

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

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 28415 of 2023

**PITTI Engineering Limited
Vs.
Union of India and others**

For the petitioner	:	Mr. Jaydip Kar, Mr. Indranil Roy, Mr. V. Chary, Mr. Suvradal Choudhury
For the Union of India	:	Mr. Sauvik Nandy, Mr. Debpriya Samanta
Hearing concluded on	:	09.01.2024
Judgment on	:	11.01.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner is a non-MSME Developmental Vendor which participated in a tender floated by the respondent-Authorities for supply of motor suspension units for WAG-9 and WAP-7 LOCO. Under Clause 4 containing the 'Eligibility Conditions' of the tender document, Serial No. 2 of the 'Special Eligibility Criteria' stipulates that offers of development vendors appearing in UVAM can be considered for order up to 20 per cent of Net Procurement Quantity (NPQ) whereas Serial No. 1 provides that the CLW, that is, the tender issuing authority reserves the right to procure entire or bulk

quantities (minimum 80 per cent of NPQ) from CLW-approved vendors. It is relevant to mention that the petitioners are Class-I non-approved local vendors.

2. Again, under the 'Special Conditions' of the tender document, Serial No. 1 provides that MSE bidders whose bids are technically suitable and quote a price within price-band of L-1 + 15% shall be allowed to supply a portion of the requirement by bringing down their price to L-1 price. Such MSEs can be together ordered up to 20 per cent of NPQ. Serial No.3 under the Special Conditions provides that the authorities reserve the right to distribute the procurable quantity to one or more than one of the eligible tenderers.
3. It is argued by learned senior counsel for the petitioner that in contravention of the said provisions, the entire orders of developmental vendors (up to 20 per cent of NPQ) has been allocated in favour of the private respondent which is an MSE unit. By relying on Annexure P-15 at page 161, it is pointed out that after allocating 80 per cent of the orders to two bulk vendors, the rest 20 per cent in its entirety has been allocated to the private respondent, which is a developmental vendor on otherwise equal footing as the petitioner apart from the fact that the private respondent is an MSE unit.
4. It is argued that the 25 per cent upper limit to be allocated to MSEs under Serial No. 1 of the Special Conditions refers to 25 per cent out of the total 20 per cent orders which can be placed on developmental vendors in total. Thus, out of the 20 per cent allocable to developmental vendors, at best 25 per cent (that is, 5 per cent of the

grand total) could be placed with the private respondent, which is an MSE unit, and the rest ought to have been allocated to the petitioner, who is otherwise the L-1 bidder. It is submitted that the purpose of the tender would be frustrated if the entire amount allocable to developmental vendors is offered to the MSE units in exclusion of other developmental vendors such as the petitioner.

5. On the other hand, learned counsel for the respondent-Authorities places reliance on Clause 11.1 of Section II, the General Conditions of Tender, which provides Splitting Criteria. Clause 11.1.1 stipulates that normally full order would be placed on the L-1 firm. However, after due processing if it is discovered that the quantity to be ordered is more than the L-1 alone is capable of supplying and there is no prior decision to split the quantities then the quantity being finally ordered will be distributed among the other bidders in a fair, transparent and equitable manner.
6. Learned counsel places reliance on an order dated March 23, 2012 issued by the Ministry of Micro, Small and Medium Enterprises, Office of the Development Commissioner (MSME) which is a policy decision of the Central Government. Clause 6 of the same provides for price quotation in tenders. Under sub-clause (1), in tender, participating MSEs quoting price within price-band of L-1 + 15% shall also be allowed to supply a portion of requirement by bringing down their price to L-1 price in a situation where L-1 price is from someone other than an MSE. Further, such MSE shall be allowed to supply “up to” 20 per cent to total tendered value. Thus, the private respondent,

being an MSE unit, has been allocated 20 per cent of the total tendered value in terms of the said provision. After such allocation, no further orders remained to be offered to the petitioner, who is a non-MSE unit.

7. Learned counsel appearing for the respondent-authorities further argues that Serial No. 1 of the Special Conditions of the tender document contemplates up to 25 per cent of orders being issued to MSE units. Such 25 per cent, it is argued, refers to the NPQ and cannot be restricted only to the portion allocated to the developmental vendors.
8. Upon hearing learned counsel for the parties, the relevant eligibility conditions which acquire relevance are Serial Nos. 1 and 2 of Clause 4 pertaining to 'Eligibility Conditions' and Serial No. 1 of the 'Special Conditions' of the tender document. A careful scrutiny of the said provisions shows that the common refrain in all the said clauses is the expression "Net Procurable Quantity" (NPQ).
9. Within the same tender document, different meanings cannot be attributed to the term NPQ as used in different places of the document, since such an interpretation would lead to absurdity. Proceeding on such premise, Serial No. 1 of Clause 4 stipulates that the authorities reserve the right to procure "entire" or "bulk" quantities from the CLW approved vendors for the specified item. It is also provided that such procurement has to be a minimum of 80 per cent of the NPQ. Thus, on a proper reading of Serial No. 1, it is evident that the authorities reserve the right to procure not only 80

per cent of the NPQ from approved vendors but even the entire NPQ from such vendors. If such an interpretation is lent to Serial No.1, it cannot be said that there is any straight jacket formula to allocate the rest 20 per cent of NPQ to developmental vendors, simply because the authorities may, at their discretion, decide to procure the entire products from CLW approved vendors, leaving nothing to be allotted to developmental vendors.

