

**IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

ITANAGAR PERMANENT BENCH

1. WP(C)461(AP)2016

M/s Millenium Synergy Pvt. Ltd.

No. 12A, 11th Avenue, Ashok Nagar, Chennai-600083, LIC Colony

Represented by its authorized signatory, Shri Jabring Venia

S/o Lt. T. Venia, R/o Panchali, Mowb-II, PO/PS: Itanagar

Papum Pare District, Arunachal Pradesh.

Contact No. 9402698530, Email: Nil.

.....Petitioner

By Advocates:

Mr. P. D. Nair

Mr. Rajesh Sonar

Ms. Subu Ampy

Mr. H. Rinya

-Versus-

1. The State of Arunachal Pradesh represented by the Chief Secretary to the Government of Arunachal Pradesh, Itanagar.
2. The Commissioner, Department of Power and Non-Conventional Energy Resources, Government of Arunachal Pradesh, Itanagar.
3. The Director, Arunachal Pradesh Energy Development Agency(A State Government Agency), Urja Bhawan, Tadar Tang Marg, Near IG Park, Itanagar - 791111.
4. The Tender Opening cum Evaluation Committee headed by its Chairman, the Chief Engineer(CEZ), Department of Power, Itanagar.
5. Union of India represented through Ministry of Power, Govt. of India, Shram Shakti Bhawan, Rafi Marg, New Delhi.

.....Respondents

By Advocates:

Mr. Duge Soki, Additional Sr. Govt., Arunachal Pradesh

Mr. N. Ratan, Central Govt. Counsel

2. WP(C)523(AP)2016

M/s Millenium Synergy Pvt. Ltd.

No. 12A, 11th Avenue, Ashok Nagar, Chennai-600083, LIC Colony

Represented by its authorized signatory, Shri Jabring Venia

S/o Lt. T. Venia, R/o Panchali, Mowb-II, PO/PS: Itanagar

Papum Pare District, Arunachal Pradesh.

Contact No. 9402698530, Email: Nil.

.....Petitioner

By Advocates:

Mr. Rajesh Sonar
 Mr. P. Tatam
 Ms. Subu Ampu
 Mr. T. Shiva
 Mr. H. Rinya

-Versus-

1. The Union of India, represented by the Secretary to the Govt. of India, Ministry of Power, Shram Shakti Bhawan, Rafi Marg, New Delhi-110001.
2. Rural Electrification Corporation Ltd.(REC), a Govt. of India Enterprise, represented by its Chief Project Manager, DDUGJY, having its registered office at Core-4, SCOPE Complex, 7 Lodhi Road, New Delhi-110003.
3. The State of Arunachal Pradesh represented by the Chief Secretary to the Government of Arunachal Pradesh, Itanagar.
4. The Commissioner, Department of Power and Non-conventional Energy Resources, Government of Arunachal Pradesh, Itanagar.
5. The Director, Arunachal Pradesh Energy Development Agency(A State Government Agency), Urja Bhawan, Tadar Tang Marg, Near IG Park, Itanagar - 791111.

.....*Respondents*

By Advocates:

Mr. Duge Soki, Additional Sr. Govt., Arunachal Pradesh
 Mr. N. Ratan, Central Govt. Counsel

3. WP(C)466(AP)2016**M/s Rays Power Infra Pvt. Ltd.**

Having its registered office at D-43 Janpath,
 Shyam Nagar, Jaipur-302019, in the State of Rajasthan
 Represented herein by its authorized signatory, Shri Praveen Sharma
 S/o Late Ramavtar Sharma, resident of Vidhyadhar Nagar,
 Dist-Jaipur, Rajasthan-302023.

.....*Petitioner*

By Advocates:

Mr. S. Chamarla
 Mr. M. Phukan
 Mr. D. Sarmah

-Versus-

1. The State of Arunachal Pradesh represented by the Chief Secretary to the Government of Arunachal Pradesh, Itanagar-791111.
2. The Department of Power & NRE, Government of Arunachal Pradesh, Itanagar-791111, represented by the Commissioner(P&NRE).
3. Arunachal Pradesh Energy Development Agency(A State Government Agency), having its office at Urja Bhawan, Tadar Tang Marg, P. B. No. 124, Itanagar - 791111, represented by its Secretary.

4. The Chairman, Arunachal Pradesh Energy Development Agency (APEDA), Urja Bhawan, Tadar Tang Marg, P. B. No. 124, Itanagar - 791111.
5. The Director, APEDA, Urja Bhawan, Tadar Tang Marg, P. B. No. 124, Itanagar - 791111, District- Papum Pare, Arunachal Pradesh.

.....*Respondents*

By Advocates:

Mr. Duge Soki, Additional Sr. Govt., Arunachal Pradesh

4. WP(C)513(AP)2016

M/s Rays Power Infra Pvt. Ltd.

Having its registered office at D-43 Janpath,
Shyam Nagar, Jaipur-302019, in the State of Rajasthan
Represented herein by its authorized signatory, Shri Praveen Sharma
S/o Late Ramavtar Sharma, resident of Vidhyadhar Nagar,
Dist-Jaipur, Rajasthan-302023.

.....*Petitioner*

By Advocates:

Mr. S. Chamaria
Mr. M. Phukan
Mr. D. Sarmah

-Versus-

1. Union of India, represented by the Secretary to the Govt. of India, Ministry of Power, Shram Shakti Bhawan, Rafi Marg, New Delhi-110001.
2. Rural Electrification Corporation Ltd.(REC), a Govt. of India Enterprise, represented by its Chief Project Manager, DDUGJY, having its registered office at Core-4, SCOPE Complex, 7 Lodhi Road, New Delhi-110003.
3. The State of Arunachal Pradesh represented by the Chief Secretary to the Government of Arunachal Pradesh, Itanagar-791111.
4. The Department of Power & NRE, Government of Arunachal Pradesh, Itanagar-791111, represented by the Commissioner(P&NRE).
5. Arunachal Pradesh Energy Development Agency(A State Government Agency), having its office at Urja Bhawan, Tadar Tang Marg, P. B. No. 124, Itanagar - 791111, represented by its Secretary.
6. The Chairman, Arunachal Pradesh Energy Development Agency (APEDA), Urja Bhawan, Tadar Tang Marg, P. B. No. 124, Itanagar - 791111.
7. The Director, APEDA, Urja Bhawan, Tadar Tang Marg, P. B. No. 124, Itanagar - 791111, District- Papum Pare, Arunachal Pradesh.

.....*Respondents*

By Advocates:

Mr. Duge Soki, Addl.Sr.Govt.Advocate, Arunachal Pradesh
Mr. N. Ratan, Central Govt. Counsel

:::BEFORE:::
HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

Dates of hearing : 26/27-10-2016
Date of Judgment & Order : 07 -11-2016

JUDGMENT & ORDER(CAV)

Heard Mr. S.Chamaria and Mr. R. Sonar, learned counsel for the petitioners. Also heard Mr. D.Soki, learned Senior Government Advocate and Mr. Ratan, learned Central Govt. Counsel , for the Union of India.

2. All the 4(four) writ petitions are being taken-up together for disposal since all are preferred by the same parties against identical issues.

3. The brief facts leading to filing of the present writ petitions are as bellows:

The Director, Arunachal Pradesh Energy Development Agency (hereinafter in short APEDA) one of the respondents invited online bids from the prospective bidders through E-tendering vide NIT APEDA /BDUGJY/2015-16/01 dated 6.4.2016 for design, supply, installation, testing, commissioning and maintenance of 300Wp Solar Power Packs for rural electrification under the scheme "Electrification of 1058 nos. off-grid villages in Arunachal Pradesh". The estimated cost of the tender was Rs.127.00 crores. Deendayal Upadhyay Gramjyoti Yojana (DDUGJY) is a centrally sponsored scheme and one of the flagship programme of Ministry of Power that has been launched with view to facilitate 24 x 7 hours supply of powers in the rural areas. In pursuance of the aforesaid need dated 6.4.2016 altogether 10 bidders including the above two petitioners participated in the tender process and their respective technical bids were opened online by the tender opening-cum-evaluation committee comprising of eight members on 19.4.2016 (hereinafter referred as 'Tender Committee') wherein only six bidders were found to be technically qualified. Thereafter financial bids of the aforesaid six bidders were opened by the Tender Committee' on 27.5.2016 wherein the rate quoted by M/S Sukam Power System was found to be the lowest (L-1) which is 31.47 percentage below the tender value. The rate quoted by the present two petitioners i.e M/s Rays Power Infra Pvt. Ltd. and M/s Millenium Synergy Pvt. Ltd., were

found to be L-2 and L-3 respectively, which are 0.96 and 0.8% below the tender value. The Tender Committee found the rates quoted by L-1 to be extremely low and unworkable considering the difficult site condition and other different parameters. The Tender Committee come to be justified i.e. the minimum cost required for proper and complete adjudication of the project including five years warrant, that any amount below 120 crores for entire works may not be viable without compromising the quality of the materials.

"Section 6 of the bid document provides that:

6.0 The procedure for Finalization of BID would be as follows:

6.1 Finalization of BID.

First the Technical Bids shall be opened and evaluated.

Then the Price Bid of technically qualified bidders shall be opened.

The party offering the lowest rate(s) (L1) will be the successful bidder. However, work may be awarded to more than one party at the accepted lowest rate(s) if APEDA desires so in order to achieve completion of work in time. The rate(s) will be quoted by the bidders district wise and L1 will also be decided districtwise.

6.2 Finalisation of Empanelment:

First the Technical Bids shall be opened and evaluated

Then the Price Bid of technically qualified bidders shall be opened.

- The lowest rate (i.e.)L-1) will be given the preference, but it will not be binding on APEDA to award the work to L-1. The approved rate may be decided based on a justification made by the APEDA on the offers received as too low rates may affect the quality and progress of the works.
- L-1 i.e. lowest rate bidder or the party whose rate is accepted may not be awarded the entire work. It may be distributed to other participating technically qualified parties also in order to

maintain quality of equipment / work and also for timely completion of the works which is time bound.

- The approved justified /lowest rate would be offered to other technically qualified bidders (i.e.L-2, L-3 and so on) having price not more than 25% above the lowest/approved rates(L-1) will be awarded the remaining quantity/work (by district wise distribution) which is left not awarded to the L-1. In other words a short list will be prepared amongst the bidders on the lien mentioned herein above.
- APEDA will assign districts to the short listed contractor/bidders/suppliers a its wisdom and justification. Different district shave different numbers of beneficiaries and distribution of district will be done according to the number of beneficiaries in a district. It will be ensured that one district will have only one service station set up by the concerned contractor. APEDA will place the orders/award the work to the contractor/ bidder on this line.
- Training of the users/beneficiaries will be arranged by the contractor/bidders in each of the village at the time of installation.
- After award of work it should be executed and completed within the time schedule stipulated in the Tender Document , which is 6 months from the date of award. In case of delay (for any reason other than Force Majeure conditions or any extension thereof granted to him by APEDA), a penalty equal to 1.0% of the value of the unperformed services for each week (For the purposes of calculation to delay, pat of week shall be treated as week) of delay until actual performance up to a maximum deduction of 10% of the delayed services.

6.2 If required APEDA reserved the right to negotiate with (lowest)L-1 bidder before finalisation of the tender.

6.3 APEDA reserved the right at the time of awarding the

counteract to increase or decrease the quality of goods and locations of supply without any change in price or other terms and conditions.

6.4 APEDA reserved the right to accept or reject any or all the bids without any change in price or other terms and conditions.

6.5 NOTIFICATION OF AWARD

Notification of awarding the contract and list of successful Bidder(s) for contract shall be displayed on APEDA's website and shall be intimated in writing to the contractor.

6.7 CONTRACT AGREEMENT:

Before execution of the work, a contract agreement for execution of the work shall be signed by the Bidder with APEDA within 15 days of communication from APEDA. In case agreement is not executed without the stipulated time, Earnest money of the bidder will be forfeited."

4. In view of the above provisions of the bid documents, the Director of the APEDA made noting in the file that if the proposal of L-1 is not accepted the other bidders which quoted lowest rates for different districts can be considered vide office note dated 14.6.2016 with a recommendation that if the L-1 is not awarded the tender work the same may be awarded to L-2 and L-3. But the Commissioner Finance vide his office note dated 5.7.2016 disagreed with the aforesaid proposal of the Director APEDA and made a proposal to award the work exclusively to L-1 and in the event of his inability to undertake the work, the fresh tender process will be initiated with revised bid documents in respect of the work in question. The matter was referred to Chairman APEDA who has also expressed his opinion vide his office note dated 7.7.2016 that no compromise of quality of produce should be made considering the difficult topography of the State of Arunachal Pradesh whereby the beneficiaries/users would not be able to approach for any kind of service centre of the company of the District Headquarter. Finally the matter was endorsed before the Hon'ble Minister Power NRE who is a competent authority for Government approval and the entire matter was wholly considered by the concerned Minister, Power vide his office note dated 8.7.2016 and on the basis of evaluation report of the Bid Committee, made an observation that as the rate quoted by L-1 is abnormally low and not workable rate

the offer of L-1 was rejected and its place necessary approval was granted to award work to L-2. Thereafter the matter was placed before the Hon'ble the Chief Minister of A.P. for final approval and the Hon'ble Chief Minister vide his office note dated 8.7.2016 approved L-2 M/s Rays Power Infra Pvt. Ltd.), as well as L-3 M/s Millenium Synergy Pvt. Ltd. for the contract work in respect of the District mentioned in the orders.

