

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR PERMANENT BENCH

WP(C) No. 693(AP)2017

M/s T. Gangkak Enterprises, Represented by its Proprietor Shri Tugo Gangkak, having its Regd. Office Aalo, P.O & P.S. Aalo, West Siang District, Arunachal Pradesh. Pin-791001
Mob.No. +918787580148

.....Petitioner

-VERSUS-

1. The State of Arunachal Pradesh represented by the Chief Secretary, Government of Arunachal Pradesh, Itanagar.
2. The Chief Engineer, RWD, Government of Arunachal Pradesh, Itanagar.
3. The Superintending Engineer, RWC, Pasighat, East Siang, Arunachal Pradesh.
4. The Executive Engineer, RWD, Aalo Division, Aalo, West Siang District, Arunachal Pradesh.
5. Shri Toi Romin, Proprietor of M/s T.J. Enterprises, Nehru Chowk, Aalo, P.O. & P.S. Aalo, West Siang District, Arunachal Pradesh. Pin-791001.
6. Shri Ejum Karbak, Proprietor of M/s KKKK Enterprises, Gumin Nagar, Aalo, P.O. & P.S. Aalo, West Siang District, Arunachal Pradesh. Pin-791001

.....Respondents

By Advocates:

For the petitioner:

Mr. B. Kausik

For the respondents:

Mr. D. Soki (For respondents No.1 to 4)

Mr. P. K.Tiwari (For respondent No.5)

Mr. K. Saxena (For respondent No.5)

:::BEFORE:::

HON'BLE MR. JUSTICE KALYAN RAI SURANA

Date of hearing : **15.05.2018**

Date of Judgment : **15.05.2018.**

Heard Mr. B. Kausik, learned counsel appearing for the petitioner.

2. Also heard Mr. D. Soki, learned Addl. Sr. Govt. Advocate appearing for the respondents No. 1 to 4 as well as Mr. P.K. Tiwari, learned Sr. counsel assisted by Mr. K. Saxena, learned counsel appearing for the private respondent No.5.

3. By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the rejection of his bid in connection with NIT No. EEA/RWD(SIDF)/NIT-23/2015-16/7317 issued by the office of the Superintendent Engineer, Pasighat, East Siang District for "Construction of Multi-purpose Wooden Badminton Courts at Darak and Kamba and Audience Gallery at General Ground Yomcha and Kamba including Infrastructural Development under 27 Liromba Constituency" on the ground that the technical bid of the petitioner was found not responsive.

4. The learned counsel for the petitioner submits that in order to participate in the above mentioned tender, the petitioner had submitted his bid documents which was complete in all respect. As per terms and condition of the tender, the bids of the said tender was opened on 22.03.2017 at around

1400 hrs at the office of the Superintending Engineer, RWD, (Circle Pasighat) Pasighat. It is submitted that the tender documents were submitted two sets, one in original as well as in one photo copy. The bid documents were enclosed along with the checklist of the documents submitted along with the bid.

5. It is projected that on 22.03.2017, when the bids were opened for technical evaluation, the result of such evaluation was neither informed to the petitioner and nor displayed in the Notice Board of the Superintending Engineer, Pasighat, where tender was opened. Therefore, he was required to wait and after awaiting for some time, the petitioner visited the office of the Superintendent Engineer, Pasighat for participating in the financial bid in respect of a separate Arunachal Pradesh PMGYS tender and he was informed by Superintendent Engineer, Pasighat that the financial bids in respect of the tender in which he had participated on 22.03.2017, would be open on 29.03.2017 at 2.00PM. Accordingly, on 29.03.2017, the petitioner went to participate in the financial bid. However, he was surprised to be informed by the Executive Engineer, Aalo Division verbally that his technical bid was rejected on 22.03.2017 due to non-submission of the affidavit of his existing commitments. The petitioner projects that he was never informed about rejection of his bid by holding his bid to be technically not responsive. However, when he asked the Executive Engineer, the petitioner was informed that the notice about the rejection of his bid in course of technical evaluation was notified in his office at Aalo Division. It is projected that when the bid were opened in the office of the Superintending Engineer at Pasighat, the notice of rejection of his tender at office of the Executive Engineer at Aalo was illegal and it was designed to withhold information to the petitioner.

6. At his request, the petitioner was furnished with the copy of the order rejecting his bid on the ground of non submission of affidavit only on 29.03.2017. The said rejection order showed that the signature of none of the officials present had a date and, as such, it is projected that the said rejection order manipulated to oust the petitioner.

