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

\+ **W.P.(C) 11344/2017 & CM APPL. 46363/2017**

M/S PSS SECURITY SOLUTIONS THROUGH ITS SOLE PROPRIETOR. ..... Petitioner

Through Mr Tanuj Khurana, Mr J.S. Narula, Advocates.

versus

GOVT. OF NATIONAL CAPITAL TERRITORY OF DELHI AND ANR. ..... Respondents

Through Mr Sanjoy Ghose, ASC, GNCTD with Ms Urvi Mohan, Advocates for GNCTD.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **08.05.2019**

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning a letter dated 29.11.2017 passed by the Director General Health Services (respondent no.2), whereby the performance security furnished by the petitioner is forfeited. In addition, the petitioner also prays that performance security in the sum of ₹36,46,000/-, which e lying with respondent no.2 for due performance of the contract, be refunded/released.

2. The controversy in the present petition relates to a contract for providing uniformed Nursing Orderly/Attendant Services to various dispensaries and establishments under the Directorate of Health

Services for a period of one year. A notice inviting tenders (NIT) for providing such services was issued by respondent no.2 on 16.06.2015.

3. The petitioner responded to the said tender and furnished a Pre-Qualification Bid Form on 23.09.2015. The petitioner's bid was found to be the lowest (L1) and the petitioner was called upon to provide the detail of business model according to the rates quoted by it.

4. It is relevant to note that the petitioner had submitted a security (EMD) in the sum of ₹5,86,000/-, in the form of a Fixed Deposit Receipt (FDR), along with its bid.

5. On 29.01.2016, respondent no.2 issued a letter to the petitioner confirming that the bid submitted by the petitioner had been approved by the Competent Authority. The said letter also indicated the formalities for operation of the contract. In addition, the petitioner was called upon to submit (i) letter of acceptance; (ii) performance security for an amount of ₹30,46,00/- as per the terms and conditions of the Tender Documents; and (iii) the list of workers and supervisors. The said letter also indicated that the said compliances were necessary for execution of the agreement as stipulated in the Tender Documents.

6. In response to the aforesaid letter, the petitioner submitted a letter of acceptance on 01.02.2016. Thereafter, on 02.02.2016, respondent no.2 reiterated its request to submit a list of workers and supervisors and the performance security in terms of the tender. Since the EMD of ₹5,86,000/- submitted by the petitioner alongwith the bid had not been returned, the petitioner requested that the same be refunded in order for the petitioner to furnish the Performance

Guarantee of an amount of ₹30,46,000/-.

7. Admittedly, the said EMD was returned to the petitioner to enable the petitioner to extend the validity of the FDR for the same to be accepted against the performance security. In addition, the petitioner also submitted a bank guarantee in the sum of ₹24,60,000/- under cover of its letter dated 15.02.2016, being the balance amount of performance security. In the aforesaid manner, the petitioner complied with the requirement of furnishing the performance security of ₹30,46,000/-: ₹24,60,000/- as a bank guarantee and ₹5,86,000/- in the form of FDR.

8. Before the Agreement could be entered into, respondent no.2 received information that the petitioner had collected money from the prospective workers. In view of the aforesaid allegation, the petitioner was called upon to submit an explanation for collecting deposits from the prospective workers and was also directed to refund the amount and submit proof of the same.

9. In compliance with the aforesaid demand, on 19.02.2016, the petitioner filed an undertaking with respondent no.2 affirming that it had returned back the deposits collected from prospective workers. This letter was followed by another communication dated 23.02.2016 calling upon the petitioner to submit an affidavit, regarding refund of the payments made to all prospective workers as per the lists submitted by the petitioner on 08.02.2016. Admittedly, this was also complied with by the petitioner.

10. Notwithstanding the above, on 04.04.2016, respondent no.2

issued a show cause notice once again calling upon the petitioner to furnish an explanation from the petitioner for collecting the money from the prospective workers. The petitioner was further called upon to show cause as to why the offer letter should not be cancelled and the performance security be not forfeited.

11. The petitioner responded to the said show cause notice disputing the allegations made against it. The petitioner also requested that the performance security not be forfeited and the contract should be awarded to the petitioner. The petitioner's request was not acceded to.

12. Since the petitioner did not receive any further information in respect of the said show cause notice, the petitioner filed a writ petition –W.P. (C) 10065/2017 captioned ***M/s PSS Security Solutions Sole Proprietor v. Govt. NCT of Delhi & Anr*** – before this Court. The said petition was disposed of by an order dated 14.11.2016 while recording the submission made on behalf of the respondents that a speaking order would be passed within a period of six weeks from that date.

13. In compliance with the statement made before the Court, the respondents passed an order dated 29.11.2017, which is impugned in the present petition.

14. The principal controversy involved in the present petition is whether the respondents are entitled to forfeit the performance security. It is contended on behalf of the petitioner that since the Agreement was not executed with the petitioner, the action of the

respondents to forfeit the performance security is unsustainable.

15. The petitioner had explained that it had collected funds from various workers in order to ensure that the said workers join their duties as assigned to them.

16. Insofar as the petitioner's explanation regarding collection of money from the prospective workers is concerned, this Court is not inclined to interfere with the view expressed by the respondents. Clearly, the petitioner was not entitled to collect any sums or deposits either as security or as an insurance from the said prospective workers that they would report for duty as may be assigned. In view of the above, the only limited question that arises for consideration is regarding forfeiture of the performance security.

