IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

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CWP-14194-2016 (O&M).
Date of Decision: 18.07.2023.

MAKHAN LAL CONTRACTOR

. Petitioner

Versus

STATE OF PUNJAB AND OTHERS

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. G.S. Rana, Advocate, for
Mr. P.S. Rana, Advocate,
for the petitioner.

Ms. Niharika Sharma, AAG, Punjab.

Mr. Brajesh, Advocate, for Mr. G.S. Brar, Advocate,
for respondents No.2 and 3.

VINOD S. BHARDWAJ, J. (ORAL)

CM-17410-CWP-2022

The instant application has been filed under Section 151 of the Code of Civil Procedure, 1908 for placing on record Bidding Documents as Annexure R-2.

The application is allowed subject to all just exceptions.

Annexure R-2 is taken on record.

The Registry is directed to tag the same at appropriate place.

Main case

The present writ petition has been filed for seeking issuance of directions to the respondents to release the payment taken which was furnished as earnest money at the time of submission of the tender.

Learned counsel for the petitioner has argued that the petitioner had submitted an E-tender pursuant to the RIT/No/1/Tender LGIT Rupnagar 2015 of Rs.5,54,68,892/- and earnest money of Rs.11,09,380/- was deposited with the office of respondent No.3 i.e. the Executive Officer/Improvement Trust, Rupnagar. Vide letter dated 05.02.2015, the respondents sought clarification regarding the performance certificate No.104 dated 20.01.2015 furnished by the petitioner about providing and lying interlocking tiles in the street and roads at different places in the State of Punjab along with the quality performance certificate.

Vide allotment letter (Annexure P-2), the requisite clarification and documents were submitted by the petitioner, however, the respondents cancelled the tender process on 27.05.2015. A request was thereafter sent by the petitioner to the respondents for return of earnest money, however, the needful was not done and instead a communication was sent that Improvement Trust has passed a resolution to forfeit the said amount.

Respondents in their reply have submitted that the petitioner did not fulfill the terms and conditions of the tender and a clarification was sought. The reply furnished by the petitioner was not found to be satisfactory. Consequently, vide resolution No.112 dated 05.05.2017, the earnest money deposited by the Contractor was ordered to be forfeited.

Learned counsel for the respondents contends that certain performance certificates submitted by the petitioner were not found to be verified and exaggerated details have been furnished by the petitioner. He refers to clause 31 of the Instructions to Bidders as provided in the bid document to contend that there was a mis-representation of the facts by the petitioner. The relevant clause thereof reads as under:-

"***31. CORRUPT OR FRAUDULENT PRACTICES***

xxx xxx xxx

"Fraudulent Practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Employer, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish contract prices at artificial non-competitive levels and to deprive the Employer of the benefits of free and open competition."

Responding to the same, learned counsel for the petitioner has placed reliance on clause 16 of the Instructions to Bidders which pertain to bid security (earnest money) and provides the circumstances under which the bid security may be forfeited. The relevant extract whereof reads as under:-

16. ***BID SECURITY (EARNEST MONEY)***

xxx xxx xxx

16.5 The Bid Security may be forfeited.

(a) If the Bidder withdraws the Bid or seeks to modify, alter, add or subtract or put any rider on any ground whatsoever, afterBid opening during the period of Bid Validity; or

(b) In the case of a successful Bidder, if the Bidders falls within the specified time limit to :

(i) sign the Agreement; or

(ii) furnish the required Performance Security."

It is thus argued that the conditions in which the bid security could have been forfeited were not made out.

I have heard the learned counsel for the respective parties and have gone through the documents appended along with the present petition.

The clauses/conditions of the tender document extracted above are not subject matter of dispute. While the case of the respondents is that the petitioner had resorted to corrupt practices by misrepresentations of facts known to him to be incorrect. The case of the petitioner is that the forfeiture of bid security could be ordered only in the circumstances as provided in clause 16.5 of the bid document. Since the case of the petitioner does not fall under either of the said conditions, hence, clause 31 cannot vest any power with the respondents authorities to direct forfeiture notwithstanding the existence of the specified conditions under clause 16.5 of the tender document.

It is evident from the perusal of the clause 16.5 that bid security could have been forfeited only where the bidder withdraws the bid or seeks to modify or to add or subtract or to put any rider on any ground whatsoever during the bid opening and/or the bid validity. So far as clause 16.5 (b) is concerned, the same would come into operation where a bidder has been declared successful. Since the tender process had been cancelled without declaring any bidder as successful, clause 16.5 (b) would not be attracted in the given circumstances. Clause 16.5 (a) of the tender document does not vest any authority with the respondents to forfeit the security in the event of any alleged corrupt practice by misrepresentation of fact.

No other clause has been adverted to by the parties.

The power to order forfeiture is governed by the terms and conditions and as per procedure enshrined in the tender document. Security/earnest money may be ordered to be forfeited, however, such power ought to derive from a reading of the document in question. Where such power is not conferred upon the Authority, they cannot, under any other pretext direct forfeiture thereof.

In the absence of referring to any enabling grounds that would authorized the respondents Improvement Trust to direct forfeiture of the earnest money/bid security deposited by the petitioner, I do not find any legality and validity in the decisions taken by the respondents. The petition is accordingly allowed. The resolution No.112 dated 05.05.2017 directing forfeiture of the earnest money deposited by the petitioner is accordingly set aside. The respondents Improvement Trust is directed to refund the earnest money to the tune of Rs.11,09,380/- to the petitioner within a period of 06 weeks from today. In the event the needful is not done within the period as stated above, the aforesaid amount shall claim interest @ 6% per annum from the date of filing of the petition.

July 18, 2023 **(VINOD S. BHARDWAJ)**
raj arora **JUDGE**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No