

IN THE GAUHATI HIGH COURT

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

ITANAGAR PERMANENT BENCH: NAHARLAGUN

W.P.(C) NO. 158 (A.P.) OF 2018

M/s. Marpi Wire Products, represented by its Power of Attorney Holder, Shri Yomli Ango, resident of Pakkam-II, PO & PS Aalo, West Siang District, Arunachal Pradesh.

... Petitioner

Versus

1. The State of Arunachal Pradesh, Represented by the Commissioner, PWD, Govt. of Arunachal Pradesh, Itanagar.
2. The Chief Engineer, Public Works Department, Govt. of Arunachal Pradesh, Itanagar.
3. The Superintending Engineer, PWD, Aalo Division, West Siang District, Govt. of Arunachal Pradesh, Itanagar.
4. The Executive Engineer, PWD, Aalo Division, West Siang District, Govt. of Arunachal Pradesh, Itanagar.
5. M/s. ML Enterprises, represented by its Proprietor Shri Gemar Lollen, Aalo West Siang District, PO & PS Aalo, Arunachal Pradesh.

... Respondents

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA

Advocates for the petitioner	: Mr. Tony Pertin, M. Pertin, : K. Saxena, G. Taloh, U. Bori, : R.L. Thungon, Y. Riram, : H.K. Jamoh.
Advocates for the Respondents No. 1 to 4	: Mr. D. Soki, Senior Govt. Advocate.
Advocates for Respondent No.5	: Mr. N. Ratan, K. Lollen, Limi Bam.
Date of hearing	: 18.05.2018.
Date of order	: 23.05.2018.

JUDGMENT AND ORDER (CAV)

Heard Mr. T. Pertin, the learned Counsel for the petitioner. Also heard Mr. S. Soki, the learned Senior Govt. Advocate, State of Arunachal Pradesh, appearing for State respondents No.1 to 4 and Mr. N. Ratan, the learned Counsel appearing for the private respondent No.5.

2) The petitioner is an unsuccessful tenderer in NIT called for the work of "C/O All weather road from Nyorak PMGSY Road to Kodum Nikta CO HQ-10 KM". Hence, the petitioner has challenged the tender process by this application under Article 226 of the Constitution of India. This writ petition has been filed through an attorney.

3) The learned Counsel for the petitioner, by referring to the writ petition and affidavit-in- opposition (hereinafter referred to as 'A/O' for short) filed by the respondents, has made the following submissions:-

- a. The tender was scheduled to be opened on 27.10.2017. On the same day, the authorities constituted a Board. No separate advertisement about the date of opening of tender in terms of clause 20.1.1 of the CPWD Manual.
- b. For the purpose of opening the bids, the authorities did not include any person outside of the State PWD, like Administrative Officer from Deputy Commissioner's Office or any other independent person for

opening of tender and for evaluation of bids, as such, there was large scale manipulation in the tender process. It is mandatory to have independent persons present at the time of opening and scrutiny of bids, which is established by letter dated 21.11.2017, by which the PWD authority had requested the Deputy Commissioner to deploy a A.O. (Magistrate) for cross verification of documents.

- c. The tender was not evaluated on 27.10.2017, the date of opening and no result was declared on the said date. A RTI application submitted on 28.10.2017 remained un-responded to, which was to hide something, as such, the manipulation in the tender process cannot be ruled out. It is submitted that the State respondents did not produce any record of minutes prepared on 27.10.2017 while opening the tender.
- d. Two tenderers were allowed to inspect the tender papers submitted by one M/s. K.G.B. Enterprise. No other bids were allowed to be inspected. Thus, if the authorities could permit inspection of one bid, unless there was something to hide, inspection of all other tenders ought to have been allowed to the parties desiring inspection.
- e. The reason for the rejection of technical bid of the petitioner was disclosed for the first time through the affidavit- in- opposition filed by the State Respondents. The rejection of technical bid was not notified when bids were opened on 27.10.2017.
- f. By not disclosing the reasons for rejection of his tender on time, the State Respondents, in connivance with the private respondent No.5 had permitted the respondent No.5 to commence the work and now they would be taking a plea of public interest on commencement of the work.
- g. The provisions of District Based Entrepreneur And Professionals (Incentives, Development And Promotion) Act, 2015 (hereinafter referred to as "DBEP Act, 2015)" provided that a bidder is eligible to

