IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.04.2024

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.35873 & 35878 of 2023
and
W.M.P.No.35869 & 35874 of 2023

M/s.Reco Process Pumps,
By its Proprietor,
S.Savitha,
No.208/3B, Idigarai Road,
Coimbatore – 641 022. ... Petitioner in 2 WPs

Vs.

1.The Development Commissioner / Additional Secretary,
(Micro Small and Medium Enterprise) MSME,
'A' Wing, 7th Floor,
Nirman Bhavan,
New Delhi – 110 108.

2.The Joint Director and Head of Office,
MSME Development and Facilitation Office,
Ministry of MSME, Government of India,
MSME Bhawan,
65/1, G.S.T Road,
Guindy,
Chennai – 600 032.

3.M/s.Bharat Heavy Electricals Ltd.,

(A Government of India Enterprise)
Ranipet, Tamil Nadu 632 403. ... Respondents in 2WPs

Prayer in WP.No.35873/2023: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Mandamus, directing the 3rd respondent to consider the petitioner's offer dated 02.08.2023 to match up with Non-MSE L1 price, as per the Public Procurement Policy for Micro and Small Enterprises, 2012, Procurement Norms under Public Procurement Policy for MSEs (PPP-MSEs 2012) mentioned in the 3rd respondent website and special provisions for Micro and Small Enterprises in ANNEXURE-M mentioned in the 3rd respondent website in respect of Tender No.3820876E for the supply of Slurry Pumps for SIPAT Project and award the same in favour of the petitioner.

Prayer in WP.No.35878/2023: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Mandamus, directing the 3rd respondent to consider the petitioner's offer dated 17.10.2023 to match up with Non-MSE L1 price, as per the Public Procurement Policy for Micro and Small Enterprises, 2012, Procurement Norms under Public Procurement Policy for MSEs (PPP-MSEs 2012) mentioned in the 3rd respondent website and special provisions for Micro and Small Enterprises in ANNEXURE-M mentioned in the 3rd respondent website in respect of Tender No.3820383E for the supply of Slurry Pumps for KAHAHALGAON Project and award the same in favour of the petitioner.

For Petitioner : Mr.T.V.Ramanujan

Senior Counsel
For Mr.C.Jagadish
(in 2WPs)

For R1 & R2 : Mr.V.Sudha
Central Government Counsel
(in 2WPs)

For R3 : Mr.V.Karthik
Senior Counsel
For Mr.John Zachariah
For M/s.Fox Mandal and Associates
(in 2WPs)

COMMON ORDER

The writ of Mandamus has been instituted to direct the 3rd respondent to consider the petitioner's offer dated 02.08.2023 and 17.10.2023 to match up with Non-MSE L1 price, as per the Public Procurement Policy for Micro and Small Enterprises, 2012, Procurement Norms under Public Procurement Policy for MSEs (PPP-MSEs 2012) mentioned in the 3rd respondent website and special provisions for Micro and Small Enterprises in ANNEXURE-M mentioned in the 3rd respondent website in respect of Tender No.3820876E and Tender No.3820383E for the supply of Slurry Pumps for SIPAT Project and Kahahalgaon Project respectively.

2. The petitioner is M/s.Reco Process Pumps, which is one of the 100%

MSEM India and 100% local content women owned industry pump manufacturer. The 3rd respondent flaunted global tender for procurement FGD slurry pumps. The petitioner admittedly participated in the tender process. The petitioner has been declared as L2.

3. Mr.T.V.Ramanujam, learned Senior Counsel appearing on behalf of the petitioner would submit that the petitioner is Micro Small Enterprise and therefore, they are entitled to avail the benefit conferred under Section 11 of the Micro, Small and Medium Development Act, 2006 and the orders issued by the Ministry under the said provision. The benefit conferred under Micro, Small Enterprises under the Act is mandatory and the petitioner is ready to match L1. Thus, the petitioner must be granted job order, since the difference between L1 and L2 is 15 percent.

