

GAHC010180222024



2025:GAU-AS:230

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4448/2024

M/S NORTHEAST ENGINEERING AND CONSTRUCTION
REP. BY AUTHORIZED SIGNATORY , RUPAM HAZARIKA, AGED 32 YRS,
S/O- LATE ASHOK HAZARIKA,
R/O- H.NO-88,
MG ROAD, PANBAZAR, GUWAHATI-01

VERSUS

THE UNION OF INDIA AND ANR
REP. BY BRAHMAPUTRA CRACKER AND POLYMER , HAVING ITS REGD.
OFFICE AT 1ST FLOOR, HOUSE NO. 06, BHUBAN ROAD, UZAN BAZAR,
GUWAHATI-01,

2:ENGINEERS INDIA LIMITED
HAVING OFFICE ADDRESS AT EI BHAVAN
1 BHIKAJI CAMA PLACE
NEW DELHI-6

Advocate for the Petitioner : N GAUTAM, MR. RANGON CHOUDHURY,MR. K N CHOUDHURY

Advocate for the Respondent : SC, BPCL, MR H K SARMA (R-2),MR D SENAPATI(R-2),MR S.MITRA(R-1),MR. S MITRA(R-1),MR. R. RAMEEZ(R-1),MR A K BORO (R-1)

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

08.01.2025

1. Heard Mr. R. Choudhury, learned counsel for the petitioner and Mr. S. Mitra, learned counsel for the respondent no.1. Mr. D. Senapati, learned

counsel appears for the respondent no.2.

2. The petitioner is aggrieved by the disqualification of his Technical Bid, pursuant to the Invitation for Bid (IFB) dated 16.04.2024 (hereinafter referred to as the "NIT") for "Composite Works on Open Domestic Competitive Bidding Basis".

3. The petitioner's case is that the petitioner being a Micro and Small and Small Enterprise (in short "MSE"), the petitioner was not required to deposit the Earnest Money Deposit (EMD) for participating in the tender process, in terms of the 2012 Public Procurement Policy (PPP-2012) issued by the Ministry of Micro, Small and Medium Enterprises, Government of India. However, in spite of the exemption given to the MSEs in terms of PPP-2012 exempting them from submitting EMD, the petitioner's Technical Bid has been disqualified on the said ground.

4. The petitioner's counsel submits that the rejection of the petitioner's Technical Bid should be set aside as the same is arbitrary.

5. Mr. S. Mitra and Mr. D. Senapati, learned counsels for the respondents submit that there is no infirmity with the decision taken by the respondent authorities, inasmuch as, the NIB required the doing of work contracts which does not come within the purview of the Public Procurement Policy made by the Central Government. He further submits that at the time of issuance of the NIT dated 16.04.2024, there had been a clarification of the earlier PPP-2012 due to

Frequently Ask Questions (FAQs), vide communication dated 31.08.2023 issued by the Ministry of Micro, Small & Medium Enterprise, Government of India, wherein it was stated that irrespective of the product category, the benefits of Public Procurement Policy, such as, exemption from payment of EMD, free tender document shall be given to all eligible MSEs, except for traders and in works contracts. The counsels for the respondents further rely upon the judgments of the Delhi High Court, Bombay High Court and Allahabad High Court to buttress his submission that work contracts do not come within the purview of the PPP-2012 issued by the Central Government.

6. The learned counsels for the respondents further submit that the contract work has already been allotted to one of the eligible bidders, i.e. Bridge and Roof Company Limited, who has already started the work. However, the said successful tenderer has not been made a party. They also submit that in terms of the judgment of the Supreme Court in the case of ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Another***, reported in ***(2016) 16 SCC 818***, it was held that it would be appropriate for Constitutional Courts to insist on all eligible bidders to be made parties in proceedings filed by unsuccessful or ineligible bidder. As the petitioner has not impleaded all the eligible bidders and/or the successful bidder in the present case, the writ petition should be dismissed for non-joinder of necessary parties.

7. I have heard the learned counsels for the parties.

8. The short question that falls for consideration is whether the exemption

provided to MSEs in the PPP-2012, regarding deposit of EMD for MSEs, would cover work contracts.

9. In the case of ***M/s Shree Gee Enterprise vs. Union of India and Another***, reported in ***2015 0 Supreme (Del) 4396***, the Division Bench of the Delhi Court had referred to Question No.18 in the Office Memorandum dated 20.02.2014 issued by the Director of the Office of the Development Commissioner, Ministry of MSME, Union of India, as to whether the PPP-2012 would be applicable for works/trading activities also. The answer provided was that the policy was meant for procurement of only goods produced and services rendered by MSEs. The Delhi High Court further held in paragraph-10 of the said judgment that it would not be applicable to works contracts simpliciter.

