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

\+ W.P.(C) 3720/2024 & CM APPL.15313/2024

ANKIT KUMAR ...... Petitioner

Through: Mr. Jitender Mehta and Mr. Pankaj Mishra, Advocates

versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LIMITED & ORS. ...... Respondents

Through: Mr. Saurav Agrawal, Standing Counsel with Mr. Anshuman Chowdhary, Mr. Ajay Sharma and Mr. Shivam Chaudhary, Advocates for R-1

Mr. R.V. Prabhat and Mr. Vedansh Anand, Adv. Govt. Pleader, Advocate for R-2, UOI

% Date of Decision: 14th March, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

CM APPLs.15314-15315/2024 (Exemption)

Allowed, subject to all just exceptions.

Accordingly, the applications stand disposed of.

W.P.(C) 3720/2024 & CM APPL.15313/2024

1. Present writ petition has been filed under Article 226 of the Constitution of India seeking a direction to quash and declare the Notice Inviting E-Open Tender ('impugned NIT') bearing no. 2024/IRCTC/P&T/CLUSTER/FEB/SER/CLT/A-1 issued by Indian Railway

Catering and Tourism Corporation Limited ('IRCTC') i.e., Respondent No.1 herein, as illegal, arbitrary, unconstitutional, null and void-ab-initio and is liable to be set aside and further seeking a direction to Respondent No.1 to change the terms and conditions of the impugned NIT as per Micro and Small Enterprises ('MSEs') Order, 2012 dated 23rd March, 2012 ('MSEs Order').

2. The Respondent No.1 has issued the impugned NIT for provision of onboard catering services in trains, for a period of five years which is further extendable up to two years. The tender is proposed to be awarded for a Cluster, consisting of locations required for commissioning of Base Kitchens and the Trains identified in the Cluster for service. The selected provider shall be responsible for commissioning and operation of Base Kitchen at required locations prior to commencement of on-board catering services in all trains of the Cluster. The NIT was initially issued on 28th January, 2024. It was followed by corrigendum(s) dated 14th February, 2024, 16th February, 2024 and lastly 7th March, 2024.

2.1. It is stated that as per the last corrigendum, the revised date and time of submission of bids is 14th March, 2024 at 12:00 Hours and opening of technical bids is 14th March, 2024 at 12:15 Hours.

2.2. It is stated that the impugned NIT provides that a bidder should mandatorily deposit an EMD of Rs. 11,55,993/- and in case of non-submission of the said EMD through e-tendering website, the bid will be rejected.

2.3. It is stated that the Petitioner is a Micro enterprise and holds a valid Udyam Registration Certificate. However, there is no provision of exempting the Micro and Small Enterprises ('MSEs') from payment of

EMD contrary to the Clause '10' of MSEs Order, in order to facilitate the participation of MSMEs in the tender process.

2.4. Aggrieved by the non-inclusion of the provisions of exempting the MSEs like the Petitioner from payment of EMD in the tender process as well as relaxation in the qualifying criteria/technical criteria, the Petitioner has filed the present petition.

3. Learned counsel appearing for the Petitioner states that on a previous occasion, the Respondent has issued a tender bearing no. 2023/IRCTC/Catering & Allied/Tejas Trains ('earlier tender') on 15th September, 2023 for appointment of service provider for providing on-board catering and allied services on Tejas Train on route LJN-NDLS and ADI-MMCT-ADI. He states that the qualifying criteria for participating in the earlier tender exclusively provides a relaxation for MSEs/Startups. However, there is no such relaxation in the present tender process, which leads to restriction on the number of bidders.

3.1. He states that the terms and conditions of the impugned NIT are contrary to the Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012 dated 23rd March, 2012 ('MSEs Order') issued by the Ministry of Micro, Small and Medium Enterprises Office of Development Commissioner (MSME), as Respondent No.1 is insisting on deposit of an EMD even from MSEs like the Petitioner, which is in violation of Clause 10 of the said MSEs Order. The said Clause 10 reads as under: -

> "***10. Reduction in transaction cost.*** - *To reduce transaction cost of doing business, Micro and Small Enterprises shall be facilitated by providing them tender sets free of cost,* ***exempting Micro and Small Enterprises from payment of earnest money****, adopting e-procurement to bring in transparency in tendering process and setting up a Grievance Cell in the Ministry of Micro, Small and Medium Enterprises*."