4. To substantiate the said contention, the learned Senior Counsel would rely on the order issued by the Ministry extending the benefit for small micro industries under Section 11 of the Act 27 of 2006. The order dated 23rd March, 2012 issued by the Ministry of Micro, Small and Medium Enterprise would reveal that the benefit conferred under Section 11 to Micro Small Enterprises is mandatory and therefore, the petitioner must be provided with

an opportunity to match L1 for the purpose of securing Work order from the respondents.

5. Mrs.V.Sudha, learned Central Government Counsel for the respondents 1 and 2 would submit that the respondents 1 and 2 have issued orders in exercise of powers conferred under Section 11 of the Act and extended the benefits under the Act to Micro and Small Enterprises.

6. The Office Memorandum dated 18.05.2023 speaks about Concurrent application of Public Procurement Policy for Micro and Small Enterprises Order, 2012 and Public Procurement (Preference to Make in India) Order, 2017. Accordingly, two Preferential Procurement Orders mandated for the Public Procurement in India namely;

1. Public Procurement Policy for Micro and Small Enterprises (MSEs) Order dated 23.03.2012 (PPP-MSE Order) issued by Ministry of Micro, Small and Medium Enterprises (MoMSME) in exercise of the powers conferred in Section 11 of the MSME Development Act, 2006. (Last revised on 09.11.2018)
2. Public Procurement (Preference to Make in India) Order, 2017 (PPP-MII order), under Rule 153(iii) of the General Financial Rules (GFRs) 2017, approved by the Cabinet. Implementation of this PPP-MII order is monitored by Department for Promotion of Industry

and Internal Trade (DPIIT). (Last revised on 16.09.2020.)

7. Since the above two orders created a confusion to the procuring entities and different procuring entities interpret them differently. In order to bring predictability both to the procuring entities as well as bidders, following guidelines are issued in the said Office Memorandum dated 18.05.2023 as follows:

Guidelines:

The Class-I local suppliers, under PPP-MII Order, participating in any Government tender, may or may not be MSEs, as defined under the MSME Act. Similarly, MSEs participating in any Government tender, may or may not be Class-I local suppliers. Suppliers may be categorised in following four broad categories for consideration or applicability of purchase preference:

Category	***Terminology***
Supplier is both MSE & Class-I local supplier	"MSE Class-I local supplier"
Supplier is MSE but not Class-I local supplier.	"MSE but non-Class-I local supplier"
Supplier is not MSE but is Class-I local supplier	"Non-MSE but Class-I local supplier"
Supplier is neither MSE nor Class-I local.	"Non-MSE non-Class-I local supplier"

4. The applicability of PPP-MSE Order and PPP-MII Order in various scenarios, involving *simultaneous purchase preference to MSEs and Class-I local suppliers under PPP-MSE Order and PPP-MII Order respectively, shall be as under:*

a) Items covered under Para 3(a) of PPP. MII Order, 2017 for which Nodal Ministry has notified sufficient local capacity and competition: For these items, only Class-I local suppliers are eligible to bid irrespective of purchase value. Hence, Class-II local suppliers or Non-local suppliers, including MSEs which are Class-II local suppliers/ Non-local suppliers, are not eligible to bid. Possible scenarios can be as under:

(1) L-1 is "MSE Class-I local supplier" - 100% of the tendered quantity is to be awarded to L-1.

(ii) L-1 is "Non-MSE but Class-I local supplier" - Purchase preference is given to MSEs as per PPP-MSE Order. Balance quantity is to be awarded to the L-1 bidder.

b) Items reserved exclusively for procurement from MSEs as per PPP-MSE Order: These items are reserved exclusively for purchase from MSEs. Hence, non-MSEs are not eligible to bid for these items. Possible scenarios can be as under.

(i) L-1 is "MSE Class-l local supplier" -

100% of the tendered quantity is to be awarded to L-1.

