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

+ **W.P.(C) 8085/2023 & CM APPL. 15974/2024**

JBM AUTO LIMITED

..... Petitioner

Through: Mr. Pradeep Jain, Mr. Ashish Bansal,
Ms. Akshita Jain and Mr. Sambhav
Jain, Advocates.

versus

DELHI TRANSPORT CORPORATION

..... Respondent

Through: Mr. Vibhor Garg, Mr. Keshav Tiwari
and Ms. Ishita Mehta, Advocates with
Mr. Tarun Kumar, Asst. Foreman
DTC (SBU Office).

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

01.04.2024

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1. The Petitioner has approached this Court with the following prayers:

“(i) to issue a writ of mandamus order direction in favour of the Petitioner, thereby directing the Respondent to return/release the Performance Bank Guarantee OGT0005210051324 dated 06.02.2021 drawn on IndusInd Bank Ltd. for a sum of Rs. 61,25,00000 (“PBG-Supply”) and Performance Bank Guarantee PBGI01002100179 dated 29.05.2021 drawn on RBL Bank Ltd. for a sum of Rs. 30,44,86,000 (“PBGAMC”) in favour of the Petitioner ; and

(ii) to pass such other or further order which this Hon’ble Court may deem fit and proper in the interest of justice.”

2. The facts, in brief, leading to the filing of the instant writ petition are that the Petitioner herein is in the business of design, manufacture, supply, testing and commissioning of Buses. Material on record indicates that the



Respondents floated an e-Tender Global for supply of 1000 buses on 20.03.2020. Another tender for Annual Maintenance Contract was floated by the Respondent on 19.08.2020. The Petitioner participated in both the tenders and submitted Earnest Deposit Money Bank Guarantee (EMDBG) bearing No. OGT0005200045285 dated 04.08.2020 drawn on IndusInd Bank Ltd. for Rs.18 crores for manufacturing and supply of buses. The Petitioner also submitted Earnest Deposit Money Bank Guarantee (EMDBG) bearing No.0007NDLG00105021 dated 23.09.2020 drawn on ICICI Bank Ltd for Rs. 2.20 crores for Annual Maintenance Contract. A Letter of Acceptance bearing No.CGM/SBU/937/2021/19 was issued in favour of the Petitioner for supply of 700 Fully Built AC CNG Propelled Low Floor buses confirming to BS VI Norms (Euro-VI) Norms. The Petitioner was also awarded Letter of Acceptance bearing No. DY. CGM/SBU/937-AMC/2021/44 in respect of tender for Annual Maintenance Contract. The Letter of Acceptance was accepted by the Petitioner on 22.01.2021 and the Petitioner was awarded both the contracts on 01.02.2021 and 02.02.2021 respectively. The Petitioner, thereafter, gave a Performance Bank Guarantee bearing No. OGT0005210051324 drawn on IndusInd Bank Ltd. for a sum of Rs.61,25,00,000/- towards supply of 700 buses. Similarly, the Petitioner gave another Performance Bank Guarantee bearing No. PBGI01002100179 drawn on RBL Bank Ltd. for a sum of Rs.30,44,86,000/- towards Annual Maintenance Contract.

3. Material on record discloses that there were certain complaints regarding the award of the contracts to the Petitioner and a CBI inquiry has been initiated. The contracts have been kept in abeyance vide letter dated 12.06.2021.



4. The Petitioner has, thereafter, approached this Court by filing the instant writ petition for a direction to release the Performance Bank Guarantee bearing No. OGT0005210051324 dated 06.02.2021 drawn on IndusInd Bank Ltd. for a sum of Rs. 61,25,00,000/- and the Performance Bank Guarantee bearing No. PBGI01002100179 dated 29.05.2021 drawn on RBL Bank Ltd. for a sum of Rs. 30,44,86,000 in favour of the Petitioner.

5. The Petitioner at page 17 of the writ petition has categorically stated that it is willing to give an undertaking that as soon as the uncertain abeyance is lifted/withdrawn by the Respondent, the Petitioner shall issue fresh Performance Bank Guarantees. The relevant paragraph reads as under:

“F. Because in view of uncertain abeyance of the LoA-Supply and LoA-AMC, the Respondent may be directed to return to the Petitioner its PBG-Supply and PBG-AMC, thereby enabling the Petitioner to reduce its further losses. Nevertheless the Petitioner is willing to give undertaking that as soon as the uncertain abeyance is lifted/withdrawn by the Respondent, the Petitioner shall issue fresh Performance Bank Guarantees, after the Respondent make good the losses already suffered due the abeyance and after discussion with the Respondent on the fresh pricing/cost and fresh delivery terms to execute the present LoA-Supply and LoA-AMC.”

6. Notice was issued in the writ petition 10.07.2023. Reply has been filed in the matter.

7. Learned Counsel appearing for the Petitioner states that the Petitioner is prepared to give an undertaking to the effect that as soon as the abeyance is lifted, the Petitioner shall re-submit the Performance Bank Guarantees within a period of four days without insisting on other conditions mentioned in Paragraph F of the grounds in the writ petition.



8. Learned Counsel appearing for the Respondent has drawn the attention of this Court to Clause 43.2 of the Request for Proposal (RFP) which reads as under:

“43.2. If it is found that Bidder(s) had engaged in corrupt/ fraudulent practice in securing and executing the Contract, the Purchaser reserves the right:

(a) not to award Contract to such Bidder,

(b) to cancel the Contract, if already awarded. In case of cancellation, the Purchaser shall be entitled to recover from the Bidder/ Contractor the amount of any loss arising from such cancellation in accordance with the provisions of the RFP Document. The Purchaser shall also have the right to forfeit the Performance Bank Guarantee of such Bidder, and

(c) to ban the business dealing with the Bidder who engaged in such practices either indefinitely or for a specified period of time.”

9. Learned Counsel for the Respondent also states that in terms of Clause 20 of the RPF there is an arbitration clause and the Petitioner ought to have invoked the Arbitration Clause instead of approaching this Court by filing the instant writ petition.

10. It is well settled that existence of Arbitration Clause does not take away the jurisdiction of this Court to entertain the writ petition especially when the action of the Government is completely arbitrary. The Apex Court in Unitech Limited & Ors. v. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors., (2021) 16 SCC 35 has observed as under:-

“39.5. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities



is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of State power or a misuse of authority.

39.6. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does (sic not) oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked.”

11. The material on record also discloses that the Petitioner was called for inquiry by the CBI and the Petitioner has participated in the inquiry and has given all the relevant information. The investigation is still going on.

12. The short question which arises for consideration is whether the Respondent should be directed to release the Performance Bank Guarantees in favour of the Petitioner in view of the fact that the contracts have been kept in abeyance and more so when the Petitioner is prepared to give an undertaking that the moment the abeyance is lifted, the Petitioner would renew the Performance Bank Guarantees.

13. The investigation is still going on. This Court is of the opinion that the Petitioner cannot be directed to keep the Performance Bank Guarantees alive indefinitely more so when the contracts have been kept in abeyance. The



conduct of the Respondent not to release the Performance Bank Guarantee and keep the LoA in abeyance for an indefinite period is arbitrary. There is no material on record to show that the Petitioner has committed any offence or has indulged in any unfair means.

14. The Performance Bank Guarantee be released subject to the Petitioner giving an undertaking that the moment the Respondent decides to proceed further with the LoA, the Performance Bank Guarantees will be renewed by the Petitioner within four days' time. It is made clear that in case the Respondent decides to invoke Clause 43.2(b) of the RFP, the Respondent shall give a notice to the Petitioner directing the Petitioner to renew the Performance Bank Guarantees and the Petitioner will renew the Performance Bank Guarantees within four days of the receipt of a letter in terms of Clause 43.2(b) of the RFP.

15. In view of the above, this Court is inclined to direct the Respondent to release the Performance Bank Guarantees forthwith in favour of Petitioner subject to the undertaking that in case the Petitioner is directed to perform the contract or if the Respondent is inclined to invoke the Clause 43.2(b) of the RFP by giving a notice to the Petitioner to renew the Performance Bank Guarantees, the Performance Bank Guarantees will be renewed within four days.

16. With these directions, the writ petition is disposed of, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

APRIL 1, 2024

S. Zakir

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