

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CIVIL WRIT PETITION NO.8182 of 2015

RESERVED ON: NOVEMBER 19, 2015

DATE OF DECISION: DECEMBER 04, 2015

M/s Awla Infra, Faridkot Road, Guruharsahai,
District Ferozepur (Punjab)

.....Petitioner

Versus

The Haryana State Co-operative Supply and
Marketing Federation Limited and others

.....Respondents

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

Present: Mr.Ajaivir Singh, Advocate for the petitioners.

Mr.Vishal Garg, Advocate for respondent No.1.

Mr.KK Gupta, Advocate for respondents No.2 to 4.

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TEJINDER SINGH DHINDSA, J.

Towards implementation of the Private Entrepreneur Godowns Scheme (PEG) – 2008 of the Government of India, the first respondent i.e. Haryana State Co-operative Supply and Marketing Federation Limited (HAFED) being the State Nodal Agency for storage requirements of Food Corporation of India awarded a contract for construction of Godowns having capacity of 1,80,000 MTs in favour of petitioner-firm.

2. The instant petition has been filed assailing the decision dated 3.4.2014, Annexure P6, taken by the State Level

Committee of the Food Corporation of India in terms of which a constructed capacity of 15,550 MTs out of the total of 1,80,000 MTs has been rejected. A writ of certiorari is also sought seeking quashing of the order dated 1.10.2014, Annexure P10, passed by the Chairman and Managing Director, FCI affirming the decision dated 3.4.2014 of the State Level Committee.

3. HAFED-respondent No.1 issued Detailed Notice Inviting Tender (DNIT) in the year 2011 for construction of Godowns for FCI storage requirement in various Districts of the State of Haryana to be managed and supervised by HAFED for a guaranteed lease of ten years from the eligible tenderers. The last date for submission of tenders under the two-bid system was stipulated as 20.7.2011. Conditions No.15, 16, 42, 43 and 52 of the general conditions of tender would be relevant and are reproduced hereunder:

“15. The tenderer shall at his own cost complete the construction of godown as per the engineering and other godown specifications as per the schedule of this agreement on the land mentioned by the tenderer in the tender.

16. The specific location of the land proposed by the tenderer in the tender for the construction of the godown shall not be changed at any stage after submission of tender under any circumstances failing which EMD, Supplementary Guarantee, Security, Deposit and Performance Guarantee furnished by the tenderer is liable to be forfeited/invoked as the case

may be without prejudice to any other legal remedies available to HAFED.

42. The tenderer has to enclose with the tender a detailed site and layout plan indicating the location of proposed structures and also showing the approach to main road.

43. Change of the Site will not be agreed to by the HAFED after submission of tender.

52. INSPECTION OF GODOWNS:- *The construction work of the godown will be inspected by a Committee of following officers:*

i) Civil Engineer to be nominated by GM, FCI of the Region.

ii) Civil Engineer to be nominated by MD of nodal agency. The nodal agency can also nominate Civil Engineer from its State PWD or any other Engineering Department. However, the Civil Engineer so nominated will not be a rank lower than Executive Engineer of PWD.

iii) The work shall be inspected at the following stages:

a) layout stage

b) Lintel level

c) Roofing level

d) Completion stage

The tenderer shall inform the nodal agency regarding completion of each stage of construction.

The Committee members will inspect the site of construction at the earliest but not later than 15 days period.

iv)After inspection, a joint inspection report shall be prepared by the Committee and shall be communicated to successful Tenderer within a period of 7 days.

v)The defects pointed out in the inspection report shall be attended to by the successful Tenderer without any extra cost or time whatsoever.

vi)The scope of inspection shall be limited to general layout, level of various components, structural stability and external and internal electrification of the godowns and other buildings.

The godown would not be taken over by the nodal agency if the defects pointed out at various stages of inspection are not removed by the successful Tenderer.”

