



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

(1) S.B. Civil Writ Petition No. 9620/2021

M/s. Shera Ram Choudhary, Through Its Proprietor Shera Ram Chodhary

----Petitioner

Versus

1. State Of Rajasthan, Through The Chief Secretary, Govt. Of Rajasthan, Jaipur (Raj.).
2. The Principal Secretary, Water Resources Department, Govt. Of Rajasthan, Jaipur (Raj.).
3. The Joint Secretary Finance (G And T) Department, Govt. Of Rajasthan, Jaipur (Raj.).
4. Addl. Secretary Cum Chief Engineer, Water Resources Department Rajasthan, Jaipur (Raj.).
5. Chief Engineer, Water Resources Zone, Rajasthan, Jodhpur (Raj.).
6. Superintendent Engineer, Water Resources Department, Circle Jodhpur, Near Kishore Bagh, Jodhpur.

----Respondents

Connected With

(2) S.B. Civil Writ Petition No. 6959/2021

Shaitan Singh Sankhla

----Petitioner

Versus

1. State Of Rajasthan, Through The Chief Secretary, Govt. Of Rajasthan, Jaipur (Raj.).
2. The Principal Secretary Water Resources Department, Govt. Of Rajasthan, Jaipur (Raj.).
3. The Joint Secretary, Finance (G And T) Department, Govt. Of Rajasthan, Jaipur (Raj.).
4. Addl. Secretary Cum Chief Engineer, Water Resource Department Rajasthan, Jaipur (Raj.).
5. Chief Engineer, Water Resources Zone, Rajasthan, Jaipur (Raj.).
6. Addl. Chief Engineer, Narmada Canal Project, Sanchore, Distt. Jalore (Raj.).



----Respondents

(3) S.B. Civil Writ Petition No. 15602/2021

M/s. J.R.C. Construction, Through Its Proprietor

----Petitioner

Versus

1. State Of Rajasthan, Through The Principal Secretary, Water Resources Department, Govt. Of Rajasthan, Jaipur (Raj.).
2. The Additional Secretary Cum Chief Engineer, Water Resources Department, Rajasthan, Jaipur (Raj.).
3. The Joint Secretary Finance, (G And T) Department Govt. Of Rajasthan, Jaipur (Raj.).
4. Superintendent Engineer, Water Resources Construction Circle, Dungarpur (Raj.).
5. Executive Engineer, Water Resources Division-II, Sagwara, Distt. Dongarpur (Raj.)

----Respondents

For Petitioner(s)	:	Mr. K.K. Shah, through VC
For Respondent(s)	:	Mr. Sunil Beniwal, AAG with Mr. Saransh Vij Ms. Abhilasha Kumbhat } All through VC

JUSTICE DINESH MEHTA**Judgment****Reportable****28/01/2022**

1. These three writ petitions involve common grievance; common question of law and almost common facts, hence, they are being disposed of by this common order.
2. For the purpose of convenience and clarity, facts of SB Civil Writ Petition No.9620/2021: M/s Shera Ram Choudhary Vs. State of Rajasthan & Ors. are being taken into consideration.



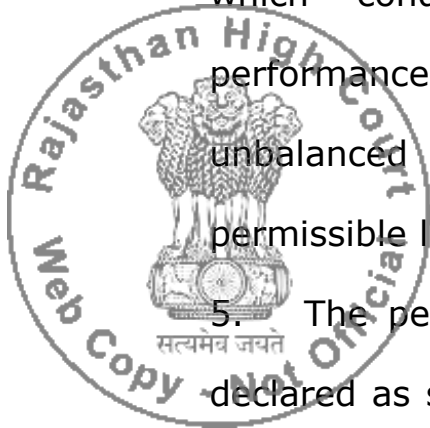
3. The petitioner is AA Class contractor engaged in execution of construction work awarded by various Government Departments, including Water Resources Department.

4. The respondent No.5 issued an NIT dated 19.03.2021 for "repair and retrofitting of dam" for an estimated cost of Rs. 1051.83 lacs. The NIT comprised of various conditions out of which condition No.16 required furnishing of additional performance security in case the bid offered by a bidder was unbalanced bid i.e., the amount offered was less than the permissible limits fixed by the circular dated 11.01.2018.

