

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CWP No. 12463 of 2015 (O&M)

Date of Decision: 16.10.2015

M/s R.S. Labour & Transport
Contractor

--Petitioner

Versus

Food Corporation of India &
others

--Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR.
HON'BLE MR.JUSTICE TEJINDER SINGH DHINDSA.

Present:- Mr. Robin Dutt, Advocate for the petitioner.

Mr. Rajinder Goyal, Addl. A.G., Punjab.

Mr. J.S. Puri, Advocate for respondents
no.1 to 5.

Mr. Sumit Jain, Advocate for respondent
no.6.

TEJINDER SINGH DHINDSA. J.

Petitioner-firm has challenged the decision of the respondent-Food Corporation of India, whereby it has been disqualified in respect of the tender in question, forfeiture of earnest money has been directed and the firm has been debarred from participating in any future tenders of the Corporation for a period of 5 years.

2. Brief facts are that an e-tender notice was published on 13.10.2014 inviting online tenders under the Two Bid System for appointment of Handling & Transport Contractor and Road Transport Contractor for movement of food grains and allied materials for a period of 2 years. The last date for online tender submission was stipulated as 3.11.2014 by 9 A.M and the technical bids were to be opened on the same date at 10 A.M. Condition No.4 laying down the disqualification conditions and Condition No.6 regulating earnest money as per Model Tender Form

would be relevant to the issue at hand and are reproduced hereunder:-

“4. Disqualification Conditions.

*(I) Tenderers who have been blacklisted or otherwise debarred by FCI or any department of Central or State Government or any other Public Sector Undertaking will be ineligible during the period of such blacklisting or for a period of 5 years from the date of **blacklisting/debarment**, whichever is earlier.*

(II) Any Tenderer whose contract with the Food Corporation of India or any department of Central or State Government or any other Public Sector Undertaking has been terminated before the expiry of the contract period at any point of time during last five years, will be ineligible.

(III) Tenderer whose Earnest Money Deposit and/or Security Deposit has been forfeited by Food Corporation of India or any department of Central or State Government or any other Public Sector Undertaking, during the last five years, will be ineligible.

(IV) If the proprietor/any of the partners of the Tenderer firm/any of the Director of the Tenderer company have been, at any time, convicted by a court of an offence and sentenced to imprisonment for a period of three years or more, such Tenderer will be ineligible.

(V) While considering ineligibility arising out of any of the above clauses, incurring of any such disqualification in any capacity whatsoever (even as a proprietor, partner in another firm, or as director of a company etc.) will render the Tenderer disqualified.

(VI) A Hindu Undivided Family (either as a proprietor or partner of a firm) shall not be entitled to apply for tender. Any tender submitted in the capacity of Hindu Undivided Family (either as a proprietor or partner of a firm) shall be summarily rejected.

6. Earnest Money

*(i) Each tender must be accompanied by an **Earnest Money***

@ 2% value of contract amounting Rs.....(Rupees.....)
which must be submitted electronically through **NEFT/RTGS/other electronic means** by the tenderers for which concerned FCI, RO will provide its bank account no. & concerned branch of the bank where the account is held. **In case of NEFT/RTGS/other electronic means the tenderer has to indicate transaction no.(UTR No.) of such payments appropriately in the Bid.** The Tenderer shall be permitted to bid on the express condition that in the case he resiles, or modifies his offer, or terms & conditions thereof, after submitting his tender, for any reason whatsoever during the tender process, **or any of the information furnished by him/her is found to incorrect or false**, the Earnest Money Deposited by his shall stand forfeited without prejudice to any other rights and remedies of the Corporation under the Contract and law and the tenderer will be liable for any loss suffered by the Corporation on account of its withdrawal/modification etc. besides forfeiture of EMD. He will also be debarred from participating in any Tender Enquiry with the FCI for a period of **Five Years**.

(ii) **The Earnest Money will be returned to all unsuccessful tenderers within a period of 15 days from the date of disqualification in the case of all Tenderers whose Technical Bids are disqualified and within a period of 30 days from the date of issue of the acceptance letter in the case of all other Tenderers and to a successful Tenderer, after he has furnished the Security Deposit, if he does not desire the same to be adjusted towards the Security Deposit. No interest shall be payable on Earnest Money, in any case.**

(iii) The amount of Rs.566/- (Rs. Five hundred sixty six only) inclusive of taxes has to be paid by tenderer electronically towards tender document fee as done in case of EMD and the deposit of tender document fee will have to be done along with EMD.”

