

GAHC040001452022



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

Case No. : WP(C)/56/2022

M/s Argi Enterprise
A Registered MSME (Micro, Small and Medium Enterprise)
Represented by Smti Rina Saksa, W/o Shri Kalo Dususow, aged about 38 years,
permanent resident of Village Khuppi, PO Dezdo, PS Thrizino, West Kameng
District, Arunachal Pradesh

VERSUS

The Food Corporation of India and Anr.
Represented by Deputy General Manager (F and A), FCI, RO, Itanagar, Arunachal
Pradesh

2:The Divisional Manager
FCI, DO, Banderdewa.

Advocate for the Petitioner : Rintu Saikia

Advocate for the Respondent : SC (FCI)

BEFORE
HONBLE MR. JUSTICE ARUN DEV CHOUDHURY

ORDER

Date : 14-08-2024

Heard Mr. R. Saikia, learned counsel for the petitioner. I have

also heard Mr. B. K. Singh, learned Standing Counsel representing the Food Corporation of India.

2. The present writ petition is filed assailing the decision of the respondent authorities to execute the Road Transport Contract EX-RH/FSC Bhalukpung to FSD Bomdila on Regular basis at the risk and cost of the petitioner. The basis of such challenge is that the respondent authorities could not have put the risk and cost upon the petitioner when the petitioner did not accept the Letter of Acceptance for the work contract arising out of the earlier tender and did not submit the documents in terms of the Clause 8 (e) of the tender document.

3. Before advertng to the arguments advanced by the learned counsel for the parties, let this Court first record the factual aspects of the present case.

4. The petitioner is an entrepreneur registered under MSME (Micro, Small & Medium Enterprise). The FCI floated an e-tender vide tender No.RH/FSD BHPN to FSD Bomdila/Rglr/RTC/2021/077 dated 17.06.2021 for Transport Contract EX-RH/FSC Bhalukpung to FSD Bomdilaon Regular basis. Pursuant to the said advertisement, the petitioner participated in the tender process. Initially, the petitioner was declared to be technically eligible and thereafter, its price bid was opened. The petitioner being the L1 bidder, a Letter of

Acceptance was issued, however, the petitioner did not respond to the Letter of Acceptance and therefore, the contract was terminated by the FCI. In the aforesaid backdrop, the FCI had issued a fresh tender for the same work and therefore, they issued the tender at the risk and cost of the petitioner.

5. The basic argument of the learned counsel for the petitioner is that the contract was not even entered between the parties and therefore, in terms of the tender document, the petitioner was within its right not to accept the Letter of Acceptance. And for such act, the only penalty that could have been imposed by the FCI was to forfeit the EMD. They had no sanction and authority under the terms of the tender to execute the work at the risk and cost of the petitioner.

6. According to the learned counsel for the petitioner, no contract was executed between the petitioner and the respondent, Food Corporation of India (herein after referred to as FCI), therefore, FCI is not within their jurisdiction to invoke in terms of Clause 7 (iv).

7. *Per contra*, Mr. Singh, learned Standing Counsel for the FCI submits that though in terms of the Clause 8 (e) of the tender document, the petitioner did not submit the Manual Bids/Hard Copies of the tender documents, however, he could not refuse to act upon Letter of Acceptance of the contract. And therefore, such

refusal to accept the Letter of Acceptance and execute the work entails it to compensate FCI. In this regard, Mr. Singh has placed reliance on the Clause 13 of the tender document to argue that genuineness of the documents can be verified by the FCI at any stage and therefore, Clause 8 (e) is not the mandatory clause, inasmuch as the petitioner while submitting his e-tender had made a declaration that all the documents are correct. Therefore, Clause 8 (e) is not a mandatory clause and accordingly, for all meaning and purport, when the petitioner was declared to be a valid tenderer, it was his bounded duty to execute the contract, which the petitioner had refused and therefore, he is liable to make good the loss to the FCI. On the other hand, the fundamental argument on behalf of the FCI is that, moment the price bid of the petitioner was accepted and the petitioner had uploaded the tender documents in the e-portal after signing, it is to be a deemed contract. And therefore, on failure of the petitioner, FCI is within their right to execute the work at the risk and cost of the petitioner on his failure to execute the contract. Mr. Singh, further submits that petitioner being MSME (Micro, Small and Medium Enterprise), there was no EMD and therefore, the FCI is also not in a position to recover any EMD from the petitioner and having no alternative, the work was decided to be executed a fresh at risk and cost of the petitioner.

8. I have considered the arguments advanced by the learned

counsel for the parties.

9. In the aforesaid backdrop, now let this Court consider the terms and conditions of the tender document. The first relevant provision is the Clause 6, which prescribes deposit of Earnest Money at the rate of 2% of the value of the contract to be submitted electronically along with the bid document, however, there was an exemption that MSME (Micro, Small & Medium Enterprise) need not deposit such Earnest Money.