10. It is noteworthy that in Serial No. 2 it is provided that offers of developmental vendors appearing in UVAM “can be” considered, leaving a discretion with the Authorities. Moreover, such consideration can be for order “up to” 20 per cent of NPQ. A comparison between Serial Nos. 1 and 2 shows that whereas the procurement from the CLW approved vendors has to be a minimum of 80 per cent of NPQ extending up to the entirety of the same, the offers of developmental vendors can be considered only up to 20 per cent of the NPQ, there being no minimum quantity which has to be mandatorily procured from them.
11. Hence, the premise of the argument of the petitioner that the 25 per cent allocable to MSEs has to be read with reference to the 20 per cent out of the total quantity which is allocable to developmental vendors fails, since there is no mandatory 20 per cent available to be allocated to developmental vendors. Rather, the upper limit allocable to such vendors is 20 per cent which may at the discretion of the authorities be reduced to zero by allocating the entire procurement to approved vendors by way of bulk orders under Serial No. 1.

- 12.** That apart, Serial No.1 under the Special Conditions categorically provides that MSE bidders coming within the price-band of L-1 + 15% will be equalised with non-MSE L-1 bidders by bringing down the price of the MSE bidders to L-1 price. Thus, once such price is brought down, the MSE bidder is on an equal footing with non-MSE L-1 bidder, in this case the present petitioner. In such a situation, when there is an MSE bidder as well as a non-MSE bidder, Serial No.1 merely provides that the MSE or MSEs, as the case may be, can be ordered up to 25 per cent of the NPQ.
- 13.** A careful consideration of the expressions used shows that the 25 per cent is not restricted to the 20 per cent offers earmarked only for developmental vendors under Serial No. 2 of the Special Eligibility Criteria but refers to 25 per cent of the entire NPQ. Hence, the 80 per cent referred to in Serial no. 1 and the 20 per cent referred to in Serial No. 2, both under Special Eligibility Criteria, as well as the 25 per cent referred in Serial No.1 of the Special Conditions all have the total NPQ as their reference frame. Thus, the sub-class of further 25 per cent within the 20 per cent allocable to developmental vendors, as sought to be projected by the petitioners, is not borne out by the provisions of the tender document.
- 14.** Thus, on a composite reading of the tender document, the following options are available to the authorities:
- i) Under Serial No. 1 of Clause 4 containing the Eligibility Conditions, with particular reference to Special Eligibility Criteria, the authorities reserve the right to procure the entire

products from the CLW approved vendors, leaving nothing for the developmental vendors.

- ii) If the authorities so decide, offers of developmental vendors can be considered but up to an upper limit of 20 per cent of the NPQ, leaving a minimum allocation of 80 of the NPQ for bulk orders to CLW approved vendors.
- iii) The overarching provision under Serial No. 1 of the Special Conditions is that the upper limit up to which MSEs can be considered for placing orders is 25 per cent of net procurable quantity. Since the ceiling for developmental vendors is 20 per cent of the NPQ, obviously to reach the maximum upper limit of 25 per cent for MSEs, the orders may have to cover the entire spectrum including bulk orders for approved vendors (if any MSE unit is eligible) and other orders for developmental vendors.

- 15.** Again, a situation may arise where there are insufficient number of CLW approved vendors available, where the orders placed with the developmental vendors who are MSE bidders may reach up to 25 per cent, defying the minimum 80 per cent of NPQ to be allocated to such approved vendors.
- 16.** Where there are sufficient numbers of approved vendors to make possible placement of bulk quantities for a minimum of 80 per cent of the NPQ, as in the present case, the authorities have the choice of restricting the bulk quantity orders to such minimum 80 per cent to the approved vendors. Precisely the same has been done in the

present case, allocating the minimum of 80 per cent permissible under the tender as bulk orders to approved vendors.

- 17.** Insofar as the remaining 20 per cent of NPQ is concerned, by operation of Clause 11.1.1 of the General Conditions of tender under Section II of the tender document, the entire orders have been placed to the private respondent which is an MSE unit. Since the private respondent, being an MSE unit, has covered the entire residual quantity of 20 per cent of the NPQ, nothing remains to be allocated further to the non-MSE (otherwise L-1) bidder, that is, the petitioner. Such a situation is fully contemplated by the terms of the tender document and is also in consonance with Clause 6(1) of the Policy of the Central Government dated March 23, 2012 which provides that MSE unit shall be allowed to supply up to 20 per cent of total tendered value.
- 18.** The expression “total tendered value” is interchangeable with “net procurable quantity” as used in the tender document. Even borrowing the arguments of the petitioner that the general provisions of the policy do not apply as against the specific terms of the tender document, the terms of the tender documents themselves clearly vindicate the action of the respondents in allocating the entire balance 20 per cent orders after leaving space for the minimum 80 per cent of the NPQ to approved vendors by way of bulk quantities, to the private respondent, which an MSE unit.
- 19.** Holding otherwise would tantamount to tinkering with specific Government Policy and would also involve rewriting the terms of the

tender document, which is not permissible under normal circumstances and is not called for in the circumstances of the instant case.

- 20.** Hence, there is no scope for interference in the present writ petition. Thus, the challenge fails.
- 21.** Accordingly, WPA No. 28415 of 2023 is dismissed on contest without, however, any order as to costs.
- 22.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)