(ii) L-1 is "MSE non-Class-l local supplier" - Purchase preference is to be given to Class-I local supplier as per PPP-MII Order. Balance quantity, is to be awarded to L-1 bidder.

c.If items are neither notified for sufficient local capacity nor reserved for MSES, then the process will be as follows:

c (a) Items covered under Para 3A(b) of PPP-MII Order are divisible items and both MSEs as well as Class-l local suppliers are eligible for purchase preference. Possible scenarios can be as under.

(i) L-1 is "MSE Class-l local supplier" - 100% of the tendered quantity is to be awarded to L-1.

(ii) L-1 is "Non-MSE but Class-I local supplier" - Purchase preference is to be given to MSEs, if eligible, as per PPP-MSE Order. Balance quantity is to be awarded to L-1 bidder.

(iii) L-1 is "MSE but non-Class-I local supplier" - Purchase preference is to be given to Class-l local suppliers, if eligible, as

per PPP-MII Order. Balance quantity is to be awarded to L-1 bidder.

(iv) L-1 is "Non-MSE non-Class-I local supplier" - Purchase preference is to be given to MSEs as per PPP-MSE Order. Thereafter. purchase preference is to be given to Class-1 local suppliers for "50% of the tendered quantity minus quantity allotted to MSEs

Example explaining applicability in scenario explained in para 4 c (a)(iv)

(Scenario: Divisible items, both MSEs as well as Class-I local suppliers eligible for purchase preference and L-1 is "Non-MSE non-Class-I local supplier")

Item *-Desktop computer*

Qty*-50 Nos.*

Details of bids received

Sl. No	***Name of Bidder***	***Rates Quoted***	***Price Ranking***	***Status of Bidder***
1.	A	100	L1	"Non-MSE Non-Class-I local supplier"
2.	B	110	L2	"Non-MSE Non-Class-I local supplier"
3.	C	112	L3	"MSE but Non-Class-I local supplier"
4.	D	115	L4	"Non-MSE but Class-I local supplier"

Sl. No	***Name of Bidder***	***Rates Quoted***	***Price Ranking***	***Status of Bidder***
5.	E	118	L5	“MSE but Non-Class-I local supplier”
6.	F	120	L6	“MSE Class-I local supplier”

1. *In this case, first purchase preference is to be given to MSEs as per PPP-MSE Order for 25% of tendered quantity of 50 Nos. i.e. 12.5 Nos. (rounded off to the next whole number say 13 Nos). Accordingly, invite L3 (bidder C), whose quoted rates falls within 15% margin of purchase preference to match L1 price i.e. Rs. 100/- for quantity of 13 Nos. Bidder "E" and "F", although MSEs, will not get purchase preference since their quoted rates don't fall within 15% margin of purchase preference. Bidder C will be considered for order of 13 Nos. on confirmation of reduction of price.*

2. For 50% of balance quantity of 37 number (tendered quantity of 50-13 awarded to bidder C; assuming bidder C has confirmed to accept L1 rates), purchase preference will be given to lowest Class-I local supplier as per PPP-MII Order. Accordingly, bidder B *will be invited to match L-1 price for 50% of 37 Nos i.e. 18.5 (say 19 Nos of computers). If bidder "B" does not accept the L1 price i.e. price of Rs. 100/- per unit, next higher Class-l local supplier falling within 20% margin of purchase preference, i.e. bidder "D", may be invited to match L-1 price for 19 Nos. of computers and so on.*

3. For remaining quantity i.e. 18 Nos (50-13-19), the contract will be awarded to lowest quoting bidder i.e. Bidder "A", who is L-1 in the example.

above" as per PPP- MII Order. For the balance quantity, contract is to be awarded to L-1 bidder. (Kindly refer to the illustrative example in the annexure).

c (b) Items covered under Para 3A(c) of PPP-MII Order, 2017 are non- divisible items and both MSEs as well as Class-I local suppliers are eligible for purchase preference. Possible scenarios can be as under:

(i) L-1 is "MSE Class-I local supplier" - Contract is awarded to L-1.

