(2008) 11 AHC CK 0139

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 49301 of 2008

Ashok Kumar Chhabra Construction (Pvt) Ltd APPELLANT

Vs

State of U.P.and others RESPONDENT

Date of Decision : 07-11-2008

Acts Referred:

Citation : (2008) 11 AHC CK 0139

Hon'ble Judges : Ashok Bhushan, J and Arun Tandon, J

Final Decision : Dismissed

Judgement

1. Heard Sri Sharad Kumar Srivastava, learned counsel for the petitioner, and learned Standing Counsel for respondents.

2. Petitioner before this Court is private limited company involved in construction work. The petitioner is registered as GradeA Contractor with the Public Works Department in the State of Uttar Pradesh, the same is stated to be renewed and valid upto 30th June, 2009.

3. Petitioner has approached this Court for a writ of mandamus commanding the authorities of the Public Works Department of the State of Uttar Pradesh to not to insist upon the petitioner to furnish bid security to the tune of 10% of the estimated cost of the work/contract at the time of submission of tender form/ application, nor to reject the tender form/application submitted by the petitioner, in case such bid security of 10% has not been furnished.

4. The facts in short relevant for deciding the present writ petition are The State Government, by means of the Government Order dated 5th June, 2007, laid down the guidelines in respect of allotment of contracts for execution of works, with a further direction that the guidelines should be strictly enforced. The clauses, which are subject matter of issue in the present writ petition are contained in Paragraphs11,12 and 18, and read as follows:

5. In compliance with the directions so issued a tender notice has been published

by the Public Works Department dated 25th August, 2008, wherein it has been provided that a contractor would be required to furnish a bid security to the extent of 1 0% of the total estimated value of contract in form of Fixed Deposit Receipt of a Scheduled Commercial Bank, NSC, Post Office Saving Bank issued in favour of Executive Engineer, C.D.3, Public Works Department, Mainpuri.

6. The demand of 10% of the total estimated cost of the contract as bid security at the time of deposit of tender is being questioned by means of the present writ petition on the ground that under the Financial Hand Book, Vol. 5, Part1 ScheduleXIX, paraXVIII as well as under GP.W. Form No. 8 as applicable to the Public Works Department, demand of bid security at the rate of 10% of the total cost of contract at the time of submission of tender document is illegal. In support of said contention, reliance has been placed upon the Division Bench Judgment of this Court in the case of M/s Jal Akash v. State of U.P, and others being Writ Petition No. 35771 of 2005 decided on 28th July, 2006.

7. It is also stated that the security, if any, is required to be furnished only after the tender bid of a contractor is accepted for ensuring due performance of the contract. The demand of security money to the extent of 10% even before acceptance of the tender bid under the impugned notice inviting tender is therefore totally unjustified.

8. Learned Standing Counsel in reply refutes the contention so raised and submits that the Government Order dated 5th January, 2007 has not been challenged. The tender notice issued is in compliance with the said Government Order. He submits that in the changed facts the law laid down in the case of M/s Jal Akash (supra) has no application.

9. We have heard counsel for the parties and have examined the records including the judgment of the Division Bench of this Court in the case of Jal Akash (supra).

10. The State Government vide Government Order dated 5th January, 2007 came out with a policy decision for regulating grant of contracts in respect of works to be performed under various departments of the State Government with reference to the judgment of the Lucknow Bench of this Court dated 9th November, 2006 passed in Writ Petition No. 5018 (M/S) of 2005 (Chandrika Prasad Nishad v. State of U.P. and others) and in Writ Petition No. 5153 (M/S) of 2005 (Bhola Nath Nishad v. State of U. P. and others). The Government order categorically records that for the purpose of ensuring that no illegal interference is placed in settlement of work contracts by Mafiyas, a decision has been taken to provide for new guidelines, to be made effective in respect of work contracts granted w.e.f. 1st April, 2007 onwards. These guidelines have to be enforced strictly.

11. In terms of the said Government Order, a shortterm tender notice has been published by the Executive Engineer, Provincial Division, Public Works Department, Mainpuri, inviting bids from prospective contractors in respect of

various categories of work mentioned in Item No.1 to 22 of the tender notice which not only provides for estimated cost of the contract but also for the bid security to be furnished at the time of deposit of tender bid. The amount so disclosed is 10% of the total estimated cost. In column 5 of the tender notice, impugned in the writ petition the amount of bid security demanded has been detailed in respect of separate works for which the tenders have been invited. The said bid security is to be furnished along with the tender bid as per Clause 8 of the tender notice in form of fixed deposit receipt of a scheduled commercial bank, NSC, post office saving bank issued in favour of concerned Executive Engineer.