17. It is an admitted case that a definitive agreement was not entered into between the parties. In view of the above, there was no occasion for the petitioner to perform the contract. It is relevant to note that by the letter dated 29.01.2016, the petitioner was called upon to submit various documents and performance security in the sum of ₹30,46,000/ in order that an agreement could be executed. It is seen that the said letter was also not in conformity with the terms and conditions as stipulated in the Tender Documents inasmuch as the performance security was required to be furnished only upon entering into the agreement. This is evident from Clause 17 of the Tender Documents. The relevant sub-clauses of Clause 17 are set out below:-

"**17. Award of Contract**:-

17.1. Award of the contract will be made to the successful evaluated bidder whose bid has been found to be responsive and who is eligible and qualified to perform the contract satisfactorily as per the terms and conditions incorporated in the bidding document.

17.2. The Authority / Department will communicate the successful bidder by facsimile confirmed by letter transmitted by registered post that his bid has been accepted. This letter (hereinafter and in the condition of contract called the "Letter of Offer") shall prescribe the amount at which the contractor will be paid in consideration of the execution of services by the contractor as required in the contract.

17.3 The successful bidder will be required to execute an Agreement in the form specified in Annexure-V within a period of 14 days from the date of issue of Letter of Offers of department/DHS.

17.4 The successful bidder shall be required to furnish Performance Security within 14 days of issue of 'Letter of Offer' for an amount equal to 10% of the contract value in the form of Account Payee DD or Fixed Deposit Receipts, or Bank Guarantee from a nationalized bank in an acceptable form (Annexure-VI) in favour Directorate of Health Services. The Performance Security shall remain valid for a period of sixty days beyond the date of completion of all contractual obligations. In case the contract period is extended further, the validity of Performance Security shall also be extended by the contractor accordingly.

17.5. Failure of the successful bidder to comply with the requirements of above clauses shall constitute sufficient grounds for the annulment of the award and forfeiture of Performance Security."

18. It is contended by Mr Ghose, learned counsel appearing for the

respondents that it was not necessary that a formal agreement be entered into for the contract to be effective. However, it is not disputed that in terms of Clause 17.3 of the Tender Documents, a successful bidder was required to execute an agreement in the form as specified within a period of 14 days from the issue of letter of offer. This is not an empty formality but was considered essential to bind the parties to their respective obligations.

19. It is seen that the respondents had consciously refrained from executing the Agreement, as it is apparent that the respondents did not wish to proceed further until a decision was taken in respect of the allegations levelled against the petitioner. The clear import of their actions is that the respondents did not want to enter into a definitive contract with the petitioner.

20. The Tender Documents also provided that if the bidder fails to enter into the agreement, the bid security furnished by the bidder would be forfeited. This is clear from Clause 7.6 of the Tender Documents, which is set out below:-

> "7. Earnest Money Deposit (EMD)
>
> xxxx xxxx xxxx xxxx
>
> 7.6 The EMD may be forfeited:
>
> a. If the bidder withdraws or amends its bid or impairs or derogates from the bid in any respect within the period of validity of its bid, or
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> b. In case of a successful bid, if the Bidder fails;
>
> i. to sign the Contract, or

ii. to furnish performance security or

iii to sign and return the duplicate copy of the letter of award within prescribed time.”

21. In the present case, there is no failure on the part of the petitioner to enter into the agreement. Although, the petitioner was ready and willing to perform the contract, however, the work order was not issued to the petitioner and he was not called upon to deploy any workers despite the petitioner sending various reminders seeking instruction for deployment of workers. It is the respondents' contention that since the definitive agreement was not executed between the parties and allegations made against the petitioner were under consideration, the petitioner was not called upon to perform the contract. Clearly, in view of this position, the question of forfeiting the performance guarantee does not arise.

22. Mr Sanjoy Ghose, learned counsel appearing for the respondent contended that the agreement was not entered into on account of the allegations made against the petitioner which were found to be merited. In the circumstances, the petitioner itself was responsible for non-execution of the contract of the defective agreement. He submitted that once having discovered that the petitioner had accepted deposits from prospective workers, the respondents could not be expected to enter into a contract with the petitioner.

23. Mr Khurana, the learned counsel appearing for the petitioner disputes the above. Nonetheless, he submits that to put a quietus to the controversy the petitioner would accept the responsibility for failure to

enter into a definitive agreement. He submits that the consequence of failure to enter into an agreement is forfeiture of EMD in terms of Clause 7.6 of the Tender Documents and the petitioner is willing to suffer the same, however, the balance security is required to be released to the petitioner.

24. In view of the above, without going into the question whether the EMD could be forfeited in this case, it would be apposite to direct respondent no.2 to limit the forfeiture to a sum equivalent to the EMD. This is in view of Mr Khurana's statement that the petitioner accepts the responsibility for not entering into a definitive agreement. Thus, the respondents would be well within their right to forfeit an amount equivalent to the EMD – a sum of ₹5,86,000/-. However, the respondents cannot be permitted to forfeit the balance performance security. In view of the above, the respondents may encash the FDR of ₹5,86,000/-; but, the original performance bank guarantee in the sum of ₹24,60,000/- is directed to be returned to the petitioner within a period of one week.

25. The petition is disposed of in the aforesaid terms. The pending application is also disposed of.

26. Order *dasti* under signatures of the court master.

VIBHU BAKHRU, J

MAY 08, 2019
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