7. The learned counsel for the petitioner has submitted that though not admitted by him but assuming that the affidavit was not present, the

requirement of such affidavit arose out of the Special Terms and Condition and Clause 11 of Instructions to Bidders ('ITB' for short) appended thereto, therefore, the said affidavit was not at all relevant for deciding the issue of non-responsiveness of his tender. Moreover, by referring to Clause No.26 of the ITB, it is submitted that the examination of bids and determination of responsiveness was provided in clause 26.1, according to which the requirement was that, the employer will determine whether each Bid (a) meets the eligible criteria defined in Clause 3 and 4; (b) has been properly signed; (c) is accompanied by the required securities and; (d) is substantially responsive to the requirements of the Bidding Documents.

8. It is submitted that Clause 23 of ITB was related to Clause 26 of ITB, which provided for bid opening and evaluation and that it provided for rectification. Therefore, it is submitted that assuming but not admitting that the affidavit was not there, had the petitioner been informed in time about such deficiency, he would have immediately rectified it. In this connection, it is further submitted that in the second set of copy of his bid, which was returned to the petitioner, the copy of the affidavit was very much available and, as such, it is not acceptable that the original document bid did not contain affidavit in original. It is also submitted that as per the photo copy of the original bid available, the said affidavit was sworn on 15.03.2017, as such, it was impossible that the bid submitted by the petitioner would not contain such an affidavit.

9. The learned counsel for the petitioner further submits that the petitioner apprehends that after the financial bids were opened and as the bid submitted by the petitioner was found to be the lowest, there was manipulation in his bid and it was only thereafter, that the authorities had rejected his bid by projecting as if though the bid was found to be not responsive on 22.03.2017 and thereby selected only the respondent No.5 in an arbitrary and malafide manner, because of which the authorities did not display the rejection of his bids in the office of the Superintending Engineer concerned in Pasighat and by projecting as if the rejection of the bid of the petitioner was circulated in the office of the Executive Engineer, Aalo.

10. The learned counsel for the petitioner further submits that the ground of challenge in the present writ petition is that the bid submitted by the petitioner has been illegally rejected, but when he had approached the authorities they had assured that they would be considering his complaint and therefore, he had waited for a reasonable time before approaching this Court and therefore, when the process of selecting the respondent No.5 was vitiated by rejecting the other firm including the petitioner, there was no impediment for this Court to set aside the entire process and grant the writ petitioner the relief in terms of the prayer made in the present writ petition. Moreover, it is submitted that the absence of affidavit, as alleged, would not materially effect the quality of his bid for making the tender non-responsive, being curable defect under Clause 23 of the ITB.

11. The learned counsel for the petitioner prays for grant for relief as prayed for in this writ petition. In support of his contention, the learned counsel for the petitioner has placed reliance on the case of (i) *M/s Poddar Steel Corporation Vs. M/s Ganesh Engineering Works and Ors., (1991) 3 SCC 273*, (ii) *Brahmaputra Consortium Ltd. & Anr. Vs. State of Assam & Ors., 2007 (4) GLT 236*.

12. The learned Addl. Sr. Govt. Advocate, by referring to the bid documents has submitted that the rejection of technical bid was notified in the office of the authority who had called the tender i.e the Executive Engineer, Rural Work Division, Aalo and that only because, the office of the Superintending Engineer was at Pasighat, the technical bid in respect of the said NIT was opened at Pasighat, which did not absolve the State respondents from notifying the result of the tender bid at the office of the Executive Engineer at Aalo. Moreover, it is submitted that as per the present writ petition, even the petitioner has his office in Aalo, and, as such, there was no impediment for the petitioner to visit the office of the Executive Engineer, Aalo to inquire about his bid.

13. It is also submitted that the affidavit in question was required in terms of the District Based Entrepreneur and Professionals, (Incentive, Development and Promotion) Act, 2015 which prescribed that bidder is eligible to bid if he has in hand not more than two works at the relevant point of time. It is submitted that therefore, the said affidavit was an essential part to evaluate the technical responsiveness of the bids and that the entire bid documents

must be read as a whole without compartmentalizing the bid documents separately for being technically responsive and for purpose of the financial bid.

