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

Case No. : WP(C)/6061/2024

SKPL-PKR JV,
RAMENDRA KUTHI, COLONEL CHOWMUHANI, KRISHNANAGAR,
AGARTALA, WEST TRIPURA DISTRICT, TRIPURA, 799001. REPRESENTED
BY ONE OF ITS PARTNER KARSAN B VARSANI, AGED ABOUT 64 YEARS,
S/O BACCHU VARSANI, RESIDENT OF C-225 SHAILENDRA NAGAR,
RAIPUR, DIST RAIPUR, CHHATISGARH, 492001

VERSUS

THE UNION OF INDIA AND 5 ORS
THROUGH THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF
RAILWAYS, 21 RAIL BHAWAN, MARG, NEW DELHI 700001

2:THE RAILWAY BOARD

REPRESENTED BY MEMBER INFRA
21 RAIL BHAWAN
MARG
NEW DELHI 700001

3:THE GENERAL MANAGER
(OPEN LINE)
NF RAILWAY (HQ) MALIGAON
GUWAHATI 78101
DIST KAMRUP M ASASM

4:THE PRINCIPAL FINANCE ADVISOR
(OPEN LINE)
NF RAILWAY (HQ) MALIGAON
GUWAHATI 78101
DIST KAMRUP M ASASM

5:THE DIVISIONAL RAILWAY MANAGER
LUMDING NF RAILWAY
LUMDING 782447
DIST HOJAI
ASSAM

6:THE ADDITIONAL DIVISIONAL RAILWAY MANAGER
NF RAILWAY STATION ROAD GUWAHATI 78100

Advocate for the petitioner(s): Mr. BD Das Senior Advocate
Mr. R Majumdar

Advocate for the respondent(s): Mr. H Gupta
CGC

B E F O R E
HON'BLE MR. JUSTICE DEVASHIS BARUAH

Date : 20-11-2024

JUDGMENT & ORDER(ORAL)

Heard Mr. BD Das, the learned senior counsel assisted by Mr. R Majumdar, the learned counsel appearing on behalf of the petitioner. Mr. H Gupta, the learned CGC appears for the respondent Nos.1 to 6.

2. Taking into account the issues involved in the instant proceedings and the requirement of disposal of the matter with a sense of urgency, the instant writ petition is taken up for disposal at the motion stage itself.

3. The NF Railway had issued a tender notice for 'Construction of Additional 3(three) Nos. of Pit lines with Cover Shed, 4 Numbers Stabling Lines, 2 Numbers Automatic Washing Plant Building and Other Miscellaneous Works like Construction of Deep Tube Well, Reservoirs, Pipe Line Connections, Roads, Pathways, Service Buildings, Drain etc at New Guwahati. The approximate value of the work is Rs.1,09,03,16,436.97/- and the completion period of the said work is 18 months. It is very pertinent to mention herein the said NIT was issued in the month of May, 2024. The petitioner along with various other bidders duly participated in the said bid. At this stage, it is very relevant to mention that to the said NIT the Standard General Conditions of the Contract, which was made sometime in the month of April, 2022, was a part of the said tender documents. Clause 16.(4) of the said General Conditions of Contract (for short, the GCC) stipulated about the performance guarantee. While Sub-Clause (a) of Clause 16.4 related as to how and when the performance guarantee is required to be submitted. Clause (b) stipulated as to what would constitute the performance guarantee. Articles (i) to (xi) of Sub-Clause (b) of Clause 16.(4) of the GCC are the various instruments which would constitute the performance guarantee.

4. The petitioner herein was the successful bidder and was issued a letter of acceptance on 24.09.2024, whereby the petitioner was asked to deposit the performance guarantee in the form as given in Clause 16.(4) of the GCC 2022, equivalent to 5% of the contract value amounting to Rs.3,88,80,479/- within 21 days from the date of issuance of the letter of acceptance, valid up to the stipulated date of completion, plus 60 days, so that the contract agreement can

be executed. It was also mentioned that a penal interest of 12% per annum shall be charged for the delay, beyond 21 days i.e. from the 22nd day, after issuance of the LOA and further if the 60th day happens to be declared holiday in the concerned office of the Railway, submission of performance guarantee can be accepted on the next working day. It was also mentioned that in case there is a failure to submit the requisite performance guarantee after 60 days from the date of issuance of the letter of acceptance, the contract shall be terminated duly forfeiting the earnest money deposited and other dues. The directions have been issued for deposit of the performance guarantee appears to be in consonance with Clause 16.(4)(a) of the GCC 2022.

5. It is very apropos, however, to take note of that on the very date on which the letter of acceptance was issued, an Office Memorandum was issued by the Government of India, Ministry of Finance, relating to Insurance Security Bonds (ISB) as an alternative to the bank guarantee. A perusal of the said Office Memorandum reveals that the insurance companies are offering bids and performance guarantee bonds and they are one of the most effective ways to finance contract security options and enable ease of doing business. Under such circumstances, it was requested to explore bid and performance guarantee bonds and to adopt and promote the use of security bonds in projects related to all Ministries.