5. The petitioner participated in the bidding process and was declared as successful bidder having offered 32.69% less amount than the G-Schedule (Rs. 7,07,98,374/-).

6. By way of the letter dated 20.07.2021 issued by the Executive Engineer, the petitioner was asked to furnish additional performance security of Rs.2,38,65,920/- in terms of the circular dated 11.01.2018, as its bid was found to be unbalanced.

7. Mr. Shah, learned counsel for the petitioner submitted that a representation dated 13.10.2019 was submitted by the Rajasthan Contractors Advisory and Welfare Association, Jodhpur to the Chief Minister and other Government Authorities, inter alia, raising a grievance that the additional performance security being asked for by various Departments of the State was illegal and creating unnecessary financial burden on the contractors, in furtherance whereof, the Finance Department issued a circular/order dated 22.11.2019 endorsing its copies to all the Departments, including Water Resources Department. He zealously read the same and submitted that the Finance Department itself has observed that the action of the Government Departments in demanding





additional performance security for unbalanced bid is contrary to law and therefore, the same be done away with.

8. Mr. Shah pointed out that vide order dated 17.12.2019, the Indira Gandhi Nahar Project and vide order dated 17.01.2020, the Public Works Department have stopped to include condition of requirement of additional performance security in their bid documents pursuant to the circular dated 22.11.2019 issued by the Finance Department.

9. Learned counsel for the petitioners argued that the action of the respondents in insisting for additional performance security pursuant to their circular dated 11.01.2018 is otherwise also illegal and without any legal basis.

10. He submitted that all the terms and conditions of tender and contract are governed by the Rajasthan Transparency in Public Procurement Act, 2012 (hereinafter referred to as 'the Act of 2012') and Rajasthan Transparency in Public Procurement Rules, 2013 (hereinafter referred to as 'the Rules of 2013'). He added that so far as security amount is concerned, the same is governed by Rule 75 of the Rules of 2013 and does not provide for additional performance security or any other type of security, hence, the respondents are legally not justified in requiring the petitioner and other contractors to furnish additional performance security in case of unbalanced bid. He argued that merely because the circular dated 11.01.2018 or the condition that has been inserted in the terms and conditions of the E-auction notice provide for additional performance security, the respondents cannot insist upon a requirement which is not having legal bearing.

11. Mr. Sunil Beniwal, learned AAG along with Mr. Saransh Vij appearing for the respondents raised a preliminary objection that



the writ petition is not maintainable, inasmuch as, the petitioner and other successful bidders are first supposed to avail remedy of appeal given under Section 38 of the Act of 2012.

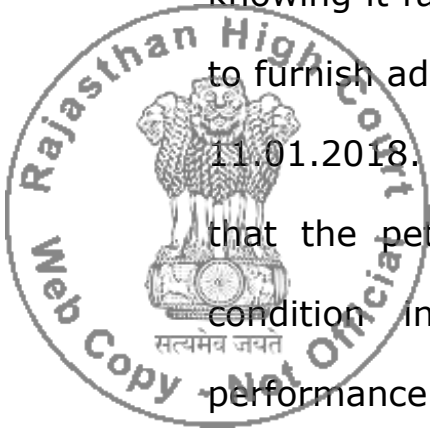
12. It was also vehemently argued by Mr. Beniwal that the petitioners have not challenged the relevant condition of the NIT and in a way, accepting the same, have submitted their bids knowing it fully well that if the same is unbalanced, they will have to furnish additional performance security as per the circular dated 11.01.2018. In other words, argument of learned AAG has been that the petitioners, having furnished the bids in spite of the condition in the E-tender notice in relation to additional performance security, cannot now challenge the letter of the respondents calling upon to furnish additional performance security, which is in line with the condition of the e-bid document.

13. It was also argued by the learned AAG that so long as the order/circular issued by the Water Resources Department dated 11.01.2018 or the condition of the E-tender are not challenged, writ petition challenging the communication requiring the petitioners to submit additional performance security is incompetent.

14. Learned AAG pointed out that by way of a recent amendment introduced by notification dated 22.10.2021, new provision in the form of Rule 75A has been inserted and accordingly, the respondents are fully justified in requiring the bidders to furnish additional performance security in terms of such provision.

15. Explaining the rationale behind prescription of additional performance security, learned AAG submitted that in order to ensure quality of work, it is necessary to call upon the bidders to furnish additional performance security, because in many a cases,

~~it is seen that the bidders submit too low a bid in an anxiety of~~





getting the contract awarded in their favour, though such rates are not feasible and commercially viable. But then at such rates, neither the contractor is able to complete the work, nor is the quality ensured even if the work is completed. It is in order to meet with such contingencies, the respondents have issued the order dated 11.01.2018, requiring a bidder to furnish additional performance security of the unbalanced amount.

16. Heard learned counsel for the parties.

17. Before advertng to the adjudication of the issues in hand, it would be apt to reproduce Rule 75 of the Rules of 2013, which reads thus:-

"75. Performance security.-[(1) Performance security shall be solicited from all successful bidders except the,-

(i) Departments/Boards of the State Government or Central Government;

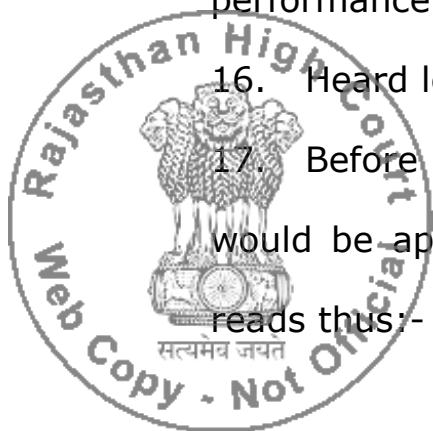
(ii) Government Companies as defined in clause (45) of section 2 of the Companies Act, 2013;

(iii) Company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments which is subject to audit by the Auditor appointed by the Comptroller and Auditor-General of India under sub-section (5) or (7) of section 139 of the Companies Act, 2013; or

(iv) Autonomous bodies, Registered Societies, Cooperative Societies which are owned or controlled or managed by the State Government or Central Government.

However, a performance security declaration shall be taken from them. The State Government may relax the provision of performance security in a particular procurement or any class of procurement.]

(2) The amount of performance security shall be five percent, or as may be specified in the bidding documents, of the amount of supply order in case of procurement of goods and services and ten percent of the amount of work order in case of procurement of works. In case of Small Scale





Industries of Rajasthan it shall be one percent of the amount of quantity ordered for supply of goods and in case of sick industries, other than Small Scale Industries, whose cases are pending before the Board of Industrial and Financial Reconstruction (BIFR), it shall be two percent of the amount of supply order.

(3) Performance security shall be furnished in any one of the following forms-

(a) deposit though eGRAS;

(b) Bank Draft or Banker's Cheque of a scheduled bank;

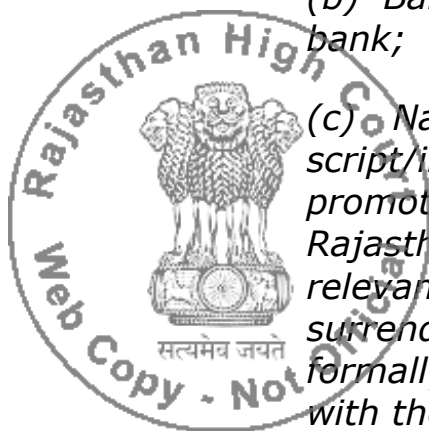
(c) National Savings Certificates and any other script/instrument under National Savings Schemes for promotion of small savings issued by a Post Office in Rajasthan, if the same can be pledged under the relevant rules. They shall be accepted at their surrender value at the time of bid and formally transferred in the name of procuring entity with the approval of Head Post Master;

(d) Bank guarantee/s of a scheduled bank. It shall be got verified from the issuing bank. Other conditions regarding bank guarantee shall be same as mentioned in the rule 42 for bid security;

(e) Fixed Deposit Receipt (FDR) of a scheduled bank. It shall be in the name of procuring entity on account of bidder and discharged by the bidder in advance. The procuring entity shall ensure before accepting the Fixed Deposit Receipt that the bidder furnishes an undertaking from the bank to make payment/premature payment of the Fixed Deposit Receipt on demand to the procuring entity without requirement of consent of the bidder concerned. In the event of forfeiture of the performance security, the Fixed Deposit shall be forfeited along with interest earned on such Fixed Deposit.

[(f) In case of procurement of works, the successful bidder at the time of signing of the contract agreement, may submit option for deduction of performance security from his each running and final bill @ 10% of the amount of the bill.]

(4) Performance security furnished in the form specified in clause (b) to (e) of sub-rule (3) shall remain valid for a period of sixty days beyond the date of completion of all contractual obligations of the bidder, including warranty obligations and maintenance and defect liability period."





18. Rule 75 of the Rules of 2013, came to be amended on 18.12.2020, which reads thus:-

"Amendment of rule 75.-In rule 75 of the said rules,-

(i) the existing proviso to sub-rule (2) shall be substituted by the following namely :-

Provided that, during the period commencing from the date of commencement of the Rajasthan Transparency in Public Procurement (Second Amendment) Rules, 2020 to 31.12.2021, the performance security shall be taken as under :-

(a) 2.5%, or as may be specified in the bidding documents, of the amount of supply order in case of procurement of goods and services and 3% of the amount of work order, in case of procurement of works;

(b) 0.5% of the amount of quantity ordered for supply of goods, in case of Small Scale Industries of Rajasthan; and

(c) 1% of the amount of supply order, in case of sick industries, other than Small Scale Industries, whose cases are pending before the Board of Industrial and Financial Reconstruction (BIFR); and

(ii) in sub-rule (3), the existing proviso to clause (f) shall be substituted by the following, namely:-

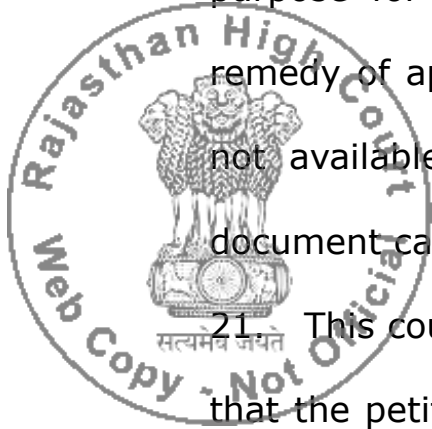
Provided that, during the period commencing from the date of commencement of the Rajasthan Transparency in Public Procurement (Second Amendment) Rules, 2020 to 31.12.2021, in case of procurement of works, the successful bidder at the time of signing of the contract agreement, may submit option for deduction of performance security form his each running and final bill @ 3% of the amount of the bill."

19. So far as the first contention on behalf of the State that the petitioners have not raised objection regarding the offending condition is concerned, this Court is of the considered view that the same is untenable in law. The condition of requiring a bidder to furnish additional performance security existed in the bid document. Raising such grievance may adversely affect secrecy of the financial bids as the competitor would beforehand know that a

particular bidder is going to furnish unbalanced bid.



20. Adverting to the second preliminary objection that the petitioners should exhaust the remedy available under the Act of 2012, this Court feels that the appellate authority would decide the appeal in light of the terms and conditions given in the e-bid document. They cannot and would not go against the circular dated 11.01.2018 issued by their own department. Hence, for the purpose for which the petitioners have approached this Court, remedy of appeal given under Section 38 of the Act of 2012 was not available to them as the terms and conditions of the bid document cannot be set aside by the appellate authority.



21. This court finds some substance in the argument of the State that the petitioners having furnished their bids in the teeth of the condition requiring furnishing of additional performance security, cannot now challenge the same, that too when the respondents have called upon them to furnish such additional performance security.

22. In normal circumstances, this Court would have accepted the argument of the State, but then, considering the fact that none-else than the Finance Department of the State itself had issued an office order dated 22.11.2019, requiring all the departments to withdraw the circular or not to insist upon furnishing additional performance security, the petitioners could well remain under apprehension or bonafide belief that they would persuade the respondents to not insist upon furnishing of additional performance security in light of the order/circular of the Finance Department dated 22.11.2019. Hence, on this count too, the petitioners cannot be non-suited.

23. The petitioners have approached this Court essentially in

light of the circular of the Finance Department, which is evident



from the perusal of the interim order passed by this Court, which reads thus:-

"Learned counsel for the petitioner has submitted that despite clear directions of the Finance Department not to levy additional performance security, the respondents are insisting the petitioner to pay the same.

In view of the above, the respondent No.2 – Water resource Department is restrained from insisting the petitioner to pay additional performance security till next date."



24. That apart, this Court feels that insertion of the condition of additional performance security so also the circular of the respondent – Department dated 11.01.2018, is absolutely alien to the statutory provision, hence, the same is contrary to Articles 14 and 19(1)(g) of the Constitution of India. The writ petition is, thus, maintainable.

25. A look at the provision given in Rule 75 of the Rules of 2013 shows that it provides for performance security only and does not envisage any other security in the name of additional performance security or otherwise. According to this Court, all the terms and conditions of a bid document are supposed to conform to the statutory provisions, which, after the promulgation of the Act of 2012 are required to be governed by the provisions of the Act of 2012 and Rules of 2013 framed thereunder. This Court has no hesitation in holding that in absence of any provision in the Act of 2012 and the Rules of 2013, the impugned letter and offending condition of furnishing additional performance security, being stranger to the Rules, have no sanctity in law and, therefore, they are non-est or a nullity.

26. It is to be noted that on 22.10.2021, the Rules of 2013 have ~~seen an amendment and provision in the form of Rule 75A has~~



been introduced, according to which the State can ask for additional performance security in case of unbalanced bid. The amendment has been brought into effect by Rajasthan Transparency in Public Procurement (4th Amendment) Rules, 2021 (hereinafter referred to as '4th Amendment Rules').

27. The abovereferred Rule 75A reads thus :-

"75A. Additional Performance Security.- (1) *In addition to Performance Security as specified in rule 75, and Additional Performance Security shall also be taken from the successful bidder in case of unbalanced bid. The Additional Performance Security shall be equal to fifty percent of Unbalanced Bid Amount. The Additional Performance Security shall be deposited in lump sum by the successful bidder before execution of Agreement. The Additional Performance Security shall be deposited through e-Grass, Demand Draft, Banker's Cheque, Government Securities or Bank Guarantee.*

Explanation : *For the purpose of this rule,-*

(i) *Unbalanced Bid means any bid below more than fifteen percent of Estimated Bid Value.*

(ii) *Estimated Bid Value means value of subject matter of procurement mention in bidding documents by the Procuring Entity.*

(iii) *Unbalanced Bid Amount means positive difference of eighty five percent of Estimated Bid Value minus Bid Amount Quoted by the Bidder.*

(2) *The Additional Performance Security shall be refunded to the contractor after satisfactory completion of the entire work. The Additional Performance Security shall be forfeited by the Procuring Entity when work is not completed within stipulated period by the contractor. Provision for 'Unbalanced Bid' and 'Additional Performance Security' shall be mentioned in the Bidding Documents by the Procuring Entity."*

28. The insertion of Rule 75A justifies the requirement of additional performance security, however, from the date of promulgation of the Rule 75A. Rule 1(2) of the 4th Amendment Rules clearly provides that the amendment will come into force



from the date of its publication in the official gazette. The 4th Amendment Rules have been published in the official gazette on 22.10.2021. Therefore, all the e-tender/e-auction notices issued after 22.10.2021, can legitly prescribe furnishing of additional performance security. But, as a necessary corollary, the requirement of additional performance security or conditions to this effect in all the e-tender notices/e-bids prior to that date, becomes fundamentally incompetent and void.

29. In the present case, the e-bid notice was issued on 19.03.2021. Hence, impugned condition No.16 in the e-bid document, so also letter dated 20.07.2021, is *dehors* the Rules of 2013 and is liable to be declared illegal and arbitrary.

30. Consequent to the foregoing discussion, these writ petitions are allowed. The letter of the respondents and corresponding condition in the e-bid document requiring the petitioners to furnish additional performance security are hereby quashed.

31. The respondents are directed to permit the petitioners to perform the contract in accordance with law, without insisting upon additional performance security.

32. Needless to observe that the present adjudication will be confined to the e-bids issued prior to 22.10.2021 and that too for those contractors, who have challenged the respondents' action of soliciting additional performance security. Whosoever has paid/deposited the additional performance security, will not be entitled for refund as a consequence of the order instant.

33. The stay applications also stand disposed of accordingly.

(DINESH MEHTA),J

1-3-skm/-