IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.11344 of 2024
Reserved on : 09.07.2024
Pronounced on: 05.08.2024

M/s Nishchay India ....Petitioner

V/s

Union of India and others ....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN PALLI
HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present: Mr. R.K. Chandana, Advocate, for the petitioner.

Mr. Vijay Pal, Senior Panel Counsel, for the respondents-UOI.

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VIKRAM AGGARWAL, J.

1. The petitioner assails the communication dated 12.04.2024 (Annexure P-8), vide which the claim of the petitioner seeking reduction in the performance security from 8.10% to 3% in terms of the communication/instructions dated 01.01.2024 (Annexure P-3) and for grant of a period of 45 days to submit the same, was rejected.

2. The ESIC Model Hospital, Ludhiana is stated to have invited bids from eligible/reputed and experienced agencies through the GeM portal for providing healthcare human resource outsourcing service for a period of two years or till joining of regular staff, whichever is earlier (Annexure P-1). As per the bid document (Annexure P-2), the bids were to be submitted by 2.00 p.m. on 20.11.2023 and were to be opened at 2.30 p.m. on the same day. It has been averred that as per Rule 171(i) of the General Financial Rules 2017, the performance security @ 3% to 10% of the value of the contract was to be obtained from the successful bidders. However, vide communication dated 01.01.2024 (Annexure P-3), the said rule was

amended and the performance security was fixed at 3% to 5%.

3. The petitioner is stated to have submitted its bid which was accepted and the petitioner was awarded the work for two years starting from 07.03.2024 to 07.03.2026. A contract agreement in this regard was executed on 04.03.2024 (Annexure P-4). As per the contract, the performance security was fixed at 8.10%.

4. The petitioner submitted a request on 06.03.2024 (Annexure P-5) to reduce the performance security to 3%, to which a response dated 28.03.2024 (Annexure P-6) was received stating that the same was not possible and the petitioner was called upon to deposit the performance security @ 8.10% within ten days.

5. Another representation dated 08.04.2024 (Annexure P-7) was moved with a similar request but the same was also declined vide order dated 12.04.2024 (Annexure P-8), leading to the filing of the present writ petition.

6. Learned counsel for the petitioner was heard.

7. It was submitted by learned counsel for the petitioner that in view of the amendment vide communication dated 01.01.2024, the performance security would be chargeable @ 3% and not @ 8.10%. Reference was made to the said communication and it was submitted that the respondents had taken an erroneous view that this amendment would not be applicable to the contract in question. Learned counsel submitted that the action of the respondents is illegal and arbitrary and thus deserves to be set aside and the writ petition deserves to be allowed, as prayed for.

8. We have considered the submissions made by learned counsel for the petitioner.

9. The petitioner, for reasons best known to it, has not annexed

any document showing that bids had been invited by the ESIC Model Hospital, Ludhiana. Be that as it may, Annexure P-1 are the general terms and conditions on the GeM portal, dated 16.08.2023. Clause 2(l) defines performance security:-

> "***PERFORMANCE SECURITY" shall mean Insurance Surety Bonds, Account Payee Demand Draft, Fixed Deposit Receipt from a Commercial Bank, Bank Guarantee (including e-Bank Guarantee) from a Commercial Bank or online payment in an acceptable form as defined in the bid document safeguarding the purchaser's interest in all respects."***

10. Further, Clause 7 deals with performance security and performance and 7(ii) deals with the performance security:-

> ***"ii. In case of contracts placed following e-Bidding/RA, Performance Security valid for 2 months beyond the date of completion of all contractual obligations including warrantee obligations, will be obtained from the successful Bidder, for ensuring due performance of the contract GeM recommends quantum of Performance Security @ 2% of the value of contract. The Buyer also has the option to select Performance Security between 2% to 10%. While finalizing e-Bid/RA, Buyer shall indicate the percentage (%) of Performance Security required to be submitted by successful bidders. In case of any extension of contract obligation period, the seller shall be liable to suitably extend the validity of the Performance Security.***
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> ***Such Performance Security must be submitted by Seller to the Buyer within 15 days of award of contract on GeM. The payments to the seller shall become due only after receipt of Performance Security by the Buyer and verification of its genuineness. No interest shall be payable upon the Performance Security / PBG or any other amounts payable by the Seller to the Buyer under the Contract.***

If the Seller fails or neglects to observe or perform any of his obligations under the contract it shall be lawful for the Buyer to forfeit either in whole or in part, the Performance Security furnished by the Seller. If the Seller duly performs and completes the contract in all respects the Buyer shall, refund the Performance Security, as the case may be, to the Seller within 30 days of completion of all contractual obligations by the Seller."

11. Annexure P-2 appears to be the invitation of bids, dated 30.10.2023, as per which bids were to be submitted by 2.00 p.m. on 20.11.2023 and had been opened at 2.30 p.m. on the same day. The performance bank guarantee percentage has been mentioned in this document as 8.10%. This, in fact, appears to be the invitation of bids which the petitioner referred to as Annexure P-1, which obviously was wrong.

12. It is an admitted fact that the petitioner emerged successful and was awarded the contract. The contract was executed on 04.03.2024. It provided that the successful bidder can submit the performance security in the form of account payee demand draft besides a performance bank guarantee. As per the own case of the petitioner, as detailed in paragraph 2.6 of the writ petition, in the said contract agreement also, the petitioner was required to give the performance security @ 8.10%.

13. The requests of the petitioner to reduce the performance security to 3% in terms of the communication dated 01.01.2024 were turned down by the respondents initially on 28.03.2024 and finally on 12.04.2024, stating that as per point No.7(ii) of the General Terms and Conditions of GeM, the payments to the seller would become due only after receipt of performance security by the buyer and verification of its genuineness. It was stated in the communication dated 28.03.2024 that the bids had been called

on 30.10.2023, whereas the amendment had come into effect from 01.01.2024 and would, therefore, be not applicable.

14. Now coming to the communication dated 01.01.2024, as per which the performance security was reduced to 3-5% from 3-10%. Clause (iii) of the said communication stated that all the procuring entities would issue future tenders with the performance security as stipulated in the said communication and they may also consider modifying tenders already issued and yet to open, wherever feasible:-

> ***"3. All procuring entities are requested to issue future tenders with the performance security as stipulated above. They may also consider modifying tenders already issued and yet to open, as above, wherever feasible."***

15. If one closely examines the communication, it emerges that first of all, it was to apply to future tenders. Then there was another clause giving an option to the procuring entities to consider modifying the tenders which had already been issued and were yet to open and that too wherever feasible. In the present case, the tender was issued on 30.10.2023 i.e. much prior to 01.01.2024 and was also opened on 20.11.2023, which was also much prior to 01.01.2024. The instructions dated 01.01.2024 would, therefore not apply to the instant tender, as was rightly held by the respondents vide communications dated 28.03.2024 and 12.04.2024. Even otherwise, it was for the respondents to see as to whether for tenders which had already been issued, whether it would be feasible to reduce the performance security or not. These are essentially administrative decisions which are not liable to be interfered with at the asking of anybody and everybody. Such decisions do not call for any interference unless and until they are unreasonable and in fact it is the decision making process which has

to be gone into and not the decision. Reference can be made to the judgments of the Supreme Court of India in the cases of ***Tata Cellular Vs. Union of India***, **1996 AIR (SC) 11,** ***Jagdish Mandal vs. State of Orissa*** **(2007) 14 SCC 517,** ***Silppi Constructions Contractors vs. Union of India and anr. etc. etc.*** **(2020) 16 SCC 489,** to name a few.

16. Keeping in view the totality of the facts and circumstances and the settled law on the subject, we are not inclined to interfere in the decision taken by the respondents and accordingly, finding the writ petition to be devoid of merit, we dismiss the same.

(ARUN PALLI)
JUDGE

(VIKRAM AGGARWAL)
JUDGE

Reserved on: 09.07.2024
Pronounced on:05.08.2024
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Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No