(ii) L-1 is not "MSE Class-l local supplier" but the "MSE Class-l local supplier falls

within 15% margin of purchase preference Purchase preference is to be given to lowest quoting "MSE Class-l local supplier. If lowest quoting "MSE Class-I local supplier" does not accept the L-1 rates, the next higher "MSE Class-l local supplier falling within 15% margin of purchase preference is to be given purchase preference and so on.

(iii) If conditions mentioned in sub paras (i) and (ii) above are not met i.e. L-1 is neither "MSE Class-I local supplier nor "MSE Class-I local supplier is eligible to take benefit of purchase preference, the contract is to be awarded/ purchase preference to be given in different possible scenarios as under:

A. L1 is "MSE but non-Class-I local supplier" or "Non-MSE but Class-I local supplier" - Contract is be awarded to L1.

B. L1 is "Non-MSE non-Class-l local supplier First purchase preference to be given to MSE as per PPP-MSE Order. If MSE not eligible/ does not accept - purchase preference to be given to Class- I Local supplier as per PPP-MII Order. If Class-1 Local supplier also not eligible/ does not accept contract to be awarded to L-1.

Items reserved for both MSEs and Class-l local suppliers: These items are reserved exclusively for purchase from MSEs as well as Class-l local suppliers. Hence, only "MSE Class-I local supplier" are eligible to bid for these items. Non-MSEs/Class-II local suppliers/ Non-local suppliers cannot bid for these items. Hence the question of purchase preference does not arise.

e) Non-local suppliers, including MSEs falling in the category of Non-local suppliers, shall be eligible to bid only against Global Tender Enquiry."

8. Mr.V.Karthik, learned Senior Counsel appearing on behalf of the 3rd respondent would submit that L1 in the present case is also registered under MSME.

9. However, Mr.T.V.Ramanujam, learned Senior Counsel for the petitioner would reply by stating that the L1 in the present case is Medium Enterprise, but the benefit under Section 11 and the order passed in exercise of Section 11 is applicable only for Micro, Small Industries. Therefore, L1 in the present case is not entitled to avail the benefit conferred by the Ministry

under Section 11 of Act 27 of 2006.

10. In this context, let us consider the scope of the Act and arguments placed by the respective learned Senior Counsels. Section 2(e) of the Act defines "enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (55 of 1951) or engaged in providing or rendering of any service or services; Section 2(g) defines "medium enterprise" means an enterprise classified as such under sub-clause (*iii*) of clause (*a*) or sub-clause (*iii*) of clause (*b*) of sub-section (*1*) of section 7; Section 2(m) defines "small enterprise" means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of Sub Section (l) of Section 7.

11. Therefore, Micro Enterprise, Small Enterprise and Medium Enterprise are defined separately under the Act. Thus, the arguments of the learned Senior Counsel Mr.T.V.Ramanujam deserves to be accepted in the present case.

12. Perusal of the registration certificate reveals that L1company registered as “Medium Enterprise” and the petitioner L2 is registered under “Micro Small Enterprise”. That being the factum, the petitioner alone is entitled for availing the benefits conferred under Section 11 of the Act and the orders issued under Section 11 by the Ministry. Thus, the benefits conferred under the Act are to be extended to the petitioner herein.

13. The counter affidavit filed by the respondents 1 and 2 reveals that now it is mandatory and the benefits under Section 11 are to be therefore extended in favour of the petitioner in the present case. In this context, the Office Memorandum dated 25th March, 2022 issued by the Government of India about frequently asked questions on Public Procurement Policy for MSEs, Order 2012 and the following question and answers would be relevant for the present case:

> “***Q No.3: Who is eligible for availing the benefits under the Public Procurement Policy?***
> *Ans. As mentioned in Section 7(4) of Ministry of MSME's Notification No. S.O2119(E) dated 26th June, 2020, an enterprise registered with any other organization under the Ministry of MSME shall register itself under Udyam Registration. With*

effect from 01.07.2020, MSES registered under Udyam Registration are eligible to avail the benefits under the Policy. MSES registered under Udyog Aadhaar Memorandum (UAM), validity of which is till 31.03.2022, are also eligible to avail the benefits under the Policy.

