

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM : NAGALAND : MEGHALAYA : MANIPUR :
TRIPURA : MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR BENCH

WP(C) No.29 (AP) OF 2010

M/s Tama Fabrication Works,
A-Sector, Naharlagun,
Represented by Shri Nabum Eka of
Tarraso Village, Balijan,
The power of attorney holder.

...PETITIONER.

Versus

1. The State of Arunachal Pradesh,
Through the Secretary, Department of Power,
Government of Arunachal Pradesh,
Itanagar.
2. The Chief Engineer (Power), Eastