thereby directing the respondents to modify the said tender and take fresh bids after removal of arbitrary clauses as stated in the Writ petition”

12. The prayer clause read with grounds raised in the writ petition makes it very clear that the petitioners were aggrieved by the benefit which was being extended to MSEs. Learned counsel for UOI has categorically stated



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before this Court as well as in the affidavit filed before this Court that they have not extended any benefit of any kind to the MSEs. Meaning thereby, Clause 4.2 has not been given effect to.

13. In the considered opinion of this Court, once the basis on which the petition was filed has been knocked down, the question of granting relief to the petitioner No.5 does not arise.

14. In the considered opinion of this Court, it was the duty of the learned counsel to bring the factum of award of work to petitioners No.1, 2 & 3 to the notice of this Court. However, for the reasons best known to him, the same was not brought to the notice of this Court.

15. In view of the aforesaid, the present petition is dismissed.

SATISH CHANDRA SHARMA, CJ

SANJEEV NARULA, J

JULY 19, 2023

B.S. Rohella