Q.No.6: Is the policy implemented in parts or fully from its inception?

Ans. As per Gazette Notification(S.O. 5670(E) dated 8th November, 2018, it is mandatory for all Central Government Ministries / Departments/ CPSUs to procure at least 25% of their annual procurement from MSEs including 4% from MSEs owned by SC/ST entrepreneur and 3% from MSEs owned by women entrepreneur.

QNo.8: Ans. Is there a -2- aprice matching facility for procurement from MSEs over large scale?

Ans:Price quotation in tenders: In tender, participating Micro and Small Enterprise, quoting price within price band of L1+15 percent shall also be allowed to supply a portion of requirement by brining down their price to L1 price in a situation where L1 price is from someone other than a Micro and Small Enterprise and such MSE shall be allowed to supply up to 25 percent of total tender value.

(ii) In case of more than one such Micro and Small Enterprise, the supply shall be shared proportionately (to tendered quantity).

Q.No.10: What steps are to be taken by the Central Government Ministries/ Departments/ CPSUs to develop vendors from MSEs owned by SC/ST/Women entrepreneurs?

Ans. For enhancing the participation of MSEs owned by SCs/STs/ Women in Government procurement, Central Government Ministries / Departments/CPSUs have to take the following steps:

i. *Special Vendor Development Programmes/ Buyer-Seller Meets would be conducted by Departments/CPSUs for SC/ST's and Women.*

ii. *Outreach programmes will be conducted by National Small Industries Corporation (NSIC) to cover more and more MSEs from SC/ST's under its schemes of consortia formation; and*

iii. NSIC would open a special window for SCs/ STs under its Single Point Registration Scheme (SPRS).

iv. A National SC/ST hub scheme was launched in October, 2016, for providing handholding support to SC/ST entrepreneur which is being *coordinated / implemented by the NSIC under this Ministry.*

Q.No.21: Can MSEs quoting a price within the band L1+15% be given complete supply to tender in case tender item cannot be split /divided?

Ans. In case of tender item cannot be split or divided, etc. the MSE quoting a price within the band L1+15% may be awarded for full/ complete supply of total tendered value to MSE, considering the spirit of the Policy for enhancing Govt. Procurement from MSEs.

Q.No.29: Are the benefits of Public Procurement Policy applicable to MSEs who are not registered for the tendered items?

Ans. The benefits of PPP should be given to all eligible MSEs irrespective of relevance of product Category and as per Sl. No. 3 of FAQ."

14. In view of the above legal position with reference to Section 11 of the Act and order dated 23rd March, 2012 and the subsequent clarification issued by the Ministry, this Court has arrived at an inevitable conclusion that the petitioner is entitled to avail the benefits conferred by the Ministry for Micro and Small Industries under Section 11 of the Act and the said benefits are directed to be extended to the petitioner while finalising the tenders by the

respondents.

15. In view of the facts and circumstances, the respondents are directed to finalise the tender as expeditiously as possible in public interest by extending the benefit of Section 11 of the Act and the subsequent orders passed by the Government of India and accordingly, issue work order by following the due process.

16. Mr.V.Karthik, learned Senior Counsel would submit that two months time is required for BHEL to complete the process and issue work order. Thus, the said exercise is directed to be completed within a period of two (2) months from today and work order is to be granted to eligible tenderer by following the due process.

17. With the above directions, these Writ Petitions stand allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

24.04.2024

Jeni
Index : Yes
Speaking order

Neutral Citation : Yes

To

1.The Development Commissioner /
Additional Secretary,
(Micro Small and Medium Enterprise) MSME,
'A' Wing, 7th Floor,
Nirman Bhavan,
New Delhi – 110 108.

2.The Joint Director and Head of Office,
MSME Development and Facilitation Office,
Ministry of MSME, Government of India,
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65/1, G.S.T Road,
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S.M.SUBRAMANIAM, J.

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