3. Petitioner submitted online bid but the same was rejected on the ground that the Experience Certificate had not been furnished in the prescribed proforma. This led to the filing of CWP No.717 of 2015 in this Court and vide judgement dated 10.3.2015 a Division Bench held the rejection of the technical bid of the petitioner to be not justified in law and as such, directed the same to be evaluated again. In purported compliance of the directions issued by this Court, the respondents called upon the petitioner vide letter dated 13.5.2015 for deposit of earnest money. Petitioner duly deposited the EMD on 14.5.2015. However, vide impugned order dated 10.6.2015 at Annexure P-10 the respondent-Corporation disqualified the petitioner-firm in respect of tender in question on the basis that an EMD of Rs.20,000/- of one of the partners namely Sh. Raj Singh had been forfeited on 9.4.2010 by the Punjab State Warehousing Corporation, Jalandhar and accordingly in terms of Condition No.4 of the Model Tender Form the petitioner-firm was ineligible. Furthermore, Condition No.6 of the Model Tender Form has been invoked to direct forfeiture of the earnest money deposit of Rs.74,299/- and it has been decided to blacklist the petitioner-firm for a period of 5 years w.e.f. 9.6.2015.

4. Learned counsel appearing for the petitioner-firm has argued that the Food Corporation of India has acted malafide and in a vindictive manner. In this regard, it is submitted that merely on account of the fact that the firm had earlier successfully contested the rejection of the technical bid by filing CWP No.717 of 2015, the Corporation was bent upon disqualifying the petitioner-firm. It has further been submitted that the impugned order dated 10.6.2015 (Annexure P-10) has been passed in violation of the principles of natural justice as no opportunity had been

granted to the petitioner to explain its stand and neither was the complaint, which has been referred to in the impugned order, made available. It has also been submitted that Sh. Raj Singh son of Sh. Chattar Singh i.e. one of the partners of the petitioner-firm had never applied for any tender with the Punjab State Warehousing Corporation and as such the question of forfeiture of the earnest money deposit by such Corporation does not even arise and consequently the very basis of disqualifying the petitioner-firm vide impugned order dated 10.6.2015 is non-existent.

5. Mr. J.S. Puri, learned counsel appearing on behalf of the respondent-Food Corporation of India has raised a preliminary objection that the petitioner has not impleaded the contractor namely M/s Krishan Kumar in whose favour the contract already stands awarded and the work having already commenced, the writ petition is liable to be dismissed on the short ground of non-joinder of necessary party. On merits, it has been submitted that a complaint had been received against the petitioner-firm and on the basis of an investigation having been carried out and upon due verification from the Punjab State Warehousing Corporation, District Office, Jalandhar as regards the EMD of Sh. Raj Singh son of Sh. Chattar Singh, one of the partners of the petitioner-firm having been forfeited, the impugned order disqualifying the petitioner-firm for the tender in question dated 10.6.2015 had been passed. Counsel submits that the action of forfeiture of earnest money as also blacklisting the petitioner-firm for a period of 5 years is strictly in conformity with Conditions No.4 and 6 of the Model Tender Form.

6. Learned counsel for the parties have been heard.

7. It has gone uncontroverted that the impugned order of forfeiture of earnest money deposit as also of blacklisting has been passed without affording the petitioner an opportunity of being heard. In fact, it was passed without even serving a show cause notice upon the petitioner-firm calling upon it to show cause to the proposed blacklisting.

It is by now well settled that blacklisting has to be preceded by a show cause notice. Reference in this regard may be made to the decisions of the Hon'ble Supreme Court in **Raghunath Thakur Vs. State of Bihar and others, (1989) 1 S.C.C, 229** and **Gorkha Security Services Vs. Government of N.C.T of Delhi and others, (2014) 9, S.C.C, 105**. The impugned order dated 10.6.2015 in so far as it blacklists the petitioner-firm for a period of 5 years, as such, cannot sustain on the short ground that it has been passed in clear violation of the principles of natural justice.

8. There is another aspect pertaining to blacklisting that we would like to address.

9. A conjoint reading of Conditions No.4 and 6 contained in the Model Tender Form clearly indicates that the tenderer whose earnest money deposit and/or security deposit has been forfeited by the Food Corporation of India or any department of Central or State Government or any other Public Sector Undertaking incurs an ineligibility for participating in the tender process. Furthermore, if any information furnished by such tenderer is found to be incorrect or false, apart from forfeiture of the earnest money deposit such tenderer is also liable to be debarred from participating in any tender with the Food Corporation of India for a period of 5 years.

10. The question, as such, which arises for consideration is as to whether in every case of a tenderer incurring a disqualification and upon

any information furnished by him/her being found to be incorrect, would the condition of blacklisting be invoked in a routine and mechanical fashion and consequently would it be imperative for the authority concerned to pass an order of blacklisting for the maximum period envisaged?