14. By referring to annexure 13 of the writ petition, being the checklist for bidding document, the learned Sr. Advocate has submitted that has against the petitioner's check-list form, at Serial No. 27 which was in respect of the affidavit that the firm is not engaged in more than two works in any Govt. department of Arunachal Pradesh, it contained a 'X' sign and that the said checklist was signed by one of the official on 22.03.2017, indicating that the documents were checked on 22.03.2017 and it was not found on record by the concerned officer. By producing a progress note as on April, 2018, it is submitted that out of 14 separate works indicated therein, the respondent No.5 has completed 100% of such work in respect of 9 items and in the remaining 5 items, the progress of work was 45%, 75%, 45%, 85% and 75% respectively, as such, upon substantial progress of the work, it would impede public interest to interfere with the instant Contract Agreement/NIT in respect of which the work was nearing completion. In support of his contention, the learned Sr. Counsel has referred to the judgment referred by this Court in the case of *M/s Tamchi Kusuk Vs. State of Arunachal Pradesh and Ors.*, in *WP(C)203/2017* decided on *21.06.2017*.

15. The learned Sr. counsel for the respondent No.5 has submitted that in the present case, the technical bid was opened on 22.03.2017, the financial bid was opened on 29.03.2017, the letter of acceptance of bid was issued on 26.06.2017. Thereafter, the contract of agreement was signed on 04.08.2017 and on the same date the authorities had issued to the respondent No.5, a notice to proceed with the work. By referring to the progress made as on April, 2018 it is submitted that since then further substantial work has been done by the respondent No.5 and some payments has also been received in connection with the said work from time to time.

16. It is submitted that as the writ petition was filed on 03.10.2017 i.e after about 7 (seven) months, on the ground of delay alone, the writ petition was liable to be dismissed.

17. It is further submitted that in the present case, the setting aside of the tender after substantial work has been done would not be in public interest because same would not only lead the frustration of the work but in the next bidding process substantial time will be taken and therefore, it will obviously cause huge cost escalation and therefore, the public interest would be hampered as the citizens of the locality will not get the benefit of the public works done so far by incurring a huge expenditure made by the public exchequer. In order to substantiate on the point that account of overwhelming public interest, the Courts are not to interfere in the tender process, the learned Sr. Counsel for the respondent No.5 has referred to the case of *Sanjay kr. Shukla Vs. Bharat Petroleum Corporation Ltd. & Ors., (2014) 3 SCC 493* and *Maa Binda Express Carrier & Anr. Vs. North East Frontier Railway & Ors., (2014) 3 SCC 760*.

18. The learned Sr. Addl. Advocate has produced the tender document as submitted by the petitioner herein. The submission made by the learned Sr. counsel for the petitioner is that in respect of the checklist of bidder's documents as submitted by the petitioner, there was tick-mark in respect of the items under Serial No.22 to 32, but it did not contain any affidavit. It is submitted that the affidavit requiring that the petitioner does not have more than two pending contract in the Govt. departments of Arunachal Pradesh is projected to be submitted under Serial No. 27 -"existing commitments". On the comparison of the bid documents annexed to the writ petition and the original bid documents, as produced by the learned Addl. Sr. Govt. Advocate, it is seen that in the present writ petition, the documents are not in the same seriatim as is available in the original bid document. Therefore, in the absence of a comparative match of the documents contained in the bid submitted by the petitioner with the documents annexed to the writ petition, this Court is unable to arrive at definite finding as to whether the affidavit as projected by the petitioner was submitted or not along with the bid documents. As per the original bid documents produced, the document which can be related to one at Serial No.27-"existing commitments", it is seen that the petitioner has submitted a writing in the form of a letter dated 15.03.2007, with reference to "existing commitments" about his going on construction work (at page 118) of this writ petition. Therefore, as stated above, in the absence of a match of documents annexed in this writ petition with seriatim of documents contained

in the original bid documents, this Court is not in a position to give a finding whether any affidavit relating to holding not more than 2(two) works in the Govt. department of Arunachal Pradesh was submitted by the petitioner with his bid documents.

19. Therefore, the other issue required to be gone into is to whether the absence of the affidavit could be fatal defect for rejection of the bid submitted by the petitioner on the ground that the same is not responsive. In this connection, it is seen that in Clause 26 of the ITB contained in the Standard Bid Documents, it is provided that the bid should meet the eligibility criteria as defined in Clause 3 and 4 of ITB and therefore, the ITB to Standard Bid Document provided for eligible bidder and the qualifications of the bidder. In this connection, the learned Sr. Govt. Advocate has submitted that it was the requirement of the District Based Entrepreneur and Professionals, (Incentive, Development and Promotion) Act, 2015 that no tenderer would be eligible to participate in tender process when he was holding 2(two) existing commitment works in any Govt. department within the State of Arunachal Pradesh. However, the said affidavit which is projected to the requirement under the said 2015 Act is not found to be set forth as one of the grounds of the eligibility or qualification of a bidder in Clause 3 and 4 of the ITB.

20. In the opinion of this Court, the said provision of Clause 3.1 of ITB provided that invitation of bids was to all who are meeting the eligibility criteria appended to ITB (pp. 164 of the writ petition). The affidavit is not contained in the said appendix. Therefore, this Court is unable to justify the rejection of the bid of the petitioner on the ground that the affidavit was not available as this Court is inclined to accept the submission of the petitioner that for the purpose of the technical evaluation, the bid of the petitioner could not have been rejected on the ground of the absence of the said affidavit in the present case in hand. This Court is of the opinion that the lack of affidavit was only a curable defect and could have been rectified under Clause 23 of the ITB. Moreover, here in above referred appendix to ITB, it is provided that bid was to be opened in the Office of the Superintending Engineer, RWD, Pasighat, and, as such, this Court is not inclined to accept the submissions made by the learned Sr. Govt. Advocate that there was no fault in the intimation of rejection of the

bid of the petitioner as it was notified at the office of the Executive Engineer, Aalo.

21. In this connection, it would be relevant to refer to Para-5 of the affidavit-in-opposition filed by the respondent No.4, wherein it has been stated that the bid opening and technical bid evaluation was displayed in the Divisional Office of Aalo, whereas, in change of stand, in Para-7 of the same affidavit, it was mentioned that the technical bid evaluation was displayed in the Divisional Office at Aalo and also in the Circle office at Pasighat. Therefore, going by the statement made in Para-5 of the said affidavit-in-opposition filed by the respondent No.4, the display of the rejection of the bid of the petitioner at Division Office, Aalo is held to be illegal having not been notified in the office of the Superintendent Engineer, Pasighat, in accordance with the Appendix to ITB (pp.164 of the writ petition), because notice is required to be given at the place where tender is opened.

22. This leads to the other question, which is raised by the learned Sr. Counsel for the respondent No.5 as well as the learned State Counsel, which is whether the interference with the tender at this stage, when substantial work has been done by the respondent No.5 and when the project is nearing completion. Considering the fact that substantial work has been done at the cost of the public exchequer, this Court of the view that in the present case, as the project is near in completion, the overwhelming public interest is in favour of the completion of work in question by the private respondent No.5 because a lot of public money has been spent in the project and the beneficial contract work is likely to be ready for use for public purpose. Therefore, weighing the commercial involvement in this case vis-a-vis the public interest involved in interfering with the rejection of the bid of the petitioner on the ground that it was technically found not responsive, this Court is of the opinion that in view of the inordinate delay on part of the petitioner to approach this Court on time, this Court is inclined not to interfere with the works allotted to the private respondent No.5 at this stage, as it seen that the petitioner was aware of rejection of the bid on 29.03.2017 and still he had approached this Court belatedly only on 07.10.2017.

23. However, this order would not be an impediment to the petitioner to proceed against the State for the losses caused to him for the illegal rejection of his bid as this Court is of the firm opinion that the affidavit was not a good or reasonable ground for rejection of the bid of the petitioner and that the absence of the affidavit in question was rectifiable defect within the meaning of Clause 23 of the Instructions to Bidder (ITB).

24. In view of the finding as indicated herein before, this Court does not deem fit to discuss the various case laws cited by the learned Sr. Counsel/Counsels for the parties owing to the distinctive nature of this case.

25. Therefore, in view of the discussions above, this writ petition partly succeeds, by holding that the rejection of the bid of the petitioner to be not responsive is not sustainable. Nevertheless, in view of the sufficient progress of the works, this court is not inclined to grant any relief to the petitioner in the ground of delay alone. However, liberty is granted to proceed against the State, if so advised, for claiming damages and/or compensation in the appropriate Court of law.

26. The record produced by the learned Sr. Govt. Advocate is hereby returned. However, the progress sheet of the work in question as on April, 2018 is kept as a part of the record.

JUDGE

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