

(2011) 12 GAU CK 0085
In the Gauhati High Court
Case No : Writ Petition (C) No. 3979 of 2010

M/s. Taru and Sons

APPELLANT

Vs

State of Assam and others

RESPONDENT

Date of Decision : 14-12-2011

Acts Referred:

Citation : (2012) 2 GLD 224

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : S. Sarma, for the Appellant; R. Gogoi, GA, for the respondent Nos. 1 and 2 and Mr. S.N. Sarma, for the respondent Nos. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goswami, J.—Heard Mr. S. Sarma, learned counsel for the petitioner. Also heard Mr. S.N. Sarma, learned senior counsel appearing for the respondent Nos. 3 & 4 and Ms. R. Gogoi, learned State Counsel appearing for the respondent Nos. 1 & 2. As agreed to by the learned counsel for the parties, this writ petition is taken up for disposal at the admission stage.

2. A notice inviting tender was issued on 24.2.2010, inviting quotation from reputed and registered firms/organizations having a set up in the State of Assam for supply and installation of scientific equipments, computers and other related materials for State Level Nodal Agency (for short, SLNA), under Integrated Watershed Management Programme (for short, IWMP) covering 26 districts in the State of Assam. The petitioner along with some others had participated in the tendering process and the petitioner having been found to be the lowest eligible tenderer, the respondent No. 4 issued a supply order dated 6.4.2010 as per rates, brand, model of equipments in respect of the 12 items as mentioned therein. The terms and conditions as appearing in the said order dated 6.4.2010 are extracted hereinbelow :-

Accordingly, you are hereby given the order for supply, installation and execution

of the above work/items, as per the following terms and conditions :

1. The Firm will provide an acceptance letter confirming all terms and conditions, as stated below.
2. The Acceptance letter shall have to be submitted within 7 (seven) days from the date of issue of Work Order along with the refundable Performance Security Deposit @ 5% of the value of the Work Order in the form of Bank Guarantee/ Demand Drafts etc. payable at Guwahati and, drawn in favour of CEO, SLNA, Assam, failing, which the Work/Supply Order shall be treated as cancelled.
3. The Firm would have to complete the whole process of supply and installation within 30 (thirty) days from the date of issue of this work/supply order.
4. Broken or damaged items shall not be accepted.
5. There shall not be bargaining on prices other than approved rates as mentioned above and the above quoted price is inclusive of VAT, transportation and installation charges and other taxes.
6. No transportation charge shall be paid by the SLNA.
7. In the event of non-performance by the Firm, the undersigned reserves the right to put an end to the agreement at any time, without any intimation thereof.
8. The said security deposit will be returned to the parties after 6 (six) months of successful delivery, installation and execution of the Work/Items.
9. Payment would be made subject to availability of funds.
10. In respect of any dispute, the legal jurisdiction will solely be at Guwahati.

3. The petitioner had submitted the acceptance letter as well as deposited the performance security in terms of the work order dated 6.4.2010. The work order of the petitioner was cancelled by an order dated 8.6.2010 with immediate effect as the time limit fixed for supply had already expired and as the petitioner had not executed any supplies.

4. The order dated 8.6.2010 is under challenge in this writ petition. The thrust of the challenge is founded on the basis that though the petitioner was in a position to execute the work order dated 6.4.2010 within the stipulated time, it was not possible in view of the fact that the respondent authorities did not, inspite of repeated requests, notify the places where the delivery was to be effected.

5. An affidavit-in-opposition has been filed by the respondent No. 3 and 4, highlighting that, though by the order dated 6.4.2010, 30 days time was granted to complete the whole process of supply and installation, by an order dated 22.4.2010, 45 days" time was granted from the date of receipt of the said letter dated 22.4.2010 for implementing the supply order dated 6.4.2010. It is also stated that the equipments were to be delivered in the office of the SLNA, IWMP initially and after certification by a Technical Committee, the equipments were to

be dispatched to different districts. It has been pointed out that there is no communication whatsoever from the petitioner during the entire period in which the entire process of supply and installation was to be completed and only after cancellation of the work order dated 6.4.2010 by the order dated 8.6.2010, a representation was filed by the petitioner on 16.6.2010 (received on 25.6.2010), wherein, plea was taken that no information was provided by SLNA, either in writing or verbally, regarding the places or persons to whom delivery had to be effected. It has also been stated in the affidavit that subsequent to the order of cancellation dated 8.6.2010, the respondent No. 3 had received a communication from "Swan Environment Pvt. Ltd." addressed to the Commissioner, Soil Conservation Department, wherein it was indicated that it had authorized the writ petitioners to participate in the tender in question but till 2.08.2010, no supply order was placed by the writ petitioner to them and therefore, they had terminated the authorization with the writ petitioner with immediate effect.

6. Though at one point of time Mr. S. Sarma, learned counsel for the petitioner had submitted that he wanted to file a rejoinder affidavit to the affidavit-in-opposition, subsequently, on re-consideration, he had submitted before the Court that he was not inclined to file any affidavit-in-reply and the same was duly recorded in the order dated 7.12.2011.