bid if he has in hand not more than two works at the relevant point of time. Accordingly, the said pre-condition was also prescribed in the tender. The Respondent No.5 had mentioned in his tender that he was having only two works in hand, being (i) C/O Road from Manmoa HQ to Phinbiro-1 (33.17 KM), Package No. AR/01/05/055; and (ii) C/O Motorable Bridge over Siyom River at Bene, C/O Steel Arch Bridge-96m span. However, the respondent No.5 had withheld that he was holding another contract work in hand, being (iii) C/O New Seppa Pakoli PWD Road to Hamba Pinda in East Kameng District. Thus, the respondent No.5 was disqualified to bid in the tender.

- h. The aforesaid provisions of DBEP Act, 2005 would have disqualified the respondent No.5. Therefore, in order to overcome the aforesaid prohibition under DBEP Act, 2005, the PWD officials took a decision in connivance with the respondent No.5 that any bidder who had completed 90% of work would be deemed to have successfully completed the work. Thus, by deeming completion of work, the bid of the respondent No.5 was saved.
- i. In the tender, the respondent No.5 had mentioned that he had only the work at Sl. No. (i) and (ii) mentioned in paragraph 3(h) above, but there was no mention of work at item Sl. No. (iii), which was surprisingly referred to in the A/O filed by the State Respondents. This not only establishes connivance but also established that there was a deliberate attempt to by-pass the DBEP Act, 2015.
- j. In paragraph 16 to 19 of the writ petition, the details of documents have been pleaded to show that invalid documents were submitted by the respondent No.5 in his bid. But, no objection could be raised at the time of opening of tender because the PWD authorities did not prepare any comparative statement at the time of opening of the tender bids. The petitioner had subsequently come to know about it

only after true copy of the bid documents of respondent No.5 were provided on application filed under RTI Act. Thus, from the documents annexed to the A/O filed by the respondents, it was alleged that the documents were subsequently manufactured. Example was cited by referring to the description of vehicles given, it is projected that up-to-date tax receipts were not submitted against such vehicles. The Registration Certificates submitted by the respondent No.5 in his bid reflected that the validity of the RC's had expired. Moreover, in the A/O filed by the State, a photograph of one Tractor bearing registration No. AS-05-AC-7640 was shown, but the bid documents did not contain the documents of the said tractor.

- k. It is projected that the petitioner had previously joined with one M/s. Siang Poultry, who had submitted RTI applications and had done correspondence with the authorities. Thereafter, along with the said party, the petitioner had filed W.P.(C) No. 142(AP)/2018, but due to some reasons, the petitioners had to withdraw the said writ petition. Now only the writ petition was prosecuting the matter alone in this writ petition. As such, the respondents have taken a defence that information was sought by others and not by the petitioner, which could not be a valid ground to contest this writ petition as the respondents had connived with each other and the entire process of tender was vitiated by mala fide. By referring to the case of *Udar Gagan Properties Ltd. Vs. Sant Singh, (2016) 11 SCC 378: (2016) 0 Supreme(SC) 377*, the Hon'ble Supreme Court had, inter-alia, held that when it would be placing intolerable burden of proof of a just claim to require a party alleging mala fide action of State to aver in his petition and prove by positive evidence that a particular officer was responsible for misusing the authority for collateral purpose. Thus, it is submitted that in the present case as the petitioner had demonstrated how and why the action taken by the State was

tainted by malice and mala fide. As such, his writ petition cannot be dismissed for want of impleading some officers against whom mala fide is alleged.

