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

+ W.P.(C) 13696/2023, CM APPL. 54089/2023 & CM APPL. 27723/2024

M/S. PARDARSHI

..... Petitioner

Through: Mr. Utsav Mukherjee, Mr. Vikalp Wange and Mr. Saksham Ahuja, Advs

versus

UNION OF INDIA THROUGH SECRETARY MINISTRY OF COMMERCE AND INDUSTRY & ORS. Respondent

Through: Mr. Ravi Prakash, CGSC with Mr. Astu Khandelwal, Mr. Taha Yasin, Mr. Yasharth Shukla, Mr. Ali Khan, and Mr. Ayushmann Kishore, Advocates for R-1 and 3/UOI Ms. Shweta Bharti and Ms. Yashodhara B. Roy, Advocates for GEM/R-2 (through VC)

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Date of Decision: 20th May, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ: (ORAL)



W.P.(C) 13696/2023

1. Present petition has been filed under Article 226 of the Constitution of India seeking quashing of the bid conditions of the tender i.e., GEM/2023/B/3825600 dated 14th August, 2023 ('said Tender') which was issued for inviting bids for production of waist belts by Respondent No. 3 on the website of Government E-Market Place ('GEM'). The Petitioner further seeks setting aside of the order dated 06th September, 2023 disqualifying the Petitioner from being considered for the tender.

2. The said Tender was issued by Respondent No.3 i.e., the Director General of National Cadet Corp through GEM portal on 14th August, 2023 for procurement of Waist Belts, Black Colour (Q3) to the tune of 8,49,596 units.

2.1. The Petitioner herein submitted its bid on 28th August, 2023 and claimed exemption from the requirement of 'Bidder Turnover' criteria and 'Experience Criteria' as provided for under Clause 2 of the said Tender on the basis that it is registered as a Start-Up. However, the Petitioner's bid was disqualified on 06th September, 2023.

2.2. The Petitioner filed its representation on the GEM portal on 07th September, 2023 to seek reasons for the said disqualification. The Petitioner on 12th September, 2023 received a reply that the Petitioner despite being a Start-Up is not exempted from the condition of 'Past Performance' in the Tender document.

2.3. Aggrieved by the aforesaid reasons for rejection, the present petition has been filed

3. Learned counsel for the Petitioner states that to give effect to the policies of the Central Government for the promotion of Micro, Small &



Medium Enterprise ('MSME') and Start-Ups, the bid document provides for exemption from the requirements of 'Bidder Turnover' and 'Experience Criteria'.

3.1. He contends that in violation of the above-said policies Respondent No. 3 has inserted a mandatory condition of 'Past Performance' in Clause 7(t) and Clause 8 of the Tender document.

3.2. He states that the Petitioner is a Start-Up and is eligible for exemption from 'Experience Criteria' in the bid document and for the same reason, it is entitled to exemption from Past Performance criteria.

3.3. He states that though the terms and conditions of the Tender document are patently contradictory and inconsistent on the Past Performance certificate for the Start-Ups, as a Start-Up is provided exemption from the Experience Criterion, yet petitioner is saddled with providing a Past Performance Certificate.

4. In reply, learned counsel for Respondent No.3 states that the exemption from past requirement of 'Experience Criteria' is not contrary to the mandate of 'Past Performance' in the Tender document as these requirements are different. In this regards, he relies upon a table in paragraph 5 of the Counter affidavit dated 24th November, .2023, which is reproduced herein below:

S. No.	Experience Criteria	Past Performance
1.	Denotes financial and production viability of the firm.	Denotes capability to manufacture specific bid item being sought.
2.	Firm may not be able to manufacture certain items despite meeting 'years of experience' & 'turnover' criteria.	Firm would have manufactured similar items or have



		capacity to manufacture the bid item verified through AR
3.	Not based on successful completion of the contracts, but just on number of contracts placed and total value of the contracts.,	Based on successful completion of contracts of either bid item or similar items in the last three FY.

4.1. He states that the authorized representative of the Petitioner firm i.e., Ms. Darshika Sureka is the wife of one Mr. Parikshit Sureka, who is director of M/s Manmohan Commercials. He states that M/s Manmohan Commercial has performed badly in the previous four contracts in the last FY 2022-23 and has been debarred. He states that since the Petitioner firm is an allied firm to M/s Manmohan Commercial and as per the guidelines on debarment of firms from bidding, issued by the Ministry of Finance, vide office memorandum (OM) No. F. 1120/20 18-PPD dated 02.11.2021, the Petitioner herein is not even entitled to participate.

4.2. He states that GEM portal provides for an option to the buyer/tendering authority to include an additional 'Past Performance' requirement over and above, the 'Years of Experience' requirement which is exempted for MSME and Start-Ups.

4.3. He states that the issue raised by the Petitioner is covered by the judgment of the Coordinate Bench of this Court in *Sempersol Consultancy Pvt. Ltd. v. UOI & Ors.*¹, where similar terms in the Tender document were challenged by the unsuccessful bidder (a MSME) on the same pleas but the

¹ 2023 SCC OnLine Del 745.



challenge was negated and this Court held that terms of the bid make a clear distinction between 'Past Experience' and 'Past Performance'.

