

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

C.W.P.No.9607 of 2015

Date of Decision: 29.05.2015

Sudarshan Kumar

...Petitioner

Versus

State of Punjab & others

...Respondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Anand Chhibbar, Senior Advocate, with
Ms. Riya Bansal, Advocate, for the petitioner.

Mr. Vinod S. Bhardwaj, Addl. AG, Punjab.

HEMANT GUPTA, J.

Challenge in the present writ petition is to the eligibility condition Nos.15 & 16 contained in the e-tender notice dated 02.05.2015, whereby the petitioner is rendered ineligible for participation in the tender process.

The petitioner is a Class A-1 Contractor having been granted license on 01.08.2014. The respondents published a tender notice inviting bids from the contractors for (i) repairing various Spurs, Studs and Revetment etc. in Panjgrain Complex, Singhoke Complex, Dharamkot Complex, Chaharpur Complex and Main FPE of various complexes of Amritsar Drainage Division on left side of river Ravi; and (ii) Repairing Spurs, studs and Revetment etc. in Sherpur, Kakkar Manj and Ranian Complex along left side of river Ravi. The estimated cost of the first project was Rs.3.48 crores for which earnest money of Rs.6.96 lacs was required to

be furnished by the Contractors and Rs.3.48 lac by the Labour & Cooperative Societies, whereas the estimated cost of the second project was Rs.3.16 crores for which earnest money of Rs.6.32 lacs was required to be furnished by the Contractors and Rs.3.16 lac by the Labour & Cooperative Societies. The last date of submission of tenders was 15.05.2015. The technical bid was to be opened on the same day at 15.30 hours, whereas the financial bid was to be opened on 18.05.2015. The petitioner asserts that it has never been disqualified by the Irrigation Department, Punjab to execute the works. However, for the first time, conditions have been changed, which make the petitioner ineligible to participate in the tender process.

As per the petitioner, condition Nos.15 & 16 are illegal and arbitrary, but the petitioner restricted itself to challenge condition No.16 alone at the time of arguments. The relevant conditions including condition No.16 from the tender notice read as under:

“GOVERNMENT OF PUNJAB (DEPARTMENT OF IRRIGATION)
ELIGIBILITY FOR PARTICIPATION CONDITIONS
FOR PREQUALIFICATION (FOR TWO TIERS SYSTEM)

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8. (a) Average annual financial turnover during the last three years ending 31st March of previous financial year (This will also include year 2014-15) should be at least 3 times of minimum 30% prescribed by the CVC i.e. 90% the cost of work in this tender.
(b) If the bidder on the basis of eligibility criteria of similar nature work done and turnover is eligible, he will be eligible for all the works separately. (Residual basis)

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16. For finalization and allotment of works, residual turnover and residual working capital shall be as per minutes of meeting of Chief Engineer / Drainage Punjab dated 25.03.2015. The residual turnover finalized by Patiala Drainage Circle, Patiala after opening of financial bids on 20.04.2015, 22.04.2015 and 23.04.2015 for flood protection works / cleaning of drains shall be considered for the above works.”

The petitioner relies upon a certificate from its Chartered Accountant (Annexure P-7) to the effect that its gross turnover during the last three years i.e. 2012-13, 2013-14 & 2014-15 is Rs.22,37,79,666/-. The grievance of the petitioner is that condition No.16, as is contained in the tender notice, was not the condition in the earlier years, which has been introduced for the first time and that the respondents are treating the annual turnover as the account of a contractor, which stands exhausted with the value of the works being executed by the contractors. It is contended that annual turnover is sought by the State to assess the suitability of a contractor to execute the work and cannot be taken into consideration as an account of a contractor out of which the contracts under execution are subtracted. Such condition has no reasonable nexus with the objective to be achieved i.e. a tenderer has the capacity to execute the work, thus, not legal and binding.

On behalf of the respondents, it has been pointed out that on 25.03.2015, a meeting was held under the Chairmanship of the Chief Engineer, Drainage with all the Superintending Engineers of Drainage Administration to work out the modalities of the tenders for the works to be executed in the State of Punjab. It was decided that after finalization and allotment of works by one circle, the residual turnover and residual working capital of each analysis evaluated by the circle will be intimated to the next circle and so on to the other circles in sequence. It is pointed out that average financial turnover of the petitioner for the last 3 years was Rs.746.00 lac and that the petitioner utilized the turnover of Rs.603.13 lac in the tender related to Amritsar Drainage Circle and, thus, its residual turnover remained Rs.142.87 lac. Therefore, it is said to be conveyed that the petitioner can be given a contract, which has a value of Rs.142.87 lacs. The

purpose of introducing such condition has been explained in para 7 of the reply. Para 7 and other relevant paras from the reply read as under:

“7. That the motive behind evaluation the residual turnover and residual working capital of all the agencies after finalization & final allotment of the works by one circle is that the same agency may not show the same working capital and turnover in the next tenders. This condition has been uniformly applied to all the agencies / contractors and in such circumstances, the petitioner has not been discriminated.

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9. That the criteria depicted in the tender documents is applicable to all the bidders. The inefficiency-inability on the part of the petitioner to complete all the formalities/conditions laid down in the tender notice cannot be attributed to the answering respondents. The tender conditions imposed by the answering respondents cannot be said to be unfair, arbitrary only for the reason that the petitioner does not fulfill the same. So, the writ petition filed by the petitioner is liable to be dismissed on this ground alone.

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12. That it is also respectfully submitted here that the instant works relate to flood protection measures to be adopted for rivers. Non-execution/delay in execution of these works can lead to breaches in Flood Protection Embankment and can flood the adjoining cities/villages, which can also endanger the lives of the residents of the area. As the works in question are emergent and of utmost importance and as such these conditions have been imposed to call only the competent and efficient contractors.”

The respondents have also attached communication dated 20.04.2015 (Annexure R-1) from the Nodal Officer, Executive Engineer, Amritsar Drainage Division, Amritsar to the Superintending Engineer, Ferozepur Drainage Circle, Ferozepur giving the details of residual turnover and residual working capital of the agencies. Such details are extracted below:

Sr. No.	Details	S.B. Construction Com. (Amount in lac)	Khara Contractor (Amount in lac)	H.S. Engineer & Associates (Amount in lac)
1.	Average Financial Turnover for the last 3 years	2012-13=203.00 2013-14=564.00 2014-15=1471.00 Total = 2238.00 Average = 746.00	2012-13=1824.00 2013-14=1996.00 2014-15=4000.00 Total = 7820	2012-13=1029.75 2013-14=1000.00 2014-15=4241.00 Total = 6270.75 Average=2090.25

2.	Turnover utilized in tenders related to this Circle	ADD, ASR 90% of 258=232.20 BDD, ASR 90% of 189=170.10 GDD, GDP 90% of 223.14=200.83 Total=603.13	ADD, ASR 90% of 72=64.80 BDD, ASR 90% of 53.37=48.03 Total=112.83	GDD, GDP 90% of 66.73=60.66
3.	Residual Turnover	746.603.13=142.87	2607-112.83=2494.17	2090.25-60.06=2030.19
4.	Working Capital as available in the bank account of the agency	156.42	667.42	184.00
5.	Working capital utilized in the Circle	ADD, ASR 20% of 258=51.60 BDD, ASR 20% of 189=37.80 GDD, GDP 20% of 223.14=44.63 Total=134.03	ADD, ASR 20% of 72=14.40 BDD, ASR 20% of 53.37=10.67 Total=25.07	GDD, GDP 20% of 66.73=13.35
6.	Residual Working Capital	156.42-134.09=22.39	667.42-25.07=642.35	184.00-13.5=170.65

During the course of arguments, the respondents were directed to produce the minutes of meetings held on 17.03.2015 and 25.03.2015 under the Chairmanship of the Chief Engineer, Drainage. Minutes of the meeting held on 17.03.2015 record a decision of the respondents that average annual financial turnover during the last three years should be at least 3 times of minimum prescribed under the CVC guidelines i.e. 90% of the cost of work in the tender. In the subsequent meeting held on 25.03.2015, the decision, which led to incorporation of condition No.16, was taken.

Learned counsel or the respondents has pointed out that question in respect of annual turnover was examined by a Division Bench of this Court in CWP No.9971 of 2013 titled 'Jhirmal Singh & others Vs. State of Punjab & others' decided on 17.12.2013. The Bench observed as under:

“We have heard learned Senior Counsel for the petitioners at length. We are not persuaded with most of the arguments advanced and thus learned Senior counsel for the petitioners does not seek to press the

petition but seeks limited indulgence of this Court. We thus dispose of both the writ petitions with the following agreed terms:-

- (i) While determining the minimum turn over for a tender, the multiplier should be taken keeping in mind the C.V.C. Guidelines applicable to the same.
- (ii) The petitioners/qualified contractors are free to make representations putting their points of view as to why in formulating future tenders there should be a variation from the terms and conditions of the tender in question. We make it clear that this aspect has to be examined by the concerned authorities and does not ipso-facto give rise to once again litigation on this issue.
- (iii) If in future, the petitioners are aggrieved by any terms and conditions of a particular tender, naturally that will be a fresh cause of action.

It is suggested by learned Senior Counsel for the petitioners that while floating the tenders of this nature, as in question in the present case, the respondent's authorities may examine the feasibility of floating the tender at an early date rather than bringing it to the last date."

Thereafter, the decision to restrict the use of turnover in multiple contracts was taken so that the contractors do not bag contracts much beyond their financial capacity and technical capability, which may hamper the time-bound contracts to be executed in the State interest. It is argued that merely because the conditions are not suitable to the petitioner, he cannot make a grievance because such conditions are applicable to all the bidders. It is sought to be argued that the petitioner, in fact, wishes to create a monopoly on the basis of turnover to seek multiple contracts much beyond his financial capacity and technical capabilities. Such conditions are not unreasonable and are relevant with the objectives to be achieved i.e. to grant such number of contracts as can be executed by the contractors, so that they do not garner contracts beyond their capacity, which may defeat the

intention of the State to ensure due execution of the contracts in public interest.

We have heard learned counsel for the parties at length and find no merit in the present writ petition. Condition No.16, as reproduced above, is a condition, which restricts a contractor to be awarded with contracts equivalent to its average annual turnover. Such condition is fair and reasonable as one contractor on the basis of his average turnover should not be able to garner all the contracts quoting rates, which may be to oust other bidders from contest, but at the cost of risk of non-completion of the awarded contracts by such contractor. The award of contracts may defeat the competition and would create a monopolistic hold over the contracts to be executed. If a contractor is able to obtain more contracts than what is within the financial capacity and technical capability, the contractor may not be able to execute work, which are time bound keeping in view the rainy season. The interest of the State is that all contracts should be executed and the State should not be subjected to delay and frustration of the contracts on account of the inefficiency or inability of the contractors to execute the works.

On the other hand, the method adopted will ensure that the contractor will get the contracts equivalent to its financial capacity and technical capabilities. Work will, thus, be distributed amongst the contractors and such process will not create a monopoly in favour of one tenderer. The petitioner has already got contracts from the Irrigation Department and to say that all the contracts in which he participates should be granted to him is unreasonable and is to create a monopoly in his favour, which cannot be countenanced.

The power of judicial review in respect of the conditions in the contract can be exercised if the conditions are impossible to perform or so arbitrary and discriminatory, which do not serve the purpose of the public contracts. Merely because there could be a better condition or more refined condition will not confer jurisdiction in this Court to set aside condition No.16 for the reason that one or the other contracts stands excluded from the execution of the work keeping in view the average turnover of a bidder. Thus, we do not find any merit in the present writ petition.

However, at this stage, learned counsel for the petitioner has raised an argument that the petitioner is the lowest tenderer and if contract is not awarded to it, the State will suffer additional cost of over Rupees one crore.

Though the petitioner cannot be made to raise a grievance, when he is not crossing the barrier of technical satisfaction of the bid, but the public interest warrants that the tender is not given to a contractor on a rate, which is higher than the rates offered by the competitors.

Consequently, while dismissing the present writ petition, we order that the State shall be free to negotiate the rates offered by the bidders so as to bring it par with the rates quoted by the petitioner in the peculiar facts and circumstances of the present case.

(HEMANT GUPTA)
JUDGE

29.05.2015
Vimal

(LISA GILL)
JUDGE