5. By the aforesaid approval /decision of the Chief Minister was not carried out by the official respondents by issuing necessary orders awarding contract work to L-2 M/s Rays Power Infra Pvt. Ltd. and L-3 M/s Millenium Synergy Pvt. Ltd. and the matter kept pending. In the meantime, by taking the change of Government the Commissioner, Power and NRE again re-endorsed the matter to the succeeding Hon'ble Chief Minister for re-consideration reiterating his earlier stand to award the work to L-1 or through fresh tender vide office noting dated 19.7.2016. The succeeding Hon'ble Chief Minister by acceding to the proposal made by the Commissioner decided to cancel the entire tender process with a view that CVC guideline do not permit awarding of work to L-2 M/s Rays Power Infra Pvt. Ltd., without discussing further about the about the decision of the evaluation committee. Thereafter the Director APEDA cancelled the entire tender process pertaining to NIT dated 6.4.2016 and decided to go for a fresh tender process in respect of the work in question by the impugned order dated 24.8.2016 on the basis of the decision of the succeeding Chief Minister dated 13.8.2016.

6. The present two petitioners being the L-2 and L-3 in favour of whom approval was granted by earlier bid evaluation committee as well as erstwhile Chief Minister has preferred the aforesaid two writ petitions i.e. WP(C)461(AP)/2016 and WP(C)466(AP)/2016 challenging the aforesaid order of cancellation dated 24.8.2016 with a prayer to set aside and quash the aforesaid order as well as prayed to restrain the respondent authority from floating fresh tender in respect of work in question. The prayer has been made to issue Writ in the nature of Mandamus directing the Respondent Authority to implement the decision dated 8.7.2016 of the Government and to give effect to the same by awarding the contract work to the petitioners as well as other eligible bidders as per terms and conditions of the bid documents and the relevant rules of Executive Business.

7. Both the petitioners by filing the two writ petitions being WP(C)523(AP)/2016 as well as W.P(C)513/(AP)/2016 as mentioned above has prayed for setting aside and quashing the impugned decision of the Ministry of Power, Govt. of India, in its review, planning and monitoring(RPM) meeting dated 10.08.2016, whereby it was decided that

Solar Energy Corporation of India(SECI), a CPSU under MNRE shall be the implementing agency for the work "Electrification of 1058 nos. off-grid villages in Arunachal Pradesh" vis-à-vis the tender process initiated by the respondent authorities vide Notice Inviting Tender(NIT) dated 06.04.2016. The writ petitioners are aggrieved by the above decision since the entire tender process initiated in pursuant to Notice Inviting Tender(NIT) dated 06.04.2016 is sought to be cancelled on the purported ground of delay in awarding the tender work, whereas a matter of record, there is no reasonable and valid grounds for taking such impugned decision and on the contrary, if the impugned decision dated 10.08.2016 is given effect to, it would cause undue delay in implementation of the flagship project thereby adversely affecting the public of Arunachal Pradesh not to speak of the petitioners interest who was found to be the lowest bidders in respect of several districts for the State, as mentioned in official communication itself discussed above.

8. In the counter affidavit filed on behalf of Respondents No. 1 and 2 in WP(c)523(AP)2016, the main categorical stand taken by Respondent No. 2, is that since it is a matter of record that Arunachal Pradesh Energy Development Agency(APEDA) was not able to conclude the tender process in view of low bid submitted by L-1 bidder and thus, the Agency would not be able to achieve the deadline of completing the off-grid electrification in the State of Arunachal Pradesh by October, 2016, as stipulated by the concerned respondent authority. As such, vide decision dated 10.08.2016, respondent Union of India took a consensus decision to replace Arunachal Pradesh Energy Development Agency(APEDA) with Solar Energy Corporation of India(SECI), as implementing agency for off-grid projects in the State of Arunachal Pradesh, for larger and overall public interest of the State, as has been done by the Respondent No. 1 in the States of Bihar, Jharkhand, Madhya Pradesh, Rajasthan, Assam and West Bengal.

It is also the stand of Respondent No. 2 that bid of the petitioners were only under consideration of the State Government and was never accepted by the Arunachal Pradesh Energy Development Agency(APEDA) and awarded with the contract work, in question. That apart, under Clause 6.4 of the Notice Inviting Tender (NIT), Arunachal Pradesh Energy Development Agency(APEDA) has the right to accept or reject any or all the bids without assigning any reason.

