

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CWP No. 2107 of 2015 (O&M)

Date of Decision: 22.9.2015

M/s Yadav Builders

--Petitioner

Versus

State of Punjab & others

--Respondents

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

Present:- Mr. Navdeep Chhabra, Advocate for the petitioner.

Mr. Vinod S. Bhardwaj, Addl. A.G., Punjab.

TEJINDER SINGH DHINDSA, J.

The petitioner-firm has assailed the decision of the respondent authorities in having forfeited its earnest money deposit and having blacklisted and debarred it from participating in any tender process for the works of Pradhan Mantri Gramin Sadak Yojna (herein after to be referred as the PMGSY Scheme) for a period of one year.

2. On 17.1.2014 tenders for upgradation of a particular section of the Muktsar-Ferozepur Road under the PMGSY Scheme were invited by respondent no.2 from the eligible tenderers. Last date for receiving online bids was stipulated as 17.2.2014 up to 5 P.M. Petitioner-firm duly submitted its bid. Respondent authorities thereafter extended the time of bid validity up to 28.4.2014. A letter of acceptance dated 9.5.2014 was issued in favour of the petitioner-firm allotting the work in question and calling upon it to furnish the Performance Security and to sign the contract. Time frame for completion of work was fixed as six months i.e. up to 8.11.2014. Work awarded having not been undertaken, order dated 5.11.2014 (Annexure P-9) was issued by respondent no.2, whereby under

clause 16.6 (b), section 2 of the Instructions to Bidders the earnest money deposit of the firm has been forfeited. By a subsequent order dated 1.12.2014 (Annexure P-10) issued by respondent no.3, clause 30.3 of the D.N.I.T has been invoked and the petitioner-firm has been debarred for a period of one year from any works under the PMGSY Scheme.

3. Writ of Certiorari has been prayed for setting aside the afore-noticed two orders dated 5.11.2014 (Annexure P-9) and 1.12.2014 (Annexure P-10) respectively.

4. Learned counsel appearing for the petitioner would contend that the action of forfeiture of the earnest money deposit by the respondent authorities is arbitrary as the work awarded was not commenced on account of Mobilization Advance up to 5% of the contract price in the light of clause 45.1 of the D.N.I.T having not been released to the petitioner-firm. It has been contended that non-performance of the contract was, as such, not on account of unwillingness on the part of the petitioner-firm. It has further been argued that prior to issuance of the order of blacklisting dated 1.12.2014 no opportunity of hearing had been granted and even a notice to show cause had not been issued.

5. On the other hand, learned State counsel would submit that the petitioner-firm having been allotted the work in question had failed to furnish the requisite performance security as also to sign the contract agreement inspite of having been repeatedly called upon to do the same. It is submitted that the action of forfeiture of earnest money deposit as also blacklisting is strictly as per terms and conditions of the D.N.I.T.

6. Learned counsel for the parties have been heard.

7. Clause 16.6 (b) under section 2 of the Instructions to Bidders (I.T.B), clause 30 and clause 45 of the D.N.I.T are extracted hereunder:-

“16.6 The Bid Security may be forfeited:

- a) if the bidder withdraws the bid after bid opening (opening of technical qualification part of the bid) during the period of bid validity.*
- b) in the case of a successful bidder, if the bidder bails within the specified time limit to:*
 - i) sign the Agreement; and/or*
 - ii) furnish the required Performance Security.*

30 Performance Security

30.1 *The successful bidder/contractor shall provide to the Employer a total Performance Security of five percent of the Contract Price covering the time period of completion of construction work plus 5 years for maintenance period plus additional security for unbalanced bids in accordance with clause 26.3 and 26.4 of ITB and clause 46 part 1 General Conditions of Contract.*

Within 15 days after receipt of Letter of Acceptance but before signing the contract, a performance security of two and a half percent of contract price plus additional security for unbalanced bids in accordance with clause 26.3 and 26.4 of ITB and clause 46 Part 1 General Conditions of Contract shall be delivered by the successful bidder to the Employer.

The Employer shall retain remaining two and a half percent of Performance Security from each payment due to the contractor until completion of the whole of the construction works (except advance payment as per Clause 45 of General Conditions of Contract).

30.2 *Performance Security of two and a half percent to be delivered by the successful bidder after the receipt of letter of acceptance shall be either in the form of a Bank Guarantee or fixed deposit receipts in the name of Employer from a scheduled commercial bank.*

If the Performance Security is in the form of a bank guarantee, the period of validity of Bank Guarantee of two and a half percent of Contract price could be one year initially, however, the bidder/contractor shall get this Bank Guarantee extended in such a way that an about equal to the requisite performance security is always available with Employer until 45 days after the lapse of Defect Liability Period. If the bidder/contractor fails to maintain above Performance Security, the Employer would recover the same from any dues payable to the Contractor; otherwise it shall be a debt due from the contractor.

30.3 Failure of successful bidder to comply with the requirement of delivery of Performance Security of two and a half percent of Contract Price plus additional security for unbalanced bids as per provisions of Clause 30.1 shall continue a breach of contract, and the Employer may resort to awarding the contract to the next ranked bidder. Such successful bidder who fails to comply with the above requirements is liable to be debarred from participating in bids under PMGSY for a period of one year.