6. The record further reveals that the National Highway Authority of India as well as the CPWD have also adopted the insurance security bonds as one of the forms for furnishing of the performance guarantee. A reference has also been

placed before this Court of a tender issued by the NF Railway being tender No.0479/2024/O/ODY.CE/CON/3/MLG/NFR wherein also in terms with Clause 2.21, the Insurance Security Bonds have been made a form of the performance security.

7. Under such circumstances, the petitioners had submitted representations to the ADRM/Guwahati NF Railway, Guwahati as well as the Senior DFM/LMG, NF Railway requesting for acceptance of the Insurance Security Bond as a form of performance guarantee in lieu of the other forms prescribed in Clauses (i) to (xi) of Sub-Clause (b) of Clause 16.(4) of the GCC 2022. However, these representations were not answered for which the instant writ petition has been filed.

8. Mr. BD Das, the learned Senior Counsel appearing on behalf of the petitioner submitted that as it is now the mandate as per the Ministry of Finance in view of the Office Memorandum dated 24.09.2024 and which appears to have been accepted by the National Highway Authority of India, CPWP as well as even by the NF Railway, the petitioner should be permitted to submit the Insurance Security Bonds in lieu of the other forms of performance guarantee to be submitted in terms with Clause 16.(4) (b) of the GCC 2022. He further submitted that the representations which have been submitted on various dates to the authorities of the NF Railway have not also been redressed. He, therefore, submitted that this is a fit case where this Court is required to pass an appropriate writ, direction and order directing the respondent authorities to accept the Insurance Security Boards in lieu of the other forms mentioned in Clause 16.(4) (b) of the GCC 2022.

9. *Per contra*, Mr. H Gupta, the learned counsel appearing on behalf of the respondents submitted that though the petitioners have submitted the representations, but unless and until a decision is taken by the Ministry of Railways and the Railway Board duly notifies such decision, the petitioner would have to submit the performance guarantee in the manner stipulated in Clause 16.(4) (b) of the GCC 2022. He, however, submitted that the decision may come at a later stage, but without such decision from the Railway Board, it is not permissible to accept any other forms of performance guarantee other than as stipulated in Clause 16.(4) (b) of the GCC 2022.

10. I have heard the learned counsel appearing on behalf of the petitioners as well as the learned counsel appearing on behalf of the respondents.

11. The materials on record categorically show that the notice inviting tender was issued in the month of May 2024. To the said notice inviting tender, the GCC 2022 was made a part thereof. Clause 16.(4) of the GCC 2022 categorically mandates as to how the performance guarantee is to be submitted and what instrument forms the performance guarantee. The petitioner, thereupon being the successful bidder, was issued a letter of acceptance on 24.09.2024 and directing the petitioner to submit the performance guarantee in the form as stipulated in Clause 16.(4) of the GCC 2022. It is further relevant to take note of that on the very date, the Ministry of Finance had issued the Office Memorandum requesting all the Ministries to accept Insurance Security Bonds as an instrument for the performance guarantee. It further appears that the National Highway Authority of India and the CPWD authorities have already

made appropriate amendments to their tender conditions. However, the Railway Authorities is yet to take such steps, which can only happen when the Ministry of Rail, through the Railway Board, takes appropriate decision in that matter. This Court also is conscious of the fact that if, within the period of 60 days from the date of issue of the letter of acceptance, the performance guarantee is not submitted, it would result in termination of the contract and forfeiture of the earnest money deposited.

12. This Court is also aware of the fact that three of the representations submitted by the petitioners are still pending. Accordingly, from the above facts, it is, therefore, clear that the last date for submission of the performance guarantee in the form as prescribed in Clause 16.(4)(b) would be on 25.11.2024, taking into account that 24.11.2024 is a Sunday.

13. Under such circumstances, taking into account the above facts and circumstances, this Court disposes of the instant writ petition with the following observation(s) and direction(s):

(i). The petitioner is at liberty to submit the performance guarantee in any of the forms as prescribed in Clause 16.(4)(b) on or before 25.11.2024.

(ii). The respondent authorities are directed to consider the representations of the petitioners so submitted for acceptance of the insurance security bonds and in doing so, the respondent authorities shall also take note of the Office Memorandum dated 24.09.2024 as well as the other Circulars issued from time to time.

(iii). This Court further directs that in the meantime during the pendency

of the contract, if the Ministry of Railways (Railway Board) takes a decision for making the insurance security bonds a form of performance guarantee, the Railway authorities shall give the petitioner an option to submit the Insurance Security Bond by taking back the instrument(s), so submitted in terms with Clause 16.(4)(b) of the GCC 2022.

(iv). This Court further taking into account the Office Memorandum dated 24.09.2024 directs the respondent No.3 to seek appropriate instruction(s) from the Railway Board as to whether the NF Railway can accept Insurance Security Bonds as a form of performance guarantee. The exercise be completed by the respondent Nos.2 & 3 within a period of 2(two) months from the date of receipt of a certified copy of this order.

14. With the above, the writ petition stands disposed of.

JUDGE

Comparing Assistant