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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 8522/2017 & CM No. 35065/2017

SUN AGRIFRESH INDUSTRIES PVT LTD ..... Petitioner

Through: Mr Arvind Sah, Advocate.

versus

MINSITRY OF RURAL DEVELOPMENT DEPARTMENT OF LAND RESOURCES CGO COMPLEX ..... Respondent

Through: Mr Vinod Diwakar, CGSc with Ms Misha P. Madhu, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **20.12.2018**

1. The petitioner has filed the present petition, *inter alia,* impugning a letter dated 05.05.2017, whereby the petitioner's requests for approval of the inception report; extension of time for performance of the contract; and release of the bank guarantees, were rejected.

2. The petitioner also prays that the respondents be directed not to invoke the bank guarantees furnished by the petitioner.

3. The controversy in the present petition relates to the contract dated 10.10.2015, which was entered into between the petitioner and the respondents for undertaking the Impact Evaluation Study of Watershed Projects sanctioned during the specified period. Whilst the petitioner has partly performed the contract in question and is ready and willing to perform the balance, the respondents have rescinded the contract on the ground that it was entered into without the approval of the competent authority.

4. The controversy in the present case arises in the following context.

4.1 On 05.01.2015 in-principle approval of the Secretary, Department of Land Resources, was accorded for undertaking Impact Evaluation Study of Watershed Projects sanctioned during the period 2005-08. Thereafter, Expression of Interest (hereafter 'EOI') for short listing of agencies to conduct the study were invited through an advertisement published on 17.01.2015.

4.2 It is affirmed on behalf of the respondents that in response to the EOI, forty prospective bidders submitted their proposals. On 06.02.2015, a Consultancy Evaluation Committee (hereafter 'CEC') was constituted with the approval of the concerned Secretary. Thereafter, a meeting of CEC was held on 12.03.2015 to evaluate the proposals received pursuant to the invitations to submit EOI, and it short listed the firms on the basis of the criteria as laid down and the rules as applicable.

4.3 The CEC short listed twenty such entities for issuance of Request for Proposal (hereafter 'RFP') and the RFPs to the said firms were issued on 19.05.2015.

4.4 Thereafter, a pre-bid meeting was conducted in the Programme Division on 02.06.2015. In response to the RFPs, 4 entities submitted their proposals within the time prescribed. The petitioner was one of them.

4.5 On 23.07.2015, a meeting of the CEC was held to evaluate the technical proposals submitted by the bidders and for opening of the financial bids of the technically qualified bidders.

4.6 It is affirmed on behalf of the respondents that the proposals were processed in the Programme and Integrated Finance Division of the Department of Land Resources. The proposal submitted by the petitioner was found to be technically competent and its financial bid was the lowest (a bid for executing the assignment for a sum of ₹7,55,27,310/-).

4.7 The petitioner was, accordingly, declared as the lowest bidder (L-1) and, thereafter, a work order was issued to the petitioner on 23.09.2015, in terms of which the petitioner was required to submit a Comprehensive Impact of Evaluation of Watershed Projects.

4.8 On 10.10.2015, the parties entered into a contract (hereafter 'the Agreement'). The Agreement was entered into by an officer of the Programme Division on behalf of the respondents.

4.9 The RFP included the payment terms, which are also a part of the Agreement between the parties. The said payment terms are set out below:-

"**17. Payment Terms**

(a) The payment schedule would be linked with the deliverables in ToR-Inception report.

(b) State-wise status report on mid-term evaluation of watershed projects.

(c) National Level consolidated comprehensive study report on watershed project and mid-term performance.

SUMMARISED PAYMENT SCHEDULE

Sr.No.	**Condition for Payment**	**% of Total Value of contract**
1.	Upon signing of contract and submission of Bank Guarantee (Advance).	25
2.	Submission and Acceptance of Inception Report	15
3.	Submission of State wise Report	25
4.	Submission of Consolidated Comprehensive Study Report.	25
5.	Acceptance of the Consolidated Report	10
Total		**100**

4.10 As is apparent from the above, the payment for the assignment was to be paid on progress linked tranches. Accordingly, in terms of the Agreement, the respondent paid a sum of ₹1,88,81,827/- being the amount equivalent to 25% of the total value of the contract, in advance. The next tranche equivalent to 15% of the contract value was agreed to be disbursed on submission of the Inception report. In terms of the Agreement, the petitioner furnished a bank guarantee for a sum of ₹1,89,00,000/- as *security for compliance with its obligations in accordance with the contract*. Further, the petitioner also furnished a performance bank guarantee in the sum of ₹38,00,000/- (being 5% of the contract value).

