

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MECHALAYA, MANIPUR, TRIPURA
MIZORAM AND ARUNACHAL PRADESH)
ITANAGAR PERMANENT BENCH

Appeal From
Writ Petition (Civil)

W.P. No. 21 (AP) 2010

M/S Sun Corporation Ltd
Versus
The State of AP & Ors

Appellant
Petitioner,

Respondent
Opposite Party.

Counsel for the Appellant
Petitioner.

R. C. Joki
A. Pangiangi
K. Bogo
S. V. Dasang
D. Soki

Counsel for the Respondent
Opposite Party.

CIA (AP)

Ms. K. Ete.
" N. Rajan
" M. Kato
" D. Padu
" K. Taso
" G. Kato

In respondent No. 2.

Noting by Officer or Advocate (1)	Serial No. (2)	Date (3)	Office note, reports, orders or proceeding with signature (4)

IN THE MATTER OF:

M/S Sun Corporation,
Having its Head Office at 2
Mile, Namsai, P.O. Namsai,
Lohit District, Arunachal
Pradesh, represented by its
Constituted Attorney, Shri Tali
Tatum, resident of Nirjuli,
Papumpare District, Arunachal
Pradesh.

.....Petitioner.

-versus-

1. The State of Arunachal
Pradesh, represented by the
Chief Secretary, Govt. of
Arunachal Pradesh, Itanagar.

2. The Secretary, Rural Works Department, Govt. of Arunachal Pradesh, Itanagar.
3. The Chief Engineer, Rural Works department, Govt. of Arunachal Pradesh, Itanagar.
4. The Superintending Engineer, Rural Work Circle, Miao.
5. The Executive Engineer, Rural Works Department, Tezu.
6. The Tender Scrutiny Board headed by its Chairman, the Superintending Engineer, RWD, Miao.
7. M/S Ram Bilash Singh, Chirwapatty Road, Tinsukia, P.O. Tinsukia, District Tinsukia, Assam.

...Respondents

**BEFORE
THE HON'BLE MR. JUSTICE HRISHIKESH ROY**

20.1.2011

The petitioner who participated in the tender process in pursuant to the NIT dated 27.7.2009 issued by the Executive Engineer, RWD, Tezu (respondent No.5) for the works "*Namsai Diyun Road to Lekang Khampti*" under Package No. Arunachal Pradesh/05/04/004 challenges the order dated 25.10.2009 (Annexure-13) of the Chief Engineer, whereby the bid of the respondent No.7 was ordered to be accepted purportedly on the basis of the recommendation made by the Tender Evaluation Committee (hereinafter referred to as "the Committee").

2. I have heard Mr. D. Panging, learned Counsel appearing for the petitioner. Mr. R.H. Nabam, learned Senior Government Advocate represents the official respondents. The submission on behalf of the respondent No.7 is made by Mr. K. Ete, learned Counsel.

3. 4 (four) bids were received in response to the NIT and in pursuant to the evaluation of the technical bids made on 20.8.2009, the bid of the petitioner and the respondent No.7 were declared as responsive bids. The financial bids of the 2 responsive bidders was considered on 14.9.2009 by the Committee constituted by order dated 22.10.2005 (Annexure-4 of the departmental secretary).

4. According to the criteria specified under Clause 29.1 of the Tender Conditions, the contract is to be awarded to the bidder whose bid has been determined to be substantially responsive and who has offered the lowest evaluated bid. The Committee during the deliberation in its Meeting dated 14.9.2009 (Annexure-7) found that the bid of respondent No.7 was lower



than the writ petitioner. However the Committee considered item wise variation in the quoted rates and made certain addition and subtraction in the financial bids in the 2 responsive bidders. After weighing the item wise variation, the Committee recommended the award of work to the writ petitioner.

5 However by the impugned order dated 25.10.2009, the Chief Engineer purporting to act on the recommendation of the Committee, ordered for acceptance of the bid of the respondent No.7, forcing the tenderer recommended by the Committee to move the Court.

6. It is contended by Mr. D. Panging on behalf of the petitioner that there is no basis for the Chief Engineer to direct award of contract to respondent No.7 as the recommendation by the Committee was in favour of the writ petitioner and not in favour of the respondent No.7.

7.1 Defending the order of the Chief Engineer, the learned Senior Government Advocate submits that Chief Engineer as the defined "*employer*" has the right to accept or reject any bid and being the final authority in the award of contracts, the order of the Chief Engineer cannot be said to be incompetent in law.

7.2 It is further submitted by Mr. Nabam that respondent No.7 had offered a lower bid than the petitioner and since only 2 bids were found technically responsive, the Chief Engineer has rightly ordered for issuance of work order in favour of the L.1 bid.

8. Representing the respondent No.7, it is pointed out by Mr. K. Ete, that in pursuant to the communication dated 18..11.2009, the respondent has furnished the performance security and had also executed an agreement on 4.1.2010 and on the basis of the work order issued on 4.1.2010 by the Executive Engineer, the work in question was commenced by the selected contractor.



9. This Court passed an interim order on 25.1.2010 staying the operation of the Chief Engineer's order dated 25.10.2009 and accordingly after 20 days from the date of the work order, the work has remain stalled for last about a year.

10. I have considered the submissions of the rival Counsels and have perused the relevant case materials. On perusal of the Minutes of the proceeding of 14.9.2009, it is clearly seen that after finding the bid of respondent No.7 to be lower, the Committee went on to examine time wise variation in the quoted rates of the 2 responsive bidders. Then after an addition and subtraction exercise the Committee declared the bid of writ petitioner as substantially responsive and recommended award of work to the writ petitioner. But this was done at the stage of consideration of financial bid and by that time the responsiveness of the bid of the respondent No.7 and the writ petitioner was already determined positively. Therefore it is not understood as to how the Committee decided to disregard the L.1 bid of the respondent No.7 and to recommend the bid of the petitioner as the substantially responsive bid.

11. The order of the Chief Engineer was even more peculiar. Although the Committee had clearly recommended the writ petitioner for award of the work, the Chief Engineer strangely read the recommendation of the Committee to be in favour of the respondent No.7 and accordingly ordered award of contract to the said private respondent.

12. Although it is submitted on behalf of the respondents that Chief Engineer was the final authority in the decision making process but the basis for the decision of the "employer" can't be outside of judicial scrutiny. The order of the Chief Engineer discloses that he considered the Committee to have made recommendation in favour of the respondent No.7 whereas, just



to contrary recommendation in favour of the writ petitioner was made by the Committee.

13. Some further justification for the Chief Engineer's order is sought to be projected by the respondents on the basis of the counter affidavit filed by the department and also the official records but it is already well settled that public order publicly made cannot be construed in the light of explanation subsequently given by the author of the order (*Commissioner of Police, Bombay vs. Gordhandas Bhanji*) reported in *AIR 1952 SC 16*. The Chief Engineer didn't say in his order that he made the recommendation in favour of the respondent No.7 because the bid of the said respondent was the L.1 bid. It is also not reflected in the Chief Engineer's order that he disagrees with the recommendation of the Committee. Instead the Chief Engineer, purporting to act on the recommendation of the Committee, passed orders in favour of the un-recommended tenderer. Therefore I hold that the Chief Engineer's order dated 25.10.2009 is not legally sustainable. Consequently his order dated 25.10.2009 as also the consequential communications of 18.11.2009 and 4.1.2010 of the Executive Engineer in favour of the respondent No.7 also stands quashed. As the work had hardly progressed and was stayed for last 1 year, the department is directed to initiate a fresh tender process, for early execution of the work.

14. The case is disposed of with the above direction without any order of cost.


JUDGE

Datta