5. In addition, learned counsel for Respondent No.2, i.e., the GEM portal states that the terms 'Past Performance' and 'Experience Criteria' are two different expressions and are used separately under the 'Manual for Procurement of Goods' issued by Department of Expenditure, Ministry of Finance.

5.1. He states that Office Memorandum No. 20/2/2014-PPD(Pt.) dated 20th September 2016, issued by the Department of Expenditure, Ministry of Finance provides relaxation only for 'years of experience' and 'turnover' of MSME and Start-Ups. He states that the said relaxation does not provide for any relaxation with respect to the 'Past Performance'.

6. In response, learned counsel for the Petitioner fairly states that the Clauses 1, 2, 4 and 8 of the impugned Tender correspond with the Tender conditions which were impugned before the Division Bench in *Sempersol Consultancy Pvt. Ltd.* (supra).

7. We have heard the learned counsel for the parties and perused the record. The only issue raised by the Petitioner is that Clause 8 of 'Past Performance' in the impugned Tender cannot be made applicable to the Petitioner (a Start-Up) in view of the exemption granted in Clause 2 of the impugned Tender with respect to Experience criteria. The Petitioner seeks to contend that the criteria of Experience and 'Past Performance' are similar in effect. However, Respondent No. 3 in its table extracted above has succinctly brought out the relevance of the information/document sought as 'Past Performance' criteria in the Tender document. The intent of the information sought under Clause 8 is the capability of the bidder to



manufacture the items for which Tender has been issued. In our considered opinion, the requirement of the said information from the bidder including the Start-Up appears to be well founded.

8. This issue is however, even otherwise no longer res integra as in the judgment of the Division Bench in *Sempersol Consultancy Pvt. Ltd.* (supra) pari materia conditions of the bid document were considered and this issue was decided against the petitioner therein. In the said judgment, the condition of conforming with the Past Performance criteria was challenged by a MSME which similarly, pleaded that since it was exempted from the Experience criteria, it was also to be exempted from compliance with the Past Performance. However, the said challenge was negated by the Court, which held that the MSME bidder would also have to satisfy the Past Performance criteria like all other bidders and the relevant paras read as under:

“22. On perusal of the aforesaid decisions, it is clear that the scope of interference in an administrative decision by way of judicial review in commercial matters is extremely limited and can only be justified when a case of arbitrariness, unreasonableness, mala fide, bias or irrationality is clearly made out. In the absence of the same, the Courts should exercise restraint and not interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. Further, in cases where a contract involves technical issues, the Courts should give way to the opinion of the experts.

23. The Petitioner herein has claimed that under Condition No. 1 and Condition No. 2 of the Impugned Bid, it is exempted from furnishing past performance experience as it is an MSME. Per Contra the Respondents have argued that Condition No. 1 and 2 of the Impugned Bid only allows an MSE to seek exemption from providing ‘past experience’ under Condition 4 of the Impugned Bid but does not exempt any bidder from providing ‘past performance’ under Condition No. 8 of the Impugned Bid. Conditions 1, 2, 4 & 8 of the Impugned Bid are reproduced hereunder:

“1. If the bidder is a Micro or Small Enterprise as per latest definitions under MSME rules, the bidder shall be exempted from the requirement of “Bidder



Turnover” criteria and “Experience Criteria”. If the bidder is OEM of the offered products, It would also be exempted from the “OEM Average Turnover” criteria. In case any bidder is seeking exemption from Turnover/Experience Criteria, the supporting documents to prove his eligibility for exemption must be uploaded for evaluation by the buyer.

2. If the bidder is a Startup, the bidder shall be exempted from the requirement of “Bidder Turnover” criteria and “Experience Criteria”. If the bidder is OEM of the offered products, it would also be exempted from the “OEM Average Turnover” criteria. In case any bidder is seeking exemption from Turnover/Experience Criteria, the supporting documents to prove his eligibility for exemption must be uploaded for evaluation by the buyer.

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4. Experience Criteria : In respect of the filter applied for experience criteria, the Bidder or its OEM (themselves or through reseller(s)) should have regularly, manufactured and supplied same or similar Category Products to any Central/State Govt Organization/PSU/Public Listed Company for number of Financial years as Indicated above in the bid document before the bid opening date. Copies of relevant contracts to be submitted along with bid in support of having supplied some quantity during each of the Financial year. In case of bunch bids, the category of primary product having highest value should meet this criterion.

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8. Past Performance : The Bidder or its OEM (themselves or through re-seller(s)) should have supplied same or similar Category Products for 50% of bid quantity, in at least one of the last three Financial years before the bid opening date to any Central/State Govt Organization/PSU/Public Listed Company. Copies of relevant contracts (proving supply of cumulative order quantity in any one financial year) to be-submitted along with bid in support of quantity supplied in the relevant Financial year. In case of bunch bids, the category related to primary product having highest bid value should meet this criterion.”

9. As is evident, in the aforesaid judgment, condition no. 1 dealt with a MSME bidder and Clause 2 similarly dealt with a Start-Up bidder. Therefore, in view of the aforesaid judgment the Petitioner as well despite being a Start-Up is bound to comply with Clause 8 in the impugned Tender and since the Petitioner admittedly does not satisfy the condition of Past Performance, the order dated 06th September, 2023 disqualifying its bid does not suffer from any infirmity.



10. We accordingly find no merit in the present petition and the same is dismissed along with applications.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

MAY 20, 2024/hp/sk