10. The Bombay High Court in the case of ***Sterling and Wilson Private Limited vs. Union of India***, reported in ***2017 SCC OnLine Bom 6829*** and the Allahabad High Court in ***M/s Rahul Singh vs. Union of India***, reported in ***2017 0 Supreme (All) 104*** has also decided in the same line as the Delhi High Court.

11. In the case of ***Rashtriya Ispat Nigam Limited vs. Union of India, represented by Secretary***, reported in ***2022 0 Supreme (AP) 1372***, the same finding has been made by the Andhra Pradesh High Court, as in the above cases also.

12. Paragraph-40 to 46 of the judgment of the Bombay High Court in the case

of ***Sterling and Wilson Private Limited (supra)*** is reproduced hereinbelow, as follows :

“40. A plain reading of these provisions clearly indicate that the MSMED Act empowers the Government to notify preference policies for procurement of goods and services produced and provided by MSEs, by its Ministries, Departments and Public Sector Undertakings. In exercise of these powers, the Central Government notified the Public Procurement Policy of 2012 in respect of procurement of goods and services produced and provided by Micro and Small Enterprises. Clauses 3 and 6, of the Public Procurement Policy 2012, read thus:-

"Clause 3. Mandatory procurement from micro Small and Enterprises. - (1) Every Central Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement from Micro and Small Enterprises from the financial year 2012-13 and onwards, with the objective of achieving an overall procurement of minimum of 20 per cent, of total annual purchases of products produced and services rendered by Micro and Small Enterprises in a period of three years.

(2) Annual goal of procurement also include sub- contracts to Micro and Small Enterprises by large enterprises and consortia of Micro and Small Enterprises formed by National Small Industries Corporation.

(3) After a period of three years i.e. from 1st April 2015, overall procurement goal of minimum of 20 per cent shall be made mandatory.

(4) The Central Ministries, Departments and Public Sector Undertakings which fail to meet the annual goal shall substantiate with reasons to the Review Committee headed by Secretary (Micro, Small and Medium Enterprises), constituted in ministry of Micro, Small and Medium Enterprises, under this Policy.

Clause 6. Price quotation in tenders. -

(1) In tender, participating Micro and Small Enterprises quoting price within price band of L1+15 per cent shall also be allowed to supply a portion of requirement by bringing down their price to L1 price in a situation where L1 price is from someone other than a Micro and Small Enterprise and such Micro and Small Enterprise shall be allowed to supply upto 20 per cent of total tendered value.

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

41. The learned Counsel for the respondent no. 3 has placed on record the

office memorandum as well as the press release dated 12th February, 2015 issued by the Government of India, Ministry of Micro, Small and Medium Enterprises, wherein the word “upto” in clause 6 of the policy are substituted by phrase “at least”. The Central Government has thus clarified that there is no embargo on CPSUs to take more than 20% supplies from MSES as per their previous procurement pattern on case to case basis.

42. A plain reading of these provisions clearly indicate that every Central Ministry Departmental or Public Sector undertaking is under a mandate to procure goods produced and services rendered by the Micro Medium Enterprises. The Central Government has enlisted total 358 items in Appendix, which have been reserved for exclusive purchase from MSES. Clause 6 of the policy allows MSES participating in tender process and qualifying in price band of L1 + 15% to supply at least 20% of the total tender value provided they bring down their price to L1 price. Thus there can be no dispute that the Ministries, its Departments and Public Undertakings are under obligation to implement the provisions under the Act and achieve the objectives of the Act and the policy.

43. The provisions of Section 11 of the Act and clause 3 of the Policy envisage procurement of “goods and services” produced and provided by MSES. The provisions of the Act and the Policy are therefore applicable to procurement of “goods and services” produced and provided by MSES. Answer to FAQ No. 18 also makes it abundantly clear that the policy is meant for procurement of only goods produced and services rendered by MSES. However, traders are excluded from purview of Public Procurement Policy.

44. The provisions of the Act would therefore not be applicable to work contracts, which are essentially contracts of composite nature involving supply of goods as well as labour/services etc. Similar view has been taken by Delhi High Court in Shree Gee Enterprises (supra) wherein it has been held that the policy is not applicable to work contracts simplicitor and that it is only meant for goods produced and services rendered by MSES.

45. In Rahul Singh (supra), the Allahabad High Court has held that provisions of Section 11 of the 2006 Act relate to the procurement of goods and services produced and provided by MSES. It was further held that:

“6. A reconstruction of Section 11 bears out that it empowers the Central Govt. to formulate preference policies in respect of (a) procurement of goods produced by MSE and (b) services provided by a MSE. The words “Services Provided” as used in the said provision must necessarily be read as disjunctive to the expression “Goods Produced”. It

cannot possibly be disputed that a “Work Contract” forms completely different and distinct genre than a contract for supply of goods, or for that matter a contract for providing services. A works contract is essentially a indivisible contract which may involve not just the supply of goods but also the provision of labour and service.

...