12. It would be relevant to reproduce Clause8 of the tender notice, which reads as follows:

"8. Bids must be accompanied with security of the amount specified for the work in the table Bid Security will have to be in any one of the forms fixed deposit receipt of a scheduled commercial bank, NSC, post office saving bank issued in favour of concerned Executive Engineer."

13. It is, thus, apparently clear that under the Government Order dated 5th January, 2007, not only the earlier form GPW8 has been replaced, but also additional conditions have also been imposed requiring the contractors to furnish the bid security, which is 10% of the total estimated cost for each category of work at the time of submission of the tender bid itself.

14. The Government Order dated 5th January, 2007 has not been challenged in the writ petition nor the competence of the State Government to impose such fair and reasonable condition has been questioned. What has been argued with all vehemence at command is that the conditions mentioned in the tender notice requiring the petitioner to deposit 10% of the bid security at the time of submission of the bid security, runs contrary to the judgment of the Division Bench of this Court in the case of M/s JalAkash (supra) and, therefore, illegal.

15. We may, therefore, first examine as to what was the issue before the Division Bench in the case of M/s JalAkash (supra) and what has been recorded by the Division Bench so as to arrive at the ratio of the said judgment.

16. A perusal of the judgment of the Division Bench of this Court in the case of M/s Jal Akash (supra) clearly demonstrates that after examining the tender notice, the form GPW8, the minutes of the resolution of the Parishad (the recommendation/decision of the High Power Committee), the Division Bench has recorded as follows:

"We find no clause anywhere which requires a contractor to deposit 10% of the estimated cost of work at the time of filing ''tenderapplication."

17. It may also be recorded that the Form GPW8 which was specifically noticed and referred to in the case of M/s Jal Akash (supra) has since been replaced under the Government Order dated 5th January, 2007 by Form PWDT1 and

therefore, reference to the condition of Form GPW8 for questioning the tender notice subject matter of challenge in the present writ petition would be totally out of context.

18. It is not the case of the petitioner that Form PWDT1 is identical to Form GPW8 nor any condition of form PWDT I have been referred to by the petitioners in support of their case.

19. We, therefore, have no hesitation to record that the facts leading to the Division Bench judgment in the case of M/s JalAkash (supra) are clearly distinguishable, visavis the case in hand and therefore, law laid down therein will have no application in the facts of the present case.

20. The Hon''ble Supreme Court of India in the case of Bhavnagar University v. Palitana Sugar Mills (Pvt.) Ltd. and others, 2003 (2) SCC111, has held as follows:

"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

21. The said judgment has been followed in the recent judgment of the Hon''ble Supreme Court in the case of Dr. Rajbir Singh Dalal v. Chaudhari Devi Lal University, Sirsa and another, 2008 AIR SCW 5817.

22. In view of the aforesaid, reliance placed upon the judgment of the Division Bench in the case of M/s JalAkash (supra) by the writ petitioners appears to be totally misplaced, having no application in the case in hand.

23. We may now deal with the issue as to whether in view of the provisions of the Financial Hand BookVolume5, Part1, Schedule XIX, Clause 18, security bid money can be demanded in excess of 2% of the total cost of the contract at the time of submission of the tender document. For our purposes it would be relevant to reproduce the relevant clauses 17 and 18:

"17. All tenders must be submitted on the prescribed form which can be obtained on application and payment where this is required. No tender should, as a rule, be considered unless it is accompanied by earnest money which should be as follows:

Amount of tender Earnest money Rs.

(1)Upto Rs. 2,000 50

(2) Above Rs. 2000 but not exceeding Rs. 5000 100

(3) Above Rs. 5000 Ditto Rs. 10,000 200

(4) For each additional Rs. 5,000 or part thereof a further sum of 100 Contracting officers may fix the amounts of earnest money at rates lower than those prescribed above, if for any particular reason they consider it advisable to do so, but in no case should the earnest money be less than 1/2 per cent of the estimated value of the work.