- I. The entire tender process was an eye wash, and the process was designed to award the contract to the private respondent No.5, as such, the tender process was vitiated by fraud.

4) The learned Senior Govt. Advocate and the learned Counsel for the respondent had given pointed reply to all the issues raised by the petitioner in this writ petition. It is not deemed necessary to burden this order with detailed reply, as such, to avoid duplication, the points-wise observations and/or findings of this Court, on the basis of the submissions made by the learned counsels for the parties are as hereunder:-

- a. The observation on allegation No. (b) is that in the NIT, the date of opening is found to be mentioned as 27.10.2017. There is nothing in Clause 20.1.1 of CPWD Manual, which requires the date of opening of tender to be advertized separately, despite advertising the date of opening of tender bids in the NIT. Thus challenge of tender process in this ground is found to be frivolous.
- b. Except for oral argument, no material has been placed before this Court that there is any requirement under CPWD Manual or under any law, office instruction or binding authority requiring that the Board constituted for opening and evaluating tender must have an independent person and that such a Board cannot be constituted of officials from the same Department. The argument appears to be preposterous and if accepted, will lead to unnecessary bottlenecks for the tendering department. By letter dated 21.11.2017, the Deputy Commissioner was asked to deploy a A.O. (Magistrate) for cross verification of documents, which might be required because only a Magistrate has powers to call for the records and summon any

party to produce documents. Thus, this Court finds no infirmity in the said procedure. The documents annexed to the A/O reflects that not only the bid documents of the petitioner was verified but the bid documents of the respondent No.5 as well as other 3 tenders were also enquired into. As mentioned earlier, the petitioner has not been able to show from the CPWD Manual that the authorities were under any obligation to constitute tender committee prior to the date of opening of tender and/or there was any prohibition to constitute the Board/ Committee to open and/or evaluate tender on 27.10.2017, i.e. the date of opening of the bids in this case. Moreover, having participated in the bid and having not objected to the constitution of the Board/ Committee on 27.10.2017, when the bids were open, this issue appears to be raised as an after-thought, and there appears to be no merit in the plea on constitution of Board/ Committee to open and evaluate the tender. Thus, the said ground for challenging the tender process is also found to be frivolous.

- c. The present bid was single bid tender. Thus, there is no separate opening of technical bid and the financial bid. The CPWD Manual Clause 20.3.1 permits the Executive Engineer to retain tender documents for technical and financial scrutiny for a period of 7 days, if tender is approved by Superintending Engineer and thereafter documents should be sent to the Superintending Engineer for further scrutiny and approval of successful bidder. Therefore, neither the tender was required to be evaluated on 27.10.2017, nor it was possible to evaluate the tender on the spot. Moreover, in this writ petition, no grievance has been raised for non- disclosure on RTI application dated 28.10.2017. Therefore, there is no reason to arrive at any conclusion that the intention of the State Respondents had to hide something, as such, there was manipulation in the tender process. The tender evaluation report was approved by the

Superintending Engineer, PWD, Aalo on 08.01.2018. The Memo Forwarding Tender to Competent Authority in form under Appendix-24 gives details of the tender evaluation. It shows that on the date of opening of tender, 6 (six) tenders were opened in the presence of representatives of 6 (six) tenderers. The tender value was for Rs.844.00 Lakh. The bid submitted by one M/s. TJ Enterprise was rejected on opening of tenders as they had not deposited earnest money. The price bids of the petitioner and the respondent No.5 was Rs.7,59,60,000/-, and both bids were found to be (-)10% below. Similarly, bids value of other 3 tenderers are disclosed in the said Memo. The bid of the respondent No.5 was found technically responsive and was allotted 100 marks. The bid of the petitioner makes an interesting reading, which is quoted below:-