11. In our considered view the answer to such a poser has to be in the negative. The aspect of blacklisting came to be considered by the Hon'ble Apex Court in **M/s Erusian Equipments and Chemicals Ltd. Vs. State of West Bengal and another, (1975) 1 S.C.C, 701**. It was held that the concept of equality of opportunity would apply even to matters of public contracts. The State has the right to trade but is also under the bounden duty to observe equality. Even though, an individual may choose not to deal with any person but the State cannot choose to exclude persons arbitrarily. It was held that an order of blacklisting has the effect of depriving a person equality of opportunity in the matter of public contract. A blacklisting order entails adverse civil consequences. Blacklisting was held to be an “instrument of coercion”.

12. There would be no quarrel with the proposition that the power to blacklist a person is a necessary concomitant to the executive power of the State to carry on trade or business and making of contracts for any purpose. There need not be any statutory grant for the exercise of such power. The legal limitation, however, upon the exercise of such a power is that the State must act fairly and rationally without in any way being arbitrary. The object of blacklisting may be seen as an effective method to discipline deviant suppliers/contractors. The object of blacklisting, however, can never be to commercially eliminate a contractor. Blacklisting is a punitive measure and has to be commensurate to the acts of omission

and commission including misrepresentations/falsification of records and other breaches of the regulations under which the contracts were allotted. Herein would lie the applicability of the principle of proportionality in the decision making process by the competent authority while blacklisting a tenderer. An administrative decision of blacklisting has to contain the element of proportionality and it would be imperative upon the decision maker to strike a balance between the adverse effects of such an order on the interests of the tenderer and the need to adopt punitive measures upon parties guilty of such default keeping in mind the object and purpose it intends to serve. The principle of proportionality works on the assumption that administrative action ought not to go beyond what is necessary and to achieve the desired results. It is not that in every case of disqualification and in regard to supply of misleading information/false information that the competent authority would mechanically invoke the power of blacklisting and blacklist the contractor for the maximum period envisaged in the relevant clause. In our view provision with regard to blacklisting will have to be viewed as an enabling provision and not in the nature of a power to issue blanket orders of debarring a contractor for the maximum period. The question whether to disqualify and to blacklist a contractor if at all and for what period would require evaluation in the facts and circumstances of each case.

13. Adverting to the facts of the present case, the petitioner-firm has been disqualified ostensibly for the reason that an earnest money deposit of one of its partner Sh. Raj Singh had been forfeited in the year 2010 by the Punjab State Warehousing Corporation. A decision to blacklist for a period of 5 years has been taken on the ground that such information had been

concealed. Concededly, the impugned order has been passed on the basis of investigation upon a complaint and in which the petitioner-firm had not been associated. Counsel for the petitioner has adverted to documents placed on record at Annexures P-11 to P-17 to contend that had a chance been afforded, there was sufficient material with the petitioner-firm to convince the authorities concerned that its partner Sh. Raj Singh had never applied for any contract floated by the Punjab State Warehousing Corporation and as such, the question of forfeiture of earnest money deposit by such Corporation did not arise. It is not for us to examine the impact of such documents and to return a finding as to whether the petitioner had supplied false information or was guilty of concealment. It was for the Food Corporation of India to have issued a notice and granted to the petitioner-firm an opportunity to furnish its view point on the complaint that had been received. Such course of action, was not followed. Against such backdrop, it was imperative upon the competent authority to have taken a reasoned decision as to whether the punitive action of blacklisting was called for if at all and for what period.

14. The above clauses merely entitle the respondent to blacklist the party for a specified period. It does not compel the respondent to do so. It would be open to the respondent to blacklist a party for less than the period specified or even not at all. A decision in this regard must be an informed one keeping in mind all the facts and circumstance of the case. It can hardly be suggested that a deliberate breach of the terms and conditions would invite the same consequences as an inadvertent error.

15. In the circumstance, the writ petition is disposed of by setting aside the impugned order dated 10.6.2015 in so far as it blacklists the

petitioner. We are, however, unable to grant to the petitioner a Mandamus to consider its financial bid for the work in question for the reason that if such relief is granted, the same would effect the rights of a third party and in favour of whom the contract has already been issued several months ago and such third party having not been impleaded as a party before us. The respondent-Food Corporation of India would be at liberty to pass a fresh order with regard to blacklisting, if any, after affording the petitioner due opportunity of being heard and in the light of the observations contained in this order, within a period of two weeks.

Petition, accordingly, is disposed of.

(S.J. Vazifdar)
Acting Chief Justice

(Tejinder Singh Dhindsa)
Judge

16.10.2015
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Whether to be referred to Reporter? Yes.