(Emphasis Supplied)

3.2. He states that if exemption from deposit of EMD is granted to MSEs, it will lead to wider participation in the tender process and not restricted to larger players. He fairly admits that prior to filing of this petition, the Petitioner has not made any representation to the Respondent for exempting MSEs from the EMD obligation as per Clause 10 of MSEs Order.

4. In reply, learned standing counsel for the Respondent states that the MSEs Order dated 23rd March, 2012 is not applicable to the impugned NIT as this is not a procuring contract. He states that MSEs Order dated 23rd March, 2012 applies to tenders issued for purchase of products and services. He states that the Respondent No.1 is not purchasing products or services under the impugned NIT and instead, it is the selected service provider, who will be paying license fee to the Respondent No.1. Thus, the impugned NIT is categorized as an earning contract as oppose to a procuring contract.

4.1. He states that in the earlier tender dated 15th September, 2023, the scope of work consisted of five distinct services and of the same, four services were being procured by the Respondent No.1 and therefore, exemption in technical criteria was extended to MSEs. He states that catering service was one of the five services tendered in the earlier tender but since the remaining four services were understood as procurement, due exemption was extended to MSEs.

4.2. He states that the Respondent No.1 has issued the impugned NIT in pursuance of the Commercial Circular no. 24/2023 dated 14th November, 2023 issued by the Ministry of Railways, Government of India. He states that there has been a policy shift in providing on-board catering services and the technical criteria for the impugned NIT has been fixed in pursuance thereof. He, more specifically, relies upon Para 3 therein.

4.3. He states that a perusal of the petition shows that the Petitioner fails to satisfy the technical criteria specified in the impugned NIT and even if the exemption of EMD was extended to the Petitioner, he was, otherwise, not eligible to participate in the impugned NIT.

4.4. He further states that as per MSEs Order dated 23rd March, 2012, the Respondent No.1 is obliged to procure a minimum of 20% of its annual purchase of products produced and services render by MSEs. He states that as the Respondent No.1 herein has complied with the said obligations and for FY 2022-23, the procurement stands at 36.5%.

4.5. He relies upon a compilation containing the Commercial Circular No. 24/2023 and the relevant extract of 24th Annual Report of IRCTC for FY 2022-23. The said compilation is taken on record.

5. In response, learned counsel for the Petitioner states that the Petitioner is not aware about the existence of Commercial Circular No. 24/2023 dated 14th November, 2023. He fairly admits that the Petitioner does not satisfy the technical criteria specified in the impugned NIT. He states that the Petitioner may be granted liberty to assail the said Commercial Circular No. 24/2023 dated 14th November, 2023.

6. We have heard the learned counsels for the parties and perused the record.

7. The sum and substance of the writ petition is the challenge laid by the Petitioner to the absence of exemption to MSEs from depositing EMD under the impugned NIT with reference to Clause 10 of the MSEs Order dated 23rd March, 2012. However, the admitted position on record is that even if the

obligation to deposit EMD is relaxed in favour of the Petitioner, he would still be ineligible to participate in the impugned NIT, as he fails to satisfy the technical criteria.

8. Further, we may also note that the initial date for submission of technical bids was 15th February, 2024, which was extended to 22nd February, 2024; thereafter, to 8th March, 2024 and finally extended to 14th March, 2024 at 12:00 Hours. The Petitioner has elected to approach the Court by way of the present writ petition literally on the last date i.e., on 13th March, 2024. We, therefore, are of the opinion that the present petition seeking quashing of the impugned NIT at the eleventh hour is barred by delay and laches.

9. We are not inclined to interfere in the tender process on the reasons recorded hereinabove and are therefore refraining from opining on the other submissions made by the Respondent; also, because the Petitioner has sought liberty to challenge the Commercial Circular No. 24/2023.

10. We therefore find no merits in the present writ petition. The petition along with application is accordingly dismissed.

11. Liberty is reserved to the Petitioner to challenge the Commercial Circular No. 24/2023 before an appropriate forum in accordance with law. It is made clear that we have not expressed any opinion on the maintainability of the said challenge.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

MARCH 14, 2024/*rhc/MG*