4. Petitioner-firm submitted its tender for the location at Ellenabad in District Sirsa for which the required capacity for construction of Godowns was 1,80,000 MTs. The petitioner offered 71.5 acres land for construction of the Godowns of the capacity noticed hereinabove in its technical bid. After opening of technical bids and financial bids on 3.8.2011 and 20.1.2012 respectively, the work for construction of Godowns under the PEG Scheme was accepted and allotted to the petitioner for a capacity

of 1,80,000 MTs @ ₹5.50 per quintal per month on lease at the Ellenaband Centre vide letter dated 3.8.2012, Annexure P2, issued by the first respondent. The lay out plan for construction of 24 Godowns having total capacity of 1,80,000 MTs is stated to have been approved by a Technical Team of FCI and HAFED on 8.10.2012. It is the case of the petitioner that having commenced construction it was felt necessary to have additional Godown/s to make good the sanctioned capacity of 1,80,000 MTs and, accordingly, a revised lay out plan was submitted and the same was also approved on 5.3.2013.

5. Learned counsel appearing for the petitioner-firm has contended that the construction work at site was periodically inspected by the nominated Officers of FCI as also the State Nodal Agency i.e. HAFED and the construction work was duly approved. It has further been submitted that the final inspection of the construction of the Godowns was carried out by a Committee on 24.1.2014 and in pursuance thereof, all the Godowns having capacity of 1,80,000 MTs were taken over on ten years guaranteed lease under the PEG Scheme, 2008. To substantiate such assertion, letter dated 4.2.2014 issued from the office of the Assistant General Manager, Food Corporation of India, Regional Office, Panchkula, Haryana has been adverted to. Apparently, the matter thereafter was taken up before a State Level Committee comprising of officials of FCI as also HAFED in its meeting held on 3.4.2014 wherein the impugned decision has been taken for rejection of the constructed capacity of 15,550 MTs ostensibly for the reason that such construction has been effected on land

which had not been offered by the tenderer at the stage of submission of its technical bid. Representation preferred against such decision has been rejected vide impugned order dated 1.10.2014, Annexure P10, by the Chairman- Managing Director, FCI.

6. The precise argument raised on behalf of the petitioner is that the construction of the Godowns for a total storage capacity of 1,80,000 MTs has been carried out as per revised lay out plan duly sanctioned and in terms of inspections having been carried out by the concerned officials at each and every stage of construction and as such, the impugned decision rejecting constructed capacity of 15,550 MTs on the plea that it has been carried out on unoffered land at the stage of submission of bids cannot sustain. Learned counsel would also term the decision to be unfair and irrational by submitting that huge investment has been made by the petitioner-firm and that too at the instance of the respondent-Authorities who had themselves approved the revised lay out plan. Our attention has also been invited to the proceedings of District Level Committee in respect of inspection carried out on 17.10.2013, Annexure P5-A, wherein it was observed that even though construction of Godowns has been carried out on certain land that had not been offered by the tenderer in the technical bid, yet the revenue record has been checked and it has been found that even such land is in the ownership of the tenderer and there is no dispute in respect of title. The District Level Committee in its report, Annexure P5-A, has also observed that the construction has been carried out in a

systematic manner and is giving a good appearance to the entire complex.

7. In response to the petition, separate written statements have been filed on behalf of respondents No.2 to 4 and respondent No.1. The decision to reject the constructed capacity of 15,550 MTs is sought to be justified on the strength of Condition No.16 of the general conditions of tender and as per which, the change in the land proposed in the tender document cannot be permitted. A categoric stand taken on behalf of the respondents is that the construction of 15,550 MTs has been carried out on land which had not been offered/proposed by the tenderer in the tender document and, accordingly, such capacity has been rejected strictly as per the terms and conditions of DNIT.