4.11 The petitioner, thereafter, proceeded to execute the work assigned and, on 14.10.2015, the petitioner submitted the inception report. The respondents required certain modifications with regard to the same. The revised inception report was submitted by the petitioner on 21.10.2015.

5. The petitioner has also produced the copy of the minutes of the meeting of the file notings, which indicate that the inception report submitted by the petitioner was examined and it was found that it was in accordance with the provisions of the Terms of Reference (ToR) as well as the provisions of the RFP. The proposal to accept the same, subject to certain conditions, was also forwarded. The relevant extract of the file notings read as under:-

> "5. The Inception Report submitted by the evaluating agency has been examined and it is in accordance with the provisions of ToR as well as the provisions of RFP. We may accept the same subject to the following conditions:-
>
> i. To strictly follow the detailed plan of approach

with reference to Scope of work for the study.

ii To comply with the Methodology and work plan in accordance with the provisions of ToR.

iii To strictly follow the time schedule for deliverables of the study provided in Para-12 of the inception Report.

iv To strictly follow the provisions provided in ToR in respect of the Collaborating Agencies and ensure that the eligibility conditions & experience etc. in respect of the key persons of the collaborating agency are in accordance with the provisions of ToR.

6. Submitted for approval please."

6. However, no approval was communicated to the petitioner, as the respondents decided to rescind the contract.

7. It is the respondent's case that the contract was awarded contrary to the General Financial Rules, 2005 (hereafter 'the Rules'), inasmuch as the approval of the competent authority (which in this case is stated to be the concerned Minister) was not obtained. The respondent states that the Department did not have the power to sanction the expenditure for a contract above a sum of ₹2 crores.

8. This is disputed by the petitioner. The petitioner claims that the contract in question was a standalone contract and cannot be construed as a contract for engaging a consultant or availing consultancy services. The petitioner states that in terms of the Rules, the Central Government has the power to award the contracts upto ₹20 Crores in respect of open tenders. The limitation of ₹2 Crore was placed only on engaging consultants or contracts for consultancy services. It is contended that the said provisions

would not apply to a standalone project for conducting the study and submitting a report.

9. It is not necessary for this Court to examine this issue in any detail in these proceedings. It is apparent that the dispute between the parties, essentially, is whether the rescission of the Agreement is wrongful. Plainly, specific performance of the Agreement cannot be awarded as damages would be an adequate remedy, and it would be necessary for the petitioner to establish the same in an appropriate proceeding. Thus, the petitioner's prayer for setting aside the letter dated 05.07.2017 cannot be accepted. However, it would be open for the petitioner to institute an appropriate action to challenge the decision holding the Agreement to be void *ab initio.*

10. Insofar as the return of the bank guarantee is concerned, it is noticed that the bank guarantee for a sum of ₹1,89,00,000/- was issued as for securing the payment made in advance, which was made. The said advance was till submission of the inception report which has been, admittedly, submitted by the petitioner. The petitioner's contention that the inception report was duly evaluated has also not been controverted. In terms of the payment schedule, the petitioner would now be entitled to further 15% of the contract value, which has been withheld by the respondents on account of the rescission of the contract. It is also pointed out by the petitioner, that it has incurred significant costs in preparation of the inception report.

11. Clearly, in these circumstances, the respondents cannot be permitted to invoke the bank guarantees which were provided for a limited purpose and in furtherance of the contract. Admittedly, the petitioner on its part is not in default of the terms of the contract and, therefore, there would be no occasion for the respondents to invoke the said bank guarantees. It is

necessary to bear in mind that the said guarantees were issued only as security for due performance of the obligations by the petitioner. The respondents cannot, on one hand, refuse to accept the performance and on the other hand, invoke the security provided for due performance of such performance.

12. In view of the above, the respondents are directed to return the bank guarantees to the petitioners (which, this Court is now informed, has already expired). It is clarified that all rights and contentions of the parties regarding the termination of the Agreement are reserved. It would be open for the petitioner to institute appropriate proceedings for recovery of damages including for expenses for keeping the bank guarantees alive, or raise any such claim as advised. It would be equally open for the respondents to contest the claim or raise counter claim, if any.

13. The petition is disposed of in the above terms. The pending application is also disposed of.

VIBHU BAKHRU, J

DECEMBER 20, 2018/MK