9. In the same writ petition i.e. WP(c) 513(AP)2016, by filing the counter affidavit on behalf of State Respondents No. 3, 4, 5, 6 and 7, the Respondent No. 4 has taken the stand that the petitioner i.e. M/s Rays Power Infra Pvt. Ltd. was not the lowest bidder, in the tender, in question, because of which work could not be awarded to the petitioner(not the L1) in violation of CVC guidelines and procurement practice. Therefore, the State Government has taken a conscious decision to cancel the bid and float fresh tender. However, before the bid could be floated, the Govt. of India has taken a decision in a high level meeting chaired by the Secretary(Power), Govt. of India, that the work should be allotted to Solar Energy Corporation of India(SECI) which is public sector enterprise of Govt. of India and it was entrusted to float the fresh tender against the work, in question, and an Expression of Interest(EoI) has been floated by the SECI.

According to the State Respondents, in fact, awarding of work to any bidder other than L1 is bound to be questioned in the Court of law on the ground of motive and therefore, the State Government has taken a fair and correct decision to float fresh bid and nothing precludes the petitioner from participating in the bid being floated by SECI.

It is also the stand of Respondent No. 2 that the bid of the petitioner was only under consideration of the State Government and was never accepted by the Arunachal Pradesh Energy Development Agency(APEDA) and awarded with the contract work, in question. That apart, under Clause 6.4 of the Notice Inviting Tender(NIT), Arunachal Pradesh Energy Development Agency(APEDA) has the right to accept or reject any or all the bids without assigning any reason.

10. In response to the contentions raised in counter affidavit filed by the State Respondents in WP(c) 513(AP)2016, the petitioner by filing his affidavit-in-reply, has contended that the basic grievance is only to the extent that the petitioner ought to have been awarded with the work orders as he was selected and approved as L1 in the bid process which however has not been done by the respondents and fresh tender process is contemplated vide impugned decision dated 10.08.2016. It is contended by the petitioner is that he would have no objection if the work is implemented by other agency by awarding the work to the petitioner against the districts for which he has been selected as L1 in the bid process conducted by the Arunachal Pradesh Energy

Development Agency(APEDA) under the express instruction of Respondents No. 1 and 2.

The further submission of the petitioner is that SECI has already floated a Tender dated 26.09.2016 wherein period for completion of the work is fixed as 9(nine) months from the date of award and last date fixed for receipt of bid documents is 26.10.2016. Apparently, the work, in question, in all probability, cannot be completed within 6/7 months. It has been reiterated that petitioner is the accepted L1 as recommended by the Evaluation Committee in its Minutes dated 03.06.2016. Therefore, the petitioner cannot be denied to award with the work order, on some misconstrued ground/misinterpretation. That apart, the contention of the petitioner is that the impugned decision dated 10.08.2016 has been passed in a very arbitrary and illegal manner and as such, the same is liable to be interfered with by the Court.

11. It is to be noted that no counter affidavit filed by the respondents as regards the Writ Petition (C) 461/(AP)/2016 and Writ Petition (C) 466/(AP)/2016 but an affidavit has been filed by the respondent no.3 the Director, Arunachal Pradesh Energy Development Agency(APEDA) in the aforesaid cases to bring on records the subsequent development as per order and direction of the Court dated 15.9.2016 whereby it has been apprised that the said respondent has received a communication from the Ministry of Power, Govt. of India dated 5.9.2016 wherein it has been communicated that in view of the Minutes of Meeting dated 10.8.2016 held at New Delhi, has decided that since the project for electrification of off grid villages have not been awarded the said project would be implemented by Solar Energy Corporation of India ((SECI), a Central Public Undertaking under Ministry of NEORENEWABLE Energy. As the decision has been taken by the Central Govt., so the State has no further role and authority to execute the said project.

12. I have given due consideration to the submission made by the learned counsel for the parties. The learned counsel for the petitioners mainly advance their argument on the following counts:

- The order dated 13.8.2016 passed by the subsequent Hon'ble Chief Minister there is nothing on record to show that there was some change in the circumstances for rescinding the earlier decision passed by the previous Hon'ble Chief Minister on 8.7.2016. It is not the case that the earlier decision was passed

by the person who did not have the authority or decision was incorrect, mala fide, arbitrary or was taken on extraneous consideration or was not legal or suffered from non-application of relevant factors of the same was without jurisdiction. In the subsequent decision it has not been mentioned by the subsequent Chief Minister concerned that the previous decision was an erroneous decision and was based on wrong premises and was inconsistent with the Government policy. Therefore, the review of the earlier decision of the government to award the work to two of the petitioners by the succeeding Hon'ble Chief Minister is illegal, arbitrary, , perverse and not permissible under relevant rules of Executive Business , 1987.