"4. M/s. Marpi Wire Products has submitted Work experience certificates (i) Rs.822.00 under RWD (DPIU-II), Pangin (ii) Rs.974.99 lakhs under EE(PWD) Boleng Division (iii) Rs.780.85 lakhs under EE(PWD) Aalo Division, but on cross verification, the actual estimated cost of work by him is (i) Rs.154.52 lakhs under RWD (DPIU-II), Pangin (ii) Rs.74.99 lakhs under EE(PWD) Boleng Division and (iii) Rs.335.42 lakhs & Rs.22.57 lakhs under EE(PWD) Aalo Division. M/s. Marpi Wire Product have attempted to misguide the authority in bidding documents by unfair means which is a very serious offence. Also M/s. Marpi Wire Product have quoted unreasonable and unrealistic rate in work viz: Sl. No. 2, 4, 5, 7, 8, 9(B)(a), 9(B)(c), 14, 15, 17, 18, 25, 29, 31, 32, 35, 36, 37, 38, 39 & 40. He has obtained 55.00 marks in his technical bid as per criteria laid down in NIT Special Condition and Contracts & Amendment From Clause 23 to 29 of NIT. Which is unsatisfactory."

Thus, in this case, not only the petitioner is not qualified, but he has even not made any prayer in this writ petition for allotment of contract work to him. Thus, the purpose of filing this writ petition is

held to be not bona fide, but this writ petition appears to be filed as a tool to harass the respondents.

- d. At the relevant stage, one M/s. Siang Poultry filed W.P.(C) No. 738(AP)/2017. Accordingly, in pursuance of the orders passed therein, one Mr. Yomgi Ori and Mr. Karyom Loyi were allowed to inspect the bid documents of one M/s. K.G.B. Enterprise in the office chamber of the Superintending Engineer, Aalo Civil Circle, in the presence of the said bidder. Hence, as the petitioner had never demanded inspection of bid documents of the respondent No.5. Therefore, having not demanded any inspection of the bid submitted by the petitioner No.5, this cannot now be a ground to challenge the tender process. This Court is unable to presume that the State respondents had anything to hide. This reason for challenging the tender process is held to be frivolous.
- e. It is seen that before filing of the present writ petition, the petitioner had never represented that he was not aware of the rejection of technical bid. It is not believable that for the first time through the affidavit- in- opposition filed by the State Respondents the petitioner has come to know about the rejection of his bid. Moreover, in this writ petition, the petitioner has not made any prayer for allotting him the tender work, his only prayer is for setting aside the letter of acceptance. Thus, assuming that the petitioner was ignorant, it was because he chose to remain so. Therefore, this reason for challenging the tender process appears to be frivolous.
- f. There is no merit in the allegation that by not disclosing the reasons for rejection of his tender on time, the State Respondents, in connivance with the private respondent No.5 had permitted the respondent No.5 to commence the work. In this regard, it is seen that under Clause 23 of the Special Conditions of Contract and Amendments, the qualification of a bidder was that he must have (a)

experience of having successfully completed two similar work of aggregate cost of not less than Rs.422.00 lakh during the last 5 years, and (b) Should have had an annual financial turnover in civil engineering construction works in any one year during last five (5) years of value of Rs.844.00 Lakh. Therefore, in view of what has been stated in sub-para (c) above, the petitioner has not been able to show that he was having the requisite qualification of participating in the tender. Therefore, if the petitioner cannot bid in the tender due to lack of requisite qualification under clause 23 referred above, public interest is loaded highly in favour of the respondents. Thus, the purpose of filing this writ petition is nothing but the petitioner is found to be abusing the process of court as a tool for harassing the respondents.