8. The scope and extent of exercise of power of judicial review in matters relating to tenders and award of contracts came up for consideration before the Hon'ble Supreme Court in **Jagdish Mandal v. State of Orissa & Ors., (2007) 14 SCC 517** and it was observed as follows:

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and

awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

9. Adverting back to the facts of the present case, we are of the considered view that the impugned decision of the State Level Committee in its proceedings held on 3.4.2014, Annexure P6, and affirmed by the Chairman & Managing Director, FCI vide order dated 1.10.2014, Annexure P10, does not suffer from any arbitrariness, irrationality, bias or malafides.

10. A reading of conditions No.15 and 16 of the DNIT and the language employed therein would make it clear that these conditions are mandatory. In condition No.15, the tenderer was obligated to complete construction of Godowns as per specification on the land mentioned by the tenderer in the tender document. Towards discharge of such obligation, the word 'shall' has been used. Likewise in condition No.16, a specific location of land proposed by the tenderer in the tender document for construction of Godowns could not be changed at any stage and under any circumstances after submission of the tender document. Herein also while creating a specific embargo as

regards change of specific location of the land the word 'shall not' has been used. Conditions No.15 and 16 are clear and categorical and there is no ambiguity whatsoever. The same would be considered as essential terms of the contract. Deviation and relaxation therefrom would not be permissible.

11. In the reply filed on behalf of respondent No.1-HAFED, it has been stated that the petitioner-firm had offered land bearing specific khasra numbers for construction of Godowns of a capacity of 1,80,000 MTs and such specific khasra numbers tendered by the petitioner-firm at the stage of submission of technical bid were as under:

“M/478, 23, 22, 21, 19, 20, 12, 11, 8, 9, 10, 4, 3, 2, 1, M/479, 24, 25, 16, 17, 15, 6, 5, M/483, 24, 23, 17, 18, 14, 13, 12, 11, 10, 9, 8, 7, 3, 2, 1, M/449, 21, 22, 23, 24, 25, 16, 17, 18, 19, 20, 15, 14, 13, 12, 11, 6, 7, 8, 9, 10, 5, 4, 3, 2, 1, M/482, 24, 17, 14, 15, 6, 7, 5, 4, M/448, 25, M/506, 4, 7, M/505, 4/1.”

12. The contract was allotted to the petitioner-firm in reference to such specific parcel of land as indicated in the afore-reproduced khasra numbers. However, subsequently it was found that out of 1,80,000 MTs, 1,64,450 MTs was constructed on the land offered at the stage of submission of bids and the balance 15,550 MTs was constructed on land bearing killa numbers which were never part of the offered land at the time of submission of bids. The details of such killa numbers have also been furnished in the reply and the same are re-produced hereunder:

“479//16/1 (6-13), 16/2 (1-7)

506//5/1 (4-13), 5/2 (3-7)

482//16/1 (6-0), 16/2 (2-0), 25(8-0)

448//14 min (1-16), 15 (8-0), 16 (8-0)

Total 6 Acre 1 Kanal 16 Marla."

The categoric assertion made on behalf of the respondents in respect of the specific parcel of land initially offered/proposed at the stage of submission of bids and construction of 15,550 MTs having been effected on a parcel of land which was not part of the initially offered land by the tenderer has gone uncontroverted. Rather in the replication filed to the written statement, a justification is sought to be offered that it was a mere typographical error at the stage of submission of the tender. In the light of such uncontroverted factual position, we do not find any infirmity in the decision taken by the respondent-Authorities to reject the constructed capacity of 15,550 MTs on land that was not offered in the tender document and such decision being in consonance with conditions No.15 and 16 contained in the DNIT. Acceptance of the prayer made in the petition and directing the respondent-Authorities to even accept such constructed capacity of 15,550 MTs would amount to re-writing the terms of the contract. The same is impermissible in law.

13. As regards the assertion made on behalf of the petitioner-firm that a revised lay out plan had been approved on 5.3.2013, the same has not been denied by the respondents. However, it has been clarified in the written statement that at the stage of submission of revised lay out plan, the petitioner-firm had not mentioned any particular killa numbers in the

amended/revised lay out plan and nor was it pointed out that construction of Godowns was proposed on land which had not been originally offered in the tender document. The approved revised lay out plan, as per respondents would necessarily relate only in respect to land that had been offered in the tender document and could not possibly extend and operate to a piece of land that had not been offered by the tenderer in its technical bid. We accept such clarification offered by the respondent-Authorities as the same would be in furtherance of and to ensure compliance of conditions No.15 and 16 of the DNIT.

14. The mileage sought to be drawn by the petitioner-firm on account of periodic inspections having been carried out by the officials of FCI and HAFED and the construction in respect of 1,80,000 MTs having been found to be without defect is wholly mis-placed. Condition No.52 of the DNIT relates to inspection of Godowns. In terms thereof, the construction work of the Godowns was to be carried out at different stages i.e. lay out stage, lintel stage, roofing level and completion stage. Condition No.52 (vi) defined the scope of inspection and limited the same to general lay out, level of various components, structural stability, as also external and internal electrification of the Godowns and other buildings.

Perusal of the inspection reports placed on record at Annexure P5 (colly) would also reveal that the inspection of the construction work had been carried out periodically and limited to the parameters envisaged under condition No.52 of the DNIT.

The scope of inspection was not to ascertain and verify the

ownership details/title of the land upon which the construction had been effected. It would be apposite at this stage to make a reference to the final inspection report dated 24.1.2014 carried out by a Committee comprising of the Area Manager, FCI, AGM (Civil) FCI, District Manager, HAFED, Sirsa and Executive Engineer, HAFED, Hisar in the presence of the representative of the petitioner-firm and in pursuance to which the constructed Godowns of 1,80,000 MTs had been taken over initially on 4.2.2014. Such inspection report dated 24.1.2014 noticed that even though the shortcomings as regards construction parameters, as had been pointed out in the earlier inspections, had been removed, but in respect of construction upon land other than offered in the technical bid, the approval of the competent authority/HLC (High Level Committee) was still pending. It was also clearly noticed that a construction of capacity of 15,550 Mts had been effected upon land measuring 6 acres/16 marlas which had not been offered at the stage of submission of tender document. It clearly emerges that the taking over of the Godowns of 1,80,000 Mts on 4.2.2014 was subject to approval of the competent authority/HLC specially in regard to construction of certain capacity upon land which had not been offered by the tenderer initially at the stage of submitting of tender document. The State Level Committee in its deliberations held on 3.4.2014, Annexure P6, has taken a decision to reject the constructed capacity of 15,550 MTs that has been effected on land which did not form part of the tender document. In our considered view, the impugned decision does

not suffer from any infirmity.

15. In view of the reasons recorded above, the writ petition is dismissed.

16. Before parting with our order, we grant liberty to the petitioner-firm to approach the respondent-Authorities to offer the constructed Godown capacity of 15,550 MTs independent of the tender process initiated vide DNIT at Annexure P1. We are inclined to grant such liberty in the light of the observations contained in the report of the District Level Committee of the respondent-Authorities dated 17.10.2013 appended and placed on record at Annexure P5-A, wherein it has been noticed that construction has been effected on killa numbers which even though were not part of the land initially offered in the tender document, but are in the ownership of the petitioner-firm. The Committee has also opined in its report that the construction is otherwise as per specifications and wheat stocks pertaining to Rabi 2013 have already been stored in such Godown and no problem is being faced in respect of storage. In the eventuality of the petitioner-firm approaching and offering on lease the constructed Godowns having storage capacity of 15,550 MTs, it would be open for the respondent-Authorities to consider the same and take a decision thereupon independent of the tender process and as may serve public interest.

(S. J. VAZIFDAR)
ACTING CHIEF JUSTICE

(TEJINDER SINGH DHINDSA)
JUDGE

DECEMBER 04, 2015

SRM