In our considered opinion, the provisions of 2006 Act and more particularly Section 11 thereof, only contemplates and brings within its hold contracts for supply of goods and provision of service simplicitor. ...-

“7. No provision of the 2006 Act bids us to deconstruct a works contract into elements relating to supply of goods and provision of service. Neither section 11 nor the Public Procurement Policy, 2012 appears to envisage a composite and distinct category of contract such as a work contract actually is.”

46. Considering the scope and object of the Act and the relevant provisions under the Act and the Public Procurement Policy, we are of the considered view that the purchase preference is restricted only to “goods and services” provided by MSEs.”

13. In the case of ***Rashtriya Ispat Nigam Limited (supra)***, the Andhra Pradesh High Court held that a careful analysis of Section 2(d), 2(e), 2(n) of the Micro Small and Medium Enterprises Development Act, 2006 showed that an enterprise is one which is engaged in the manufacture and production of goods in any manner pertaining to any industry specified in the First Schedule of the Act 65 of 1951 or engaged in providing or rendering of any service. The Court also held that services referred to under the said Act must have a direct connection with the manufacture and production of goods. By taking into consideration the fact that the term “works contract” provided in Article 366(29A)(b) was wide and could not be confined to a particular understanding of the term or to a particular form, held that the Micro Small and Medium Enterprises Development Act, 2006 would not apply to “works contract”. Further,

in view of the clarifications made by the Central Government with regard to the inapplicability of the PPP-2012 to works contract, this Court also holds that works contract would not come within the purview of the PPP-2012. Consequently, there was no arbitrariness in the respondents not incorporating any Clause in the NIT, exempting MSEs from depositing EMD.

14. The above being said, what is clear from the documents on record is that prior to the NIT dated 16.04.2024 having been issued, an earlier NIT dated 06.01.2023 had been issued by the respondent no.1, wherein Clause 16.8 of the NIT provided exemption to the MSEs from submission of EMD, in accordance with the provisions of PPP-2012 and Clause 40 of the ITB. The said NIT was taken to its logical conclusion. However, subsequent to the said NIT dated 06.01.2023 a clarification had been sought from the Ministry of MSME, Government of India, vide letter dated 18.08.2023 from the GAIL(India) Limited, a Government of India Undertaking, with regard to whether work contracts were excluded from the purview of PPP-2012 for MSEs. The Ministry of MSME, Government of India, thereafter made a clarification vide letter dated 31.08.2023, stating that the benefits of the PPP-2012 should be given to all eligible MSEs, except for traders and in work contracts. Subsequent to the clarification made by the Ministry of MSME, Government of India, the present NIT dated 16.04.2024 has been issued and Clause 16.8 of the said NIT clearly shows that the exemption provided to the MSEs under PPP-2012 from submitting EMD had been done away with. This is clear from the fact that the exemption that had been given in the earlier NIT had also been incorporated in the NIT dated 16.04.2024, with a line striking out the exemption given. Thus it is not the case of the petitioner that he did not know that the exemption given

to the MSEs from submitting EMD, was not unknown to the petitioner. The petitioner is supposed to have submitted his bid after going through the NIT dated 16.04.2024 with an open eye.

15. The above being said, the petitioner submitted his bid in terms of the NIT dated 16.04.2024, without making any objection in writing to the respondents, regarding the striking out the exemption given to MSEs from submitting EMDs. He however did not make any representation with regard to the same, prior to or after submission of his EMD. The petitioner's challenge to doing away with the exemption clause, came into the picture only after the petitioner's Technical Bid was disqualified on 09.07.2024.

16. In the case of ***Sibaram Deka vs. State of Assam & 7 Others***, WA 395/2022, the Division Bench of this Court has held that when a tenderer participates in a tender process without objection and he is subsequently found to be not successful, a challenge to the process is precluded. Such a tenderer cannot be allowed to turn around and contend that the process was unfair by virtue of existence of a clause in the NIT.

17. In the present case, the petitioner cannot insist that the NIT dated 16.04.2024 should have contained a clause granting exemption to MSEs from depositing EMD. In this respect, it would be profitable to refer to the judgment of the Supreme Court in the case of ***Afcons Infrastructure Ltd. (supra)***, wherein it has held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and

appreciate it's requirements and interpret it's documents. The Constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions.

18. On considering the PPP-2012 and the clarification given by the Government of India vide letter dated 31.08.2023, coupled with the decision of the various High Courts, which are referred to above, this Court holds that the work contracts do not come within the purview of PPP-2012, i.e. the exemptions provided to MSEs does not cover work contracts. As such, the petitioner cannot make a challenge to the NIT after the rejection of his Technical Bid, on the ground that an exemption clause for doing away with the deposit of EMD by MSEs, should have been incorporated in the NIT.

19. In view of the reasons stated above, this Court does not find any ground to exercise it's discretion in the present case. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant