IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28..02..2022

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition No.14476 of 2018

P.Yayathi ...Petitioner

-Versus-

Food Corporation of India,
No.8, Mayor Sathyamurthy Road,
Chetpet, Chennai 600031.
Rep. By its General Manager (TN)

...Respondent

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari Mandamus calling for the records pertaining to the Termination Order bearing S & C 13(6)/12/ 2017/ ARK/ CONT dated 31.8.2017 issued to the petitioner by the respondent in respect of the E-Tender/ E-Procurement bearing S&C13(6)/12/2017/ARK/CONT dated 06.06.2017 and quashing the same as being unlawful unconstitutional and contrary to law and consequentially direct the respondent to refund Rs.11,30,000/- (Rupees Eleven Lakhs Thirty thousand) to the petitioner that comprises of Earnest Money Deposit and Security Deposit for performance of contractual obligations furnished by the petitioner towards the respondent E-Tender/E-Procurement bearing S&C13(6)/12/2017/ARK/CONT dated 6.6.2017.

For Petitioner : Mr.S.P.Vijayaragavan

For Respondent : Mr.M.Imthias

ORDER

This writ petition has been filed challenging the order dated 06.06.2017 passed by the respondent terminating contract awarded on the petitioner and for a consequential direction for refund of earnest money Deposit and Security Deposit of Rs.11,30,000/- (Rupees Eleven Lakhs Thirty thousand) to the petitioner.

2. The facts leading to the filing of this writ petition in brief are as follows:-

(i) The contract division of the respondent - Food Corporation of India (in short, "the FCI") has floated e-tender/e-procurement for appointment of regular handling contract at RH Arakkonam and transport contractor for movement of food grains and allied materials, etc., from Arakkonam and vice versa for a period of two years. The petitioner was the lowest tenderer (L1) and his offer was accepted. Accordingly, a letter of acceptance was also issued to the petitioner with a direction to furnish the required security deposit within 15 working days of letter of acceptance as per clause 7(1)(a) of The Tender Conditions and the time fixed for the payment of security deposit was expired on 08.08.2017 after adjusting the Earnest Money Deposit.

(ii) The petitioner did not make the security deposit within the stipulated time, he, however, made the security deposit belatedly on 21.08.2017 only through RTGS. In such circumstances, invoking the clause 7(iv) of the Tender Conditions, the respondent FCI terminated the contract and also forfeited the Earnest Money Deposit of Rs.9,04,000/- by order dated dated 31.8.2017. It is this order which is under challenge in this writ petition.

3. The respondent – FCI has filed a detailed counter affidavit inter alia contending as follows:

(i) That the petitioner was the lowest tenderer (L1) and as such his tender was accepted and a letter of acceptance was also issued to him on 18.07.2017. As per clause 7(1)(a) of the Tender Conditions the petitioner should have remitted the security deposit to a sum equivalent to 5% of the value of the contract in the form of Demand Draft or Pay Order issued by a scheduled bank or through electronic clearance and for another sum equivalent to 10% of the value of the contract, the petitioner should furnish security in the form of an irrevocable and unconditional Bank Guarantee issued by State Bank of India or any of its Associate Banks of by any Public Sector Bank in the format prescribed in Appendix-IV thereto which would be enforceable till six months after the expiry of the contract period. Thereafter, the petitioner should furnish security for an additional sum equivalent to 10% of the value of the contract in the form of irrevocable and unconditional Bank Guarantee issued by the State Bank of India or any of its Associate Banks of by any Public Sector Bank in the format prescribed in Appendix-IV thereto which would be enforceable till six months after the expiry of the contract period.

(ii) The petitioner should have remitted a sum equivalent to 2% of the value of the contract amount after adjusting the EMD on or before 08.08.2017. Whereas the petitioner has remitted the security deposit only on 21.08.2017 that is after the expiry of 15 workings days after the issuance of letter of acceptance. Thus, the contract was terminated invoking section 7(iv) of the Tender Conditions.

4. The learned counsel appearing for the petitioner submitted that clause 7(ii) of the Tender Conditions provides for further extension of 15 working days in case of failure of tenderer to deposit the Bank Guarantee as stipulated in clause 8(i)(a) subject to payment of penalty @ 1% of whole amount of the security deposit and another 15 working days with payment of penalty @ 2% on the whole amount of the security deposit. Therefore, the petitioner paid the security deposit within the extended period of 15 working days, but, without considering the same, his contract was terminated.

5. Disputing the above, the learned counsel appearing for the respondent FCI contended that clause 7(ii) of the Tender Conditions applicable only to further payment of security deposit of sum equivalent to 10% of the value of the contract provided under clause 7(1)(b) of the Tender Conditions. So far as initial amount of security deposit of a sum equivalent to 5% of the value of the contract should have been paid within 15 working days of letter of acceptance and there was no extension time is available for the initial payment of security deposit.

6. I have considered the rival submissions and perused the records carefully.

7. Before considering the issue it would be useful to extract hereunder the relevant clause of the Tender Conditions relating to payment of security deposit and termination of contract:-

> "7. Security Deposit:-
>
> (i) The successful Tenderer shall furnish, within fifteen working days of acceptance of his tender, a Security Deposit for the due performance of his obligations under the contract. The Security Deposit shall consist of;
>
> (a) A sum equivalent to 5% of the value of the Contract of Rs.22,60,000/- (Rupees Twenty Two Lakhs Sixty Thousand only) in the form of Demand Draft or Pay Order

issued by a scheduled bank or through Electronic Clearing System (ECS) / other electronic means in favour of the General Manager, Food Corporation of India. The contractor at his option may deposit 50 (Fifty) per cent of this amount within fifteen working days of acceptance of his tender while the balance 50 (fifty) percent may be paid by the contractor by deductions at the rate of 10 (ten) per cent from the admitted bills. The Security Deposit shall not earn any interest.

(b) Another sum equivalent to 10% of the value of contract of Rs.45,20,000/- (Rupees Forty Five Lakhs Twenty Thousand only) in the form of an irrevocable and unconditional Bank Guarantee issued by State Bank of India or any of its Associate Banks or by any Public Sector Bank in the format prescribed in Appendix-IV which shall be enforceable till six months after the expiry of the contract period.

(c) If applicable, an additional sum of equivalent to 10% of the value of the contract of Rs.45,20,000/- (Rupees Fourty Five Lakh Twenty Thousand only) (in addition to a and b above), in terms of an undertaking provided by the tender for relaxation of eligibility conditions, in the form of an irrevocable and unconditional Bank Guarantee issued by SBI Bank or its Associate Banks or by other Public Sector Banks in the format prescribed in Appendix-V which shall be enforceable till six months after the expiry of the contract period.

(ii) In case of failure of tenderer to deposit the BANK GUARANTEE as stipulated in clause 7(i)(b) & (c) within 15 working days can be given subject to levy of penalty @ 1% of whole amount of the Security Deposit and another 15 working days with levy of penalty @ 2% on the whole amount of the Security Deposit by General Manager (Region).

(iii) The Security Deposit furnished by the Tenderer will be subject to the terms and conditions given in the Tender and the

Corporation will not be liable for payment of any interest on the Security Deposit.

(iv) In the event of the Tenderer's failure, after the communication of acceptance of the tender by the Corporation, to furnish the requisite Security Deposit by the due date including extension period, his Contract shall be summarily terminated besides forfeiture of the Earnest Money and the Corporation shall proceed for appointment of another contractor. Any losses or damages arising out of and incurred by the Corporation by such conduct of the contractor will be recovered from the contractor, without prejudice to any other rights and remedies of the Corporation under the Contract and Law. The contractor will also be debarred from participating in any future tenders of the Corporation for a period of five years. After the completion of prescribed period of five years, the party may be allowed to participate in the future tenders of FCI provided all the recoveries / dues have been effected by the Corporation and there is no dispute pending with the contractor/party."

7. On a careful perusal of the Tender Conditions it could be seen that the successful tenderer should furnish, within fifteen working days of acceptance of his tender, a security deposit for the due performance of his obligations under the contract which consists of three different forms. The first one is that the petitioner should furnish, within fifteen working days of acceptance, a security to a sum equivalent to 5% of the value of the contract in the form of demand draft or pay order or through electronic clearing system (ECS)/other electronic means; the second is security is to a sum equivalent to 10% of the value of the contract in the form of an irrevocable and unconditional Bank Guarantee issued by the State Bank of India or any of its Associate banks or by any Public Sector Bank in the format prescribed in Appendix-IV which shall be enforceable till six months after the expiry of the contract period; and the third one is, if applicable, the successful tenderer should furnish security to an additional sum equivalent to 10% of the value of the contract (in addition to sub clause (a) and (b) of clause 7 of the Tender Conditions) in terms of an undertaking

provided by the tenderer for relaxation of eligibility Conditions, in the form of an irrevocable and unconditional Bank Guarantee issued by the State Bank of India or its Associate Banks or by other Public Sector Banks in the format prescribed in Appendix-V which shall be enforceable till six months after the expiry of the contract period.

8. In case of failure of the tenderer to deposit the BANK Guarantee as stipulated in clause 7(i)(b) and (c) within 15 working days of acceptance of the tender, as per sub-clause (ii) of Clause 7 of the Tender Conditions, the General Manager (Region) can give further extension of 15 working days subject to levy of penalty @ 1% of whole amount of the security deposit and another 15 working days with levy of penalty @ 2% on the whole amount of the security deposit. The above condition made it very clear that extension of time provided under sub-clause (ii) of clause 7 would be applicable only insofar as security deposits under sub-clause (b) and (c) of clause of clause 7. Insofar as the security stipulated under sub-clause (a) is concerned, no extension of time has been provided under the tender conditions. As per sub-clause (iv) of 7 of the Tender Conditions , if the successful tenders failed to furnish the requisite security deposit by the due date his contract shall be summarily terminated besides forfeiture of the Earnest Money.

9. In the instant case, admittedly, the petitioner, who had become the successful tenderer (L1), has failed to furnish the requisite security within 15 working days of acceptance of his tender and hence, as per sub-clause (iv) of clause 7, his contract is liable to be terminated and EMD is also liable to be forfeited.

10. The learned counsel appearing for the petitioner made a feeble attempt to interpret sub-clause (iv) of clause 7 of the Tender Conditions to convince this court that the security deposit should have been paid by due date including extension period and it is not restricted to sub-clause (b) and (c) clause 7 alone and hence, the petitioner paid the security deposit within the extended period of 15 days. That contention of the learned counsel for the petitioner cannot be countenance for the simple reason that extension of time provided under clause 7(ii) of the Tender Conditions would be applicable only for payment of security deposit in respect of sub-clause (b) and (c) and the benefit of extension of time will not be extended to the tenderer who failed to make the initial payment of security deposit to a sum equivalent to 5% of the value of the contract within 15 working days of acceptance of his tender. Therefore,

this court does not find any illegality or irregularity in passing the impugned order by the respondent summarily terminating the contract of the petitioner and forfeiting the earnest money.

11. For the foregoing discussions, this court finds no merit the writ petition and the same deserves only to be dismissed.

In the result, this Writ Petition is dismissed. No cost.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

kmk

To

The General Manager (TN)
Food Corporation of India,
No.8, Mayor Sathyamurthy Road,
Chetpet, Chennai 600031.

+1 CC to Mr.S.P.Vijayaragavan, Advocate sr 13499
+2 Ccs to M/s.M.Imthias, Advocate sr 12999

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SKM(CO)
SP(11/04/2022)