10. Clause 8 deals with submission of tenders. Sub-Clause (a), (b) and (c) of Clause 8 prescribe and mandate the documents and appendixes, which are required to be uploaded in e-tender process.

11. Since, the Sub-Clause (e) to Clause 8 is the bone of contention, let this Court quote the said provision which is as follows;

“(e) Tenders should be uploaded/ submitted through e-procurement at <https://eprocure.gov.in/eprocure/app>. Manual Bids/Hard copy of the tender documents will not be accepted. However the successful tenderer will have to submit the original Hard copy of MTF duly signed on each page of MTF along with Annexures/Appendices duly attested on or before the date and time stipulated by FCI, failing which the EMD furnished by the Bidder is liable to be forfeited and further that the award of contract through the letter of acceptance will be issued to the successful tenderer only after he fulfills this requirement.”

12. From the aforesaid it is clear that Sub-Clause (e) prescribes that tender is to be uploaded through e-procurement at the designated web portal. It further mandates that Manual Bids/Hard Copy of the tender documents will not be accepted. The said Clause further prescribes that successful tenderer will have to submit the original Hard copy of the tender document duly signed on each page, along with Annexures/Appendixes duly attested, on or before the date and time to be stipulated by FCI. It is also mandated that on failure of the tenderer to submit such documents, the EMD furnished by the bidder shall be forfeited and the FCI can award the contract through a Letter of Acceptance only after fulfilling of the requirement and provision prescribed under Clause 8 (e).

13. In the case in hand, it is an admitted position that the FCI, after the completion of the tender process, did not notify any date or time for submission of Hard copy/Manual Bids, in terms of Clause 8 (e). It is also an admitted position that the petitioner also did not insist or submit such Hard Copies in terms of Clause 8 (e). At that stage, the Letter of Acceptance was issued, which the petitioner refused to accept on the ground that the petitioner had decided not to execute the contract work and therefore, did not submit the hard copies duly signed. Accordingly, in the opinion of this Court, under the Clause 8 (e) on the admitted background that no procedure was

finalised or completed as regard the submission of signed Hard copies of the tender and documents, it cannot be said that the contract was executed. Even if, it is assumed that acceptance of the Letter of Acceptance is initiation of the contract and there is no necessity of signing a separate contract, but under the terms of the tender, submission of the Hard copy of the tender document is a condition precedent for issuance of Letter of Acceptance. Therefore, it cannot be said that there is a signing of contract, more particularly for non adherence submission of signed hard copies of the tender document in terms of Clause 8 (e), inasmuch as, it bars FCI to issue a Letter of Acceptance without fulfilment of Clause 8 (e).

14. Therefore, there was no contract on the date, when the Letter of Acceptance was issued to the petitioner, inasmuch as, as recorded herein above sub-clause (e) of the Clause 8 bars the FCI to issue a Letter of Acceptance without fulfilment of the conditions that a hard copy duly signed is furnished to the FCI. That being the position, in the considered opinion of this Court, FCI could not have proposed to execute the work at the risk and cost of the petitioner, inasmuch as the petitioner had not become a contractor by that time and his status was only a bidder.

15. Now let this court deal with argument of Mr. Singh, that in terms of the Clause 13, signing of the hard copy of the contract is not mandatory and that such mandate given under Clause 8 (e) is a

curable defect. Clause 13 prescribes that if at later point of time, it is found that the documents, annexure and information given by the contractor/tenderer is wrong, the Food Corporation of India shall be at liberty to disqualify and summarily terminate the contract, forfeit the EMD, security deposits and Bank Guarantee. In the considered opinion of this Court, Clause 13 only declares the right of the FCI to terminate the contract, in the event, certain wrong facts or wrong documents are submitted and it cannot be relatable to the signing of the contract under Clause 8(e) of the tender document.

16. Yet another aspect of the matter is that under the terms and conditions governing the contract under Clause IX, it is prescribed that security deposit is to be submitted within 15(fifteen) days of acceptance of his tender and on the failure, the contract is liable to be summarily terminated besides the forfeiture of the Earnest Money. However, as has been held herein above, without signing of the hard copy of the tender document, no contract did exist. And therefore, such Clause also cannot be made applicable in the present case.

17. Accordingly, the present writ petitioner is allowed by holding that the petitioner cannot be put to risk and cost as prescribed in the NIT dated 25.01.2022. However, the FCI is at liberty to approach appropriate forum for recovering the damages, if any, for the conduct of the petitioner, if so advised and if permissible under the contract.

18. Accordingly, this Writ petition stands allowed in the manner indicated herein above.

JUDGE

Comparing Assistant