- That the impugned decision taken on 13.8.2016 by the succeeding Chief Minister without taking into consideration the material placed before the earlier Minister and without taking into consideration the relevant terms and conditions of BID document, would make its impugned decision irrational, perverse and not sustainable in the eye of law.
- As per matter on record, there were factual inaccuracies in the statement recorded by the Commissioner, Power and NRE in his earlier note dated 5.7.2016 and subsequent Note dated 19.7.2016 to the extent that under CVC guidelines and standard procurement guidelines it is not permissible toward the work to L-2 and L-3 (except L-1) and fresh tender should be floated. Whereas, there is no such guideline which prohibit the government from settling the tender work to the next lowest bidder in the larger public interest. The view of the Commissioner is contrary to the explicit terms and conditions of the Bid document inasmuch as it is unequivocally provided under relevant section 6.2 of the BID document that it will not be binding on APEDA to award the work to L01. It is further provided that L-1 or the party whose rate is accepted may not be awarded the entire work and it may be distributed to the other participating technically qualified parties also in order to

maintain quality of equipment/work and also for timely completion of the work which is time bound. It is also provide the rate(s) shall be quoted by the bidders district wise and L-1 will also be decided district wise. Therefore, the impugned decision made vide office note dated 13.8.2016 by the succeeding Hon'ble Chief Minister on the basis of false and wrong statement made in the office note must be deemed to have vitiated on this account alone.

- The action taken by the succeeding Chief Minister in reversing the earlier noting/decision and in deciding to go for a fresh tender is unfair, unreasonable , irrational and improper inasmuch as the decision of the Government in this regard is not based on proper material on record.
- The office noting dated 8.7.2016 was in fact a 'decision' for all practical purposes. The very language of the so-called 'noting'suggests that in no uncertain terms and earlier Chief Minsitr had takne a 'decision' to award the contract work to L-2 & L-3 i.e. the petitioners, in view of the non-workable rate quoted by L-1, difficult site conditions and as per the relevant terms and condition of the BID document in the larger public interest.
- The executive's discretionary power has not been properly, reasonably and fairly exercised by the successor Chief Minister in the present case. The discretion has been exercised malafide, without application of mind and in the absence of material to support a decision. It is completely based on irrelevant consideration by leaving out the relevant considerations and also be extending the limits set by the rules governing the ministerial discretion. Hence, the decision making process culminating into impugned 'decision' dated 13.8.2016 by the successor Chief Minister cancelling the tender process is perverse, irrational, arbitrary , unfair and actuated with malice which is antithesis to the principle of fair play in administrative action.

13. The argument advanced on behalf of the State Respondents is that the petitioners have no absolute right to challenge the decision of the State regarding floating of fresh bid and the petitioner can again participate in the bid being floated by SECI and the APEDA has cancelled the aforesaid tender in terms of the decision of the State Govt. The learned Standing Counsel on behalf of the Union of India has made a submission that the decision taken in the meeting dated 10.8.2016 is based upon the factual submission made by the representative of the State i.e. Commissioner, Department of Power and Energy and on the basis of such submission decision was taken to complete the work through SCCI since the aforesaid project was a time bound project and it was not implemented as directed.

14. I have carefully examined the documents filed by the petitioners as no document has been filed by the respondents' side. The respondents' side have not however disputed any of the documents that has been filed by the petitioners. After going through the Annexure-4 (report of the bid evaluation committee) dated 3.6.2016 it appears that the said Committee comprised by eight members and the said Committee has taken a consensus opinion for rejection of the offer of the first lowest bidder i.e M/s Sukam Power System Ltd. and the 2nd lowest bidder M/s Rays Power Infra Pvt. Ltd. became eligible to the first lower (L-1) and M/s Millenium Synergy Pvt. Ltd., became the 2nd lowest (L-2) and so on. On the basis of the aforesaid findings the Director, APEDA made detailed office note dated 14.6.2016 and placed the matter before the Commissioner, Power & NRE for necessary action with an observation that the rate given by L-1, M/s Sukam Power System Ltd. is below the tender value. However, it is submitted that after awarding the work to L-1 i.e. M/s Sukam Power System Ltd. if they fail in their commitment to execute the work in time the work may be awarded to L-2 or L-3. There was further observation in the office note of the Director, APEDA that the aforesaid work may be distributed to the L-1 and L-2 in the districts where their bid is lowest. It is to be found that the entire project was meant for electrification of 1058 villages and such a decision by Director, APEDA dated 14.6.2016 was properly made in the interest of the project as well as per the bid conditions that has been mentioned above. Even though the earlier L-1 was rejected by the bid evaluation committee but the Chairman APEDA in view of the willingness of the L-1 proposed to award the project to L-1 and in case of L-1 it was proposed to be awarded to the L-2 and L-3. That apart, this view was quite consistent with the bid condition and proper appreciation on the subject for the interest of the State. But the