Notes.(1)An Executive Engineer of Public Works Department has the discretion to accept tenders without earnest money for road metal collection costing less than Rs. 5, 000; and in the case of works costing less than Rs. 10,000 an Executive Engineer or other officer may, at his discretion, demand earnest money from all tenders or only from the contractor whose tender is accepted.

(2) No earnest money is necessary in the case of tenders received by the Store Purchase Department.

(3) In the Forest Department tenders for works costing less than Rs. 5,000 may in the discretion of the officer calling for the tender, be accepted without earnest money.

(4) The Agricultural Engineer is authorised in case of tenders for the supply and erection of pumpingplanes to dispense with the demand for earnest money in individual cases and to dispense with such demand from firms approved and listed by him for this purpose. (Vide G.O. No. 1262/XIIA392, dated October 30,1934).

18. Earnest money may be furnished in one of the forms mentioned in paragraph 71 of the Financial Handbook, Volume V, Part I, as well as in Municipal debentures, Post Trust bond or bonds and/or debentures issued by the State Financial Corporations. The amount of earnest money to be furnished should be stated in the notice calling for tenders, which should also contain a direction that, instead of furnishing cash, tenders should themselves deposit the amount in the Treasury or SubTreasury which is convenient to them and attach to their tender the treasury receipt in support of the payment of the earnest money. In special cases, where it would be inconvenient for tenders to deposit earnest money into a Treasury tenders may be permitted to deposit the earnest money with the officer inviting the tender in cash or currency notes up to a limit of Rs. 500, instead of into a Treasury. Such deposits will be treated as Public Works Department deposits, or revenue deposits, as the case may be."

24. From the aforesaid it is apparently clear that the said rule does not in any way deal with the demand of bid security and, therefore, if the State Government as per clause 18 of its Government Order dated 5.1.2007, has provided that all tenders in respect of work contract must be accompanied by bid security of 10%, such uniform condition cannot be said to be in violation of the Fundamental Rules, referred to above.

25. In our opinion the demand of bid security is in addition to the deposit of the earnest money which a prospective contractor has to submit along with the tender bid.

26. It is always open to the State Government in the matter of contracts to provide for such conditions as may be necessary for ensuring that the bids are offered in respect of particular contract by the persons possessed of requisite experience, expertise and other resources for carrying out the contract within

stipulated time. With this motive, if the State Government has come out with a policy decision to insist upon bid security of 10% at the time of submission of the tenders. It cannot be said that the State Government has violated any law including the provisions of the Fundamental Rules. There is no quarrel so far as the demand of the earnest money which is in conformity with the Fundamental Rules, quoted above, however, the issue is as to whether in addition thereto the Government can insist upon furnishing of bid security along with the tender bid. Such an issue was neither a subject matter of examination in the case of Jal Akash (supra) nor could have been examined in the said judgment inasmuch as the Government Order imposing such a condition dated 5th January, 2007 had not seen the light of the day.

27. It appears that in order to over come the legal difficulty qua demand of bid security as pointed out by the Division Bench in the case of Jal Akash (supra) that the State Government had come out with the Government Order dated 5th January, 2007.

28. The power of the State Government to impose such conditions, as may be fair and uniformly applicable in the matter of settling work contract, which do not violate any statutory provision, cannot be interfered with under Article 226 of the Constitution of India. It is always open for the State Government to prescribe additional condition as may be relevant for the purposes of deciding as to who should be permitted to participate in the settlement of contracts in addition to those which may be prescribed under any statutory provision, the only restriction being that the State Government cannot dilute the statutory provisions relating to the award of the contract but the power for prescription of conditions in addition to those prescribed by statutes is not lost nor such prescription of higher/ additional condition can be said to be arbitrary or violative of statutory provisions.

29. The clause insisting upon the prospective bidder to submit bid security to the extent of 10% of the total estimated cost of the contract cannot be said to be arbitrary or in violation of any statutory provisions. Such condition appears to have been incorporated by the State Government for the purposes of ensuring that only contractor possessed of the requisite funds and the material to execute the work contract for which tenders were being invited, alone offer the bid. It is to be kept in mind that the time for completion of the project is one of the important aspect to be considered by the State Government in all such contracts.

30. We therefore, hold that there is no illegality in the decision of the State Government to impose the condition requiring the prospective bidder to furnish bid security at the time of submission of the tender bid itself.

31. The writ petition is accordingly dismissed.