- g. The State Respondents have annexed as Annexure-E to their A/O, to show that they had convened a pre-bid meeting on 16.10.2017 with 6 (six) bidders, where the petitioner was represented by Sri Makar Bagra, son of the Proprietor of the petitioner firm. On question No. 3, put-up by three prospective tenderers, viz., M/s. TJ Enterprises, M/s. Siang Poultry and M/s. M/s. KKKK Enterprises, to the effect that under General Rules Clause 14 according to DBEP Act, 2015 only two works is permitted at a time then why 3 (three) works in hand is allowed to participate in this tender process, the participants were informed about the Corrigendum issued vide No. SEA/CONT/M-0/2017-18/1229-32 dated 16.10.2017, only two works were allowed and it provided that 90% completed works shall be deemed to be completed. The bid documents produced by the respondents show that the work No. (i) was 95% completed. Hence, the said first work was deemed to be completed and exempted. The said position was accepted by all present in the said pre-bid meet held on 16.10.2017. The tender had been opened on 27.10.2017. Hence, it is not open to

the petitioner to allege there was any incorrect statement in the bid submitted by the Respondent No.5 where he had mentioned that he was having only two works in hand. Thus, the respondent No.5 is found to be not disqualified to bid in the tender. Thus, in this case, the petitioner is guilty of suppression of material facts that the son of the proprietor of the petitioner had attended the pre-bid meet held on 16.10.2017.

- h. DBEP Act, 2015 is not found to be violated because of the corrigendum dated 16.10.2017 as well as because of disclosure in pre-bid meet held on 16.10.2017, permitting that any bidder who had completed 90% of work would be deemed to have successfully completed the work. Therefore, in this count, the petitioner is found to be guilty of suppression of material facts because the son of the proprietor of the petitioner had attended the pre-bid meet on 16.10.2017 and was aware of had transpired there.
- i. The non- mentioning of work (iii) in the tender does not vitiate the tender, but shows that the PWD authorities had made due enquiry and as work of item No. (i) was completed, the bid was held to be valid for 2 (two) other works. Moreover, even under first two works, the respondent No.5 was qualified to bid for the tender. This does not establish any connivance, or bye-passing of DBEP Act, 2015. Thus, the reason for filing this writ petition is found to be frivolous.
- j. The allegations made in paragraphs 16 to 19 of the writ petition are also baseless. It is well known that Registration Certificate of any vehicle would only reflect its first date of validity of first tax paid. Subsequent validity stands automatically extended by payment of taxes for subsequent period. Assuming tax for any period is not paid, it may be an offence under Motor Vehicles Act, 1988. But nothing could be shown that the Registration Certificate gets invalid merely because road tax has not been paid or Permit is not renewed. On

perusal of the bid documents of the respondent No.5 as produced by the learned counsel for the petitioner, the RC of tractor bearing No. AS-05-AC-7640 is very much present at page No. 35 thereof. At least "AC-7640" is readable and the words and figures "AS-05" is not clearly legible, but it can be made out. The requirement under Clause 27 of Special Conditions of Contract And Amendment requires only RC Book of vehicles to be submitted and not documents showing tax clearance and valid permits. Hence, these allegations are also found to be baseless and frivolous.

- k. As mentioned herein before, in this case, the petitioner is not seeking any relief for himself. The petitioner has filed this writ petition on 03.04.2018. The undated certificate issued by the Executive Engineer PWD, Aalo Division, as annexed as Annexure-6 to the A/O filed by the respondent No.6 discloses that work was commenced on 17.01.2018 and date of completion is 30.06.2018 and that as on 31.03.2018, 70% of work has physically completed. Moreover, a sum of Rs.2,64,84,804/- has been released as on 31.03.2018. Thus, public interest is heavily tilted in favour of completion of the tendered work. The entire process of tender is not found to be vitiated either by malice or by mala fide, as alleged. Therefore, the case of *Udar Gagan Properties (supra)* has no application in the present case.
- l. Therefore, in view of the discussions above, the entire tender process was not an eye wash as alleged. The petitioner has committed fraud, in submitting fabricated documents in his bid. Being aware of the said position, the petitioner has refrained from seeking award of tender and/or contract work in his favour. Therefore, one who is himself found to be guilty of misrepresentation and fraud, has not approached this Court with clean hands and, as such, the petitioner is estopped from seeking

equitable relief from this Court. In the present case no element of fraud, malice of mala fide or any connivance is found against the State Respondents No.1 to 4 and respondent No.5, as such, the tender process is not found to be vitiated by any reason whatsoever.

5) In view of the discussions above, this writ petition fails. The writ petition is also found to be frivolous and the petitioner, who was not found qualified to participate in the tender has taken up the judicial time of this court in a proceeding which is found to be a total abuse of the process of the Court. Moreover, the petitioner had not come to this Court with clean hands and has suppressed material facts. This is a case where the petitioner has made an attempt to minutely scrutinize all bid documents of the respondent No.5 so as to find one minor fault and to get the tender set aside, but without claiming any relief for his own benefit. If public projects are made to stop and re-tendered for small and frivolous issues, the cost escalation would be unimaginable and moreover, the public would not see the completion of such important road work in near future.

6) As stated herein before, in this case, the bids were opened on 27.10.2017. The work had commenced on 17.01.2018. The expected date of completion is 30.06.2018. Notwithstanding the dismissal of a previous writ petition on withdrawal, this present writ petition has been filed on 03.04.2018. As per the undated certificate issued by the Executive Engineer PWD, Aalo Division, 70% of work has been physically completed as on 31.03.2018. Thus, the present writ petition is also liable to be dismissed on ground of delay. In such a situation, this Court in the case of *M/s. Tomchi Kujuk Vs. State of Arunachal Pradesh, W.P.(C) 203(AP)/2017*, inter-alia, has held as follows:-

"18] ... It must be borne in mind that these work of construction of road are to be completed in a time bound manner

and the early completion of the road is beneficial to the public in general. If one of the tenderers is aggrieved by the decision making process leading to award of the tender, it would be incumbent upon the bidder to approach the Court at the earliest possible time, inasmuch as, any delay in seeking relief before the appropriate forum would not only prejudicially effect the interest the awardee but would also adversely affect the interest of the public in general who remain unrepresented in these matters."

7) Thus, in view of the discussions above, and for all the reasons assigned in the foregoing paragraphs, this writ petition is hit by the principles of delayu, laches and negligence. This writ petition is also held to be frivolous, vexatious, total abuse of the process of the Court. Moreover, the petitioner had not come to this Court with clean hands and has suppressed material facts. Hence, this writ petition stands dismissed.

8) For bring about an absolutely frivolous litigation in this Court, this Court is inclined to impose a cost of Rs.25,000/- (Rupees Twenty five thousand only) against the petitioner firm i.e. M/s. Marpi Wire Products, represented by its Proprietor, namely, Shri Tummar Bagra, son of Shri Kartum Bagra, Vill. Spiu Colony, Aalo, West Siang District, Arunachal Pradesh, PIN- 791001, by holding the principal to be liable for the acts and things done by the agent/ attorney.

9) The petitioner is directed to deposit the said cost within a period of 1 (one) month from today before the Registry of Itanagar Permanent Bench of this Court, for onward deposit to the Gauhati High Court Legal Aid Committee, to be ear-marked for being spent for legal aid and education in schools and colleges in the State of Arunachal Pradesh. It is provided that if the said cost is not deposited within the time allowed, the same would be enforced as arrear of land revenue or under any other mode for recovery.

10) The writ petition stands dismissed with cost of Rs.25,000/- as indicated above.

11) Return the certified true copy of the bid document of the respondent No.5 to Mr. T. Pertin, the learned Counsel for the petitioner, who had produced the same. Return the copy of the (a) GCC (Part-A), and (b) Tender documents of the petitioner, to Mr. D. Soki, the learned Senior Govt. Advocate, who had produced the same. Photocopy of verification report of 3 previous works undertaken by the petitioner are retained in the record.

12) Let a copy of this order be sent to the Gauhati High Court Legal Aid Committee.

JUDGE

Victoria.