Commissioner through his opinion has opposed such proposal made by the Chairman APEDA without any proper reasoning by its order dated 5.7.2016. However, the said opinion of the Commissioner became nonest as soon as the proposal of the Chairman APEDA got approval from the Minister of Power as well as the Chief Minister of Arunachal Pradesh vide approval dated 8.7.2016 and the same became final and in that context the contract is liable to be awarded to L-2 and L-3 i.e. the present petitioners. But the respondent authority by flouting the aforesaid decision of the highest authority of the State has kept the matter pending and the Commissioner, Power & NRE made a note on 19.7.2016 before the new Chief Minister with his observation that " the previous CM has approved by awarding the work to L-2 and L-3 which is impermissible as per standard procurement guidelines so the work may be awarded to L-1" and accepting the aforesaid opinion of the Commissioner the Chief Minister of Arunachal Pradesh has approved the proposal for cancellation of the bid and floating of fresh bid by its order dated 13.8.2016, without any further discussions, reasons whatsoever.

It can be apparently seen that both the Commissioner Power and NRE as well as the Chief Minister has not applied their mind to all the official procedure that has been exhausted by the bid committee as well as the guidelines and rules of the bid that has been mentioned above that the APEDA is within their ambit to reject the L-1 and contract can be awarded to other bidders (as referred above). The opinion of the Respondent Commissioner itself not proper while he made an opinion that CPC guideline do not permit awarding of work to L-2 and L-3 and he has given the direction to award the work to L-1 irrespective of the findings of the Bid Committee and the Chairman APEDA, so the opinion rendered by the Commissioner is bereft of valid and cogent reason and hence not tenable in law. Floating of new tender and to undertake a new exercise for tendering process is no way appears to be necessary, either in the factual grounds as it is a time bound project or not legally permissible in view of all above earlier communication.

15. As regards the decision rendered by the present Chief Minister dated 13.8.2016 also suffers from vices for not discussing any of the earlier official recommendation by the Department as well as discarding the decision of the erstwhile Chief Minister. Absolutely no reason has been recorded by the present Chief Minister while acceding the submission of the Commissioner while cancelling the entire bid. As has been held

in *AIR 2012 Orisa 81 Akhila Kumar Mahapatra –vs- State of Orisa* the reason is the “heart bit of every conclusion”. It introduces clarity in an order and without the same it became lifeless. Failure to give reason amounts to denial of justice. It has been further held that every action of State and its instrumentality should be fair, legitimate and board and without any affection or aversion. In a contractual sphere as in all other State action the State and its instrumentality has to conform the Article 14 of the Constitution of which non-arbitrariness is a significant asset. There is no unfettered discretion in public law. A public authority possess power only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is fairplay in action. Due observance of this obligation is a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction in the State and its instrumentalities with this ailments forming a necessary component of the decision making process in all State action.

16. In *Royal Power Turnkkey Implement Pvt. Ltd. Pimpri –vs- Maharashtra Industrial Development Corporation*, reported in *2014 (5) MH.L.J.* it has been held that principles of equality embodied in Article 14 for the Constitution mandates that the respondent corporation cannot arbitrarily cancel the tender process for choosing any person it likes, for entering into relationship with it and for excluding the petitioner by adopting irrelevant consideration. Therefore, arbitrary and irrational decision of the Respondent Corporation in re-tendering the work needs to be set aside as the same is unable to meet the test of unreasonableness and non-discrimination. In a similar context, the Hon'ble Supreme Court in *State of Jharkand & ors –vs- CWE-SOMA Consortium decided on 12.7.2016* reported in *Monu –SC 0760 /2016* – it has been elaborately discussed about the inviting of tender or awarding of contract determination thereof by the State Govt./Union Territory and has held that re-tendering may be considered with utmost caution under the following circumstances –

- (a)- offer do not conform to essential specification.
- (b) wherever there are major changes in the specification and quantity which may have considerable impact on the price.
- (c) price quoted are unreasonable high with reference to assess price or there is evidence of a sudden slump in prices.

(d) there may be cases where the lack of completion is due to the respective specification which do not permit any vendor to participate .

