
(2022) 03 KL CK 0244

In the High Court Of Kerala

Case No : Writ Petition (C) No. 28908 Of 2021

M & T Constructions

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 29-03-2022

Acts Referred:

Citation : (2022) 03 KL CK 0244

Hon'ble Judges : N.Nagaresh, J

Bench : Single Bench

Advocate : Babu Joseph Kuruvathazha, M.G.Sreejith, K.S.Archana, Parvathy Kottol

Final Decision : Dismissed

Judgement

N. Nagaresh, J.

1. The petitioner-Contracting Firm, which has been awarded with the work of "construction of Kaduthuruthy Bypass & Phase II from Ch.0/190 to 0/785, Phase II Part I (formation, bridge and culvert)", has filed the writ petition to quash Exts.P3 and P12 to the extent directing the petitioner to furnish additional Performance Guarantee for the purpose of executing the Supplementary Agreement seeking extension of time.

2. The petitioner was awarded with the work in question and executed an agreement on 03.10.2018. The petitioner gave a Performance Guarantee of ₹ 37,47,800/-. The petitioner also made Additional Performance Security Deposit in the form of Bank Guarantee worth ₹ 53,26,708/-. The work had to be completed in 18 months. The worksite was handed over belatedly. By 06.04.2020, 50% work was completed. As completion of the remaining work was likely to take another 6 months, the petitioner sought extension of time. The petitioner was thereupon required to extend the validity of Security Deposit and Additional Performance Security Deposit.

3. According to the petitioner, the insistence on Additional Performance

Guarantee is erroneous since the Government of India has directed to reduce Security Deposit from 5% to 3%. In fact, the Government of Kerala also has issued Ext.P9 G.O. waiving the condition of furnishing Additional Performance Guarantee. The respondents, however, are taking a stand that unless there is a court direction, there cannot be any exemption from providing Performance Guarantee.

4. The 3rd respondent filed a Statement and contested the writ petition. The 3rd respondent stated that based on the request of the petitioner for time extension on 06.04.2020 and on the basis of the report received from Executive Engineer, the time for completion of the work was extended up to 31.01.2021 without fine on 25.05.2020. The contractor was directed to execute supplementary agreement for the extended period of contract. But, the petitioner did not submit the extended Bank Guarantee for Security Deposit and Additional Performance Guarantee. Thereafter, a reminder letter was also sent to the petitioner on 12.04.2021 for the extension of Bank Guarantee for security deposit (₹ 18,73,900/-) valid up to 28 days from the expiry of Defect Liability Period and Bank Guarantee for Additional Performance Guarantee (₹ 53,26,708) for low quoted items valid up to 28 days from the actual completion of the work as per the agreement. The petitioner has only submitted sufficient security deposit (5% of Accepted PAC) as per agreement.

5. Based on the Office Memorandums (Exts.P4, P5 and P6) issued by the Ministry of Finance, Department of Expenditure Procurement Policy Divisions, Government of India, the Government of Kerala, Finance (Industries and Public Works-B Department) issued Order No.G.O.(P) No.7/2021 dated 07.01.2021 (Ext.P9) revising the following.

(1) The Performance Security / Security Deposit to be submitted at the time executing the agreement is reduced from the existing rate of 5% to 3% of the contract amount.

(2) Correspondingly Bid Security / Earnest Money Deposit is reduced from 2.5% to 1.5% of the estimated amount.

(3) Additional Performance Guarantee is waived for the low quoted items on the condition that the bidder shall furnish an undertaking to execute all low quoted items in full as per contract terms.

6. The above relaxation was issued on account of Covid-19 pandemic and are made applicable for new works only, initially for one year and would be reviewed, post that date. A bare perusal of Ext.P9 would show that the said Government Order is applicable to all new tenders only. The contract in question was executed before Covid pandemic. As per agreement, the contractor has to submit the extended Bank Guarantee for the Additional Performance Guarantee for ₹ 53,26,708/- which can be released only after 28 days from the date of completion of work. The petitioner, however, has failed to submit the Bank Guarantee for Additional Performance Guarantee for ₹ 53,26,708/-.

7. I have heard the learned counsel for the petitioner and the learned Government Pleader representing the respondents.

8. The petitioner was issued with Ext.P1 selection notice in the month of September, 2018 for the work "construction of Kaduthuruthy Bypass & Phase II from Ch.0/190 to 0/785, Phase II Part I (formation, bridge and culvert)". Agreement for the work was executed on 03.10.2018. The petitioner gave Performance Guarantee of ₹ 37,47,800/- and Additional Performance Security Deposit of ₹ 53,26,708/-.

9. Later, the time for completion of work extended by the respondents up to 31.01.2021 at the request of the petitioner. The extension required signing of supplementary agreement for the extended period of contract. The petitioner was required to provide extended Bank Guarantee for security deposit and also to provide Additional Performance Guarantee. The petitioner challenges the said demand. The petitioner states that insistence on Additional Performance Guarantee goes against Exts.P4 to P8 OMs issued by the Ministry of Finance, Government of India and Ext.P9 G.O. dated 07.01.2021 of the Government of Kerala.

10. By the OMs issued by the Ministry of Finance in the background of pandemic, the Government of India decided to reduce Performance Security from existing 5-10% to 3%. Following the said OMs, the Government of Kerala issued Ext.P9 G.O. (P) No.7/2021/Fin. dated 07.01.2021.

11. Paragraphs 4 to 6 of Ext.P9 reads as follows:

4. Government have examined the matter in detail and are pleased to order as follows:

(1) Performance Security / Security Deposit to be submitted at the time of executing the agreement is reduced from the existing rate of 5% to 3% of the contract amount.

(2) Correspondingly Bid Security / Earnest Money Deposit is reduced from 2.5% to 1.5% of the estimated amount.

(3) Additional Performance Guarantee is waived for the low quoted items on the condition that the bidder shall furnish an undertaking to execute all low quoted items in full as per contract terms.

5. The above relaxations on account of Covid-19 pandemic are made applicable for works initially for one year and would be reviewed post that date.

6. This Government Order is made applicable to all new tenders as well as works which have been tendered and awarded, but agreements have not been signed by the winning bidder.

Paragraph 6 would make it clear that the waiving of Additional Performance Guarantee and other benefits under Ext.P9 will be applicable only to new tenders

and to works which have been tendered and awarded, but agreements have not been signed by the winning bidder.

12. Ext.P9 G.O. was issued on 07.01.2021. The tender pursuant to which the petitioner was awarded the work was prior to 07.01.2021. The petitioner executed the agreement on 03.10.2018, which is also prior to Ext.P9. Therefore, the petitioner will not be eligible for the benefit of Ext.P9.

13. The petitioner would urge that the OMs and G.O. were issued in the context of Covid-19 pandemic and to effectuate the purpose of the orders, the works going on during the period of pandemic should also be treated as included in the G.O. The petitioner has entered into a commercial transaction with the respondents, which would fall within the realm of contract. Therefore, unless the benefits are expressly extended, those cannot be granted to the petitioner by a process of interpretation of Government Orders.

14. The petitioner would further urge that the petitioner is directed to execute a supplementary agreement now and since execution of supplementary agreement will be after the date of Ext.P9, the petitioner should be held entitled to the benefits provided under Ext.P9. This Court is unable to accept the said proposition because paragraph 6 of Ext.P9 categorically states that the G.O. would be applicable only to works which have been tendered and awarded, but agreements have not been signed. In the petitioner's case, agreement is signed before the issuance of Ext.P9. Therefore, the argument of the petitioner is not sustainable.

In view of the above, the writ petition is without any legal merit, and it is therefore dismissed.