7. Mr. S. Sarma, learned counsel for the petitioner submits that, the respondents had made two further abortive attempts to procure the supplies which were the subject matter of the work order dated 6.4.2010. Two notices inviting tenders had been issued on 1.4.2011 and 7.5.2011 and on both occasions, there were no takers and as a result, till date, the respondents are not able to procure the items. It is in this backdrop, the learned counsel for the petitioner submits that when the petitioner was willing to supply the items, there could not have been any justification for the respondents to have issued the cancellation order dated 8.6.2010. Mr. S. Sarma also submits that some of the items covered under work order dated 6.4.2010 are highly sophisticated equipments and a couple of items also need to be imported. He has reiterated that but for the non-identification of the places where the supply and installation were to be effected, it would have been possible on the part of the petitioner to have executed the work order. The learned counsel for the petitioner also submits that the authorities were also not clear about the procedure to be adopted for receipt of the goods and that would be clear by the notification dated 3.6.2010, whereby, only on that date, a Technical Committee was constituted and the goods are to be received on certification of the computer expert in the Committee. It is in this background, submission is advanced by the learned counsel for the petitioner that the issuance of the cancellation order dated 8.6.2010 is based on irreverent consideration.

8. Mr. S.N. Sarma, learned senior counsel for the respondent Nos. 3 & 4 submits that the plea taken by the writ petitioner that only because of non-identification of special places where supplies are to be effected and installations are to be

done, the petitioner was unable to execute the work order, is clearly an after thought. Having regard to the magnitude of contract, if the petitioner had harbored any doubt, it could have sought a clarification from the authorities and the authority would have accordingly apprised the petitioner. That the petitioner did not do so, is the proof that there was no doubt for confusion with regard to place of delivery. The work order was issued by the respondent No. 4 and in absence of identification of any other place, the delivery has to be in the office from which the work order was issued. Constitution of the Technic Committee on 3.6.2010 is an internal matter of the respondents and when no supply was effected by the petitioner, the petitioner cannot seek to take mileage out of the constitution of the Committee on 3.6.2011, he submits. He also submitted that the petitioner suppressed the fact that the work order was extended by another 45 days by order dated 22.4.2010. This work order, according to the learned senior counsel was also received by the writ petitioner on 22.4.2010 itself therefore, 45 days starting from 22.4.2010, expired on 6.6.2010 and even then when it was found that there was no attempt on the part of the petitioners to execute the supply, the authority had no alternative but to cancel the work order.

9. I have heard and considered the submissions of the learned counsel for the parties.

10. A perusal of Clause 3 of the work order dated 6.4.2010 goes to show that the firm will have to complete the installation within, 30, days from the date of issue of the work order/supply order. Clause 7 of the work order reserves a right on the respondent No. 3 to put an end to the agreement at any time, without any intimation thereof for non-performance by the firm. The letter dated 22.6.2010, which is placed before this Court today shows that the respondent No. 4 had allowed 45 days from the date of receipt of the said order for implementing the supply order dated 6.4.2010, while maintaining the other terms and conditions laid down in the work order dated 6.4.2010. It would also appear from the copy placed before this Court that the said letter dated 22.4.2010 was received on behalf of the writ petitioners on 22.4.2010 itself. The order dated 22.4.2010, however, was not brought on record by either of the parties. However, the order dated 8.6.2010 itself makes reference to the said order dated 22.4.2010 and therefore, nothing hinges for non-production of the order dated 22.4.2010.

11. The approximate amount of the supply order was Rs. 1,13,38,000/-. Materials on record do not disclose that at any point of time, prior to cancellation, the writ petitioners had taken the plea that they were unable to execute the work order for not being provided with the location of the places where the supplies are to be effected. The orders dated 6.4.2010 and 22.4.2010 would indicate that the time was the essence of the contract. If there was any genuine difficulty or hindrance in execution of the work order as pleaded in the representation as well as before this Court it would have been only logical to expect that such a plea had been put forth before the authority before any adverse consequences had ensued. But nothing of the kind had been done by the

petitioner and therefore, this Court is unable, to agree with the submissions of the learned counsel for the petitioners. Though the Technical Committee was constituted towards the later part of 45 days time period, certainly it was within the period of 45 days. This Court cannot lose sight of the fact that till then the writ petitioner had not made any supplies. Constitution of the Technical Committee on 3.6.2010 is not the issue in the facts and circumstances of the case.

12. This Court is concerned with the decision making process and from the materials available on record, it would appear that no fault can be attributed to the respondents In canceling the work order dated 6.4.2010. The issuance of subsequent notice inviting tenders and failure to find a suitable tenderer is another matter and this aspect cannot have any relevance with the action taken earlier, pursuant to which these events have unfolded. Mr. S.N. Sarma, learned counsel for the respondent Nos. 3 and 4, however, submits that another notice inviting tender was issued and a tenderer has already been selected on the basis thereof and it is only a matter of time that the work order will be issued to the successful tenderer. Considering the matter in its entirety and after hearing the learned counsel appearing for the parties and for the reasons assigned, this Court does not find merit in this application and accordingly, the same stands dismissed. No order as to costs. There letter dated 22.4.2010 is placed on record of this case.