17. Reference has been made to the observation to the case of *Tata Cellular –vs- Union of India*, reported in *1994 6 SCC 651* where it has been held as follows:

“ It cannot be denied that principles of judicial review would apply to exercise of contractual powers by govt. bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitation in exercise of that power of judicial review. The govt is the guardian of finance of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Govt. but the principles laid down in Article 14 of the Constitution has to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 to the Govt. tries to get the best person for the best quotation. Right to choose cannot be considered an arbitrary power of course, if the said power is exercised for any collateral purpose. The exercise of that power is struck down. A decision must not be tested by the principles of reasonableness but must also free from arbitrariness not affected by bias or actuated by mala fide. ”

18. As has been discussed above, the decision making process on the part of respondent commissioner as well as the Chief Minister while cancelling the aforesaid tender process appears to be based on non application of mind and against the object sought to be achieved, unreasonable and against the prescribed rules and procedure of the bid documents and it can be held accordingly that the aforesaid decision of cancellation of bid has been made by way of arbitrariness which is not permissible as has been held by the Apex Court.

19. Rather it is to be noted that the Tender Evaluation Committee comprising of eight members basing on comparative statement so given by the tenderers vis-a-vis the object to be achieved by the aforesaid project for rural electrification in the

different districts of Arunachal Pradesh has arrived at a reasonable conclusion having regard to the better interest of the State, decided to award the contract to L-2 and L-3 instead of L-1. The said decision was accepted and approved by the earlier Chief Minister on the basis of detailed reasoned office note given by the Chairman APEDA but such a proper exercise has been flouted by the successive order of Chief Minister without application of mind to all above aspects as discussed earlier. From all point of view earlier order of erstwhile Chief Minister dated 8.7.2016 is liable to upheld and the subsequent decision dated 24.8.2016 for cancellation of bid without any valid reason while arriving at such decision is liable to be cancelled.

20. Further as regards the challenge made to the decision dated 10.8.2016 whereby the Respondents Authority /Union of India decided to implement the project through another SECI on the basis of the recommendation made by the Respondent/Commissioner & Secretary that the State is unable to award the project even after more than 10 months of sanction is also found to be improper representation on the part of the Commissioner. Matters on record reflect that the aforesaid project was sanctioned on 5.6.2016 and tender was floated on 6.4.2016 and the final evaluation of the bid was made as on 3.6.2016 and the aforesaid evaluation was thereafter placed by the Director APEDA to the Commissioner/Respondent as on 14.6.2016 to award the work to L-1 and in case of their failure in commitment to execute the work in time to award the work to L-2 and L-3 and the Commissioner /Respondent by refusing the aforesaid proposal /office note has given the direction to award the work to L-1 and in case of inability of L-1 the fresh bid should be floated. In such factual matters on record the submission of the Commissioners as on 10.8.2016 that the State has not be able to award the project even after 10 months of sanction is itself not proper and hence not maintainable. If calculated from the date of sanction from 5.4.2016 to 10.8.2016 four months was completed while making such submission. In fact, no delay was accrued for the cause of other respondent authorities but the matter was duly progressed and the contract was liable to be awarded in terms of the approval given by the earlier Chief Minister by letter dated 8.7.2016. In the given circumstances such a representation on the part of Commissioner is found to be unauthenticated. It is only on the basis of representation so made by the responsible representative of the State Respondents i.e. the Commissioner/Respondent, union of India has decided the matter to execute the work by other agencies and the same is also not maintainable. In view of the matters on

record any action of the respondents towards implementation of the project thorough SECI cannot be permitted. Most interesting aspect in the whole scenario appears to be noted that the rejected L-1 never meanwhile came forward to challenge the rejection of his bid but it was the Commissioner/Respondent who has chosen to protect the interest of L-1 who is otherwise not at all found to be competent to award the contract by the Bid Evaluation Committee. This can not a one man show so that commissioner to take a decision on his own in suppression of all the matters on record. Accordingly, the decision arrived at the RPM meeting on 10.8.2016 at New Delhi is liable to be interfered with. In this aspect the plea of the Commissioner/Respondent that has been taken on their affidavit cannot be accepted as it is a case of clear rejection of L-1 without their being any scope of negotiation.

21. In view of all above, all the writ petitions succeed. Impugned office order No.APEDA/W -225/DDUGJY /-Tender/ 2016/1087-92 dated 24.8.2016 as well as 18th Review, Planning and Monitoring (RPM) Meeting of Ministry of Power held on 10.8.2016 and all consequential decisions are hereby set aside and the decision approval order so passed by the earlier Chief Minister dated 8.7.2016 is hereby upheld. The Respondent Authority is hereby directed to proceed with the award of the work to the present petitioners as indicated in the aforesaid order dated 8.7.2016 without further delay, preferably within 15 (fifteen) days.

JUDGE

Bikash/Nandi