45. Advance Payment

45.1 The Employer will make the following advance payment to the Contractor upon his request and against provision by the Contractor of an Unconditional Bank Guarantee in a form and by a Commercial bank acceptable to the Employer in amounts equal to the advance payment:

- a) Mobilization advance up to 5 percent of the contract price excluding the contract price for routine maintenance;*
- b) Equipment Advance up to ninety percent of the cost of the new equipment brought to the site and fifty percent of depreciated value of old equipment subject to a maximum of ten percent of the contract price excluding the contract price for routine maintenance.*

The guarantee shall remain effective until the advance payment has been repaid but the amount of the guarantee shall

be progressively reduced by the amounts repaid by the Contractor. Interest will not be charged on the advance payment.

45.2 *The Contractor is to use the advance payment only to pay for Equipment plant and Mobilization expenses required specifically for execution of the works. The Contractor shall demonstrate that the advance payment has been used in this way by supplying copies of invoices or other documents to the Engineer.*

45.3 *The advance payment shall be repaid by deducting proportionate amounts from payments otherwise due to the Contractor for the construction work, following the schedule of completed percentages of the works on a payment basis. No account shall be taken of the advance payment or its repayment in assessing valuations of work done. Variations, price adjustments, compensation events or liquidated damages.”*

8. A perusal of clause 30 governing Performance Security obligates the successful bidder/contractor to furnish the Performance Security within 15 days from the receipt of the Letter of Acceptance. However, under clause 45 regulating advance payment to be made to the contractor in the shape of a Mobilization Advance, no time frame is envisaged. The case set up on behalf of the petitioner-firm with regard to non-performance of the contract and not furnishing performance security on account of Mobilization Advance having not been released essentially pertains to a contractual dispute. That apart, the document placed on record at Annexure P-7 i.e. a communication dated 16.9.2014 from the petitioner-firm and addressed to respondent no.2 relates only to clearance of dues in respect of a different work having already been executed. Such communication did not even raise a demand for release of Mobilization Advance. The writ petition, as such, raises disputed questions. We are of

the considered view that such disputes cannot be agitated under Article 226 of the Constitution of India. We, accordingly, refrain from examining the validity of the order dated 5.11.2014 (Annexure P-9).

9. In so far as the order dated 1.12.2014 (Annexure P-10) blacklisting the petitioner-firm for a period of one year is concerned, concededly a separate show cause notice had not been issued. Learned State counsel would, however, advert to the documents appended at Annexures R-2/4 and R-2/5 along with the reply i.e. communications dated 9.7.2014 and 9.9.2014 respectively, whereby the firm had been informed that the work in question had not been started at the site, agreement had not been signed and neither performance security had been deposited. It has been contended on behalf of the State that vide such communications the petitioner-firm had been put to notice that in the eventuality of work not being commenced and performance security not been furnished, action would be taken as per conditions contained in the notice inviting tender. Argument that has been raised is that blacklisting has been ordered strictly as per terms and conditions of the D.N.I.T and as such, there would be no occasion for the petitioner-firm to raise a grievance with regard to show cause notice having not been issued.

10. It is by now well settled that blacklisting has to be preceded by a show cause notice. In a recent decision of the Hon'ble Supreme Court in ***Gorkha Security Service Vs. Government of N.C.T of Delhi and others, (2014) 9 S.C.C, 105***, the question pertaining to the form and content of a show cause notice that is required to be served prior to action of blacklisting came to be considered. It was held that in order to fulfill the requirement of principles of natural justice in a case of blacklisting, the show cause notice

had to meet two requirements viz. (i) the material/grounds to be stated which according to the department necessitates such an action and (ii) the particular penalty/action which is proposed to be taken should also be mentioned. It was further held that even if the contemplated action of blacklisting is not specifically mentioned in the show cause notice but the same can be clearly and safely discerned from the reading thereof, adherence to the principles of natural justice would have been met.

11. Adverting to the facts of the present case, clause 30.3 of the D.N.I.T stipulates that on the failure of the successful bidder to furnish the requisite performance security, he would be liable to be debarred from participating in bids under the PMGSY Scheme for a period of one year. It is not possible for us to read such a provision to mean that in every case of non-deposit of performance security there shall be automatic blacklisting.

12. 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. Moreover, clause 30.3 only makes the party liable to be debarred from participating in bids for one year. The party is not bound to be debarred for failure to deposit the earnest money.

13. Even the documents at Annexures R-2/4 and R-2/5 along with the written statement only mentioned that if work is not commenced and performance security is not deposited, action would be taken as per

agreement. We are of the considered view that it was imperative upon the respondent authorities to have issued a show cause notice contemplating the penalty of blacklisting so as to provide an adequate and meaningful opportunity to the petitioner-firm to show cause against the same. In the present case the documents at Annexures R-2/4 and R-2/5 do not suggest that such a harsh action was contemplated. There has been an infraction of the principles of natural justice. Mere existence of a condition in the D.N.I.T empowering the respondent authorities to resort to an action of blacklisting would not be sufficient to sustain the passing of the impugned order.

14. In view of the above, the writ petition is partly allowed. Order dated 1.12.2014 (Annexure P-10) blacklisting the petitioner-firm is set aside. Liberty, however, is granted to the petitioner-firm to take out appropriate proceedings as regards the order dated 5.11.2014 (Annexure P-9) with regard to forfeiture of earnest money deposit. All contentions in such regard are kept open.

Petition is allowed in the aforesaid terms.

(S.J. Vazifdar)
Acting Chief Justice

(Tejinder Singh Dhindsa)
Judge

22.09.2015
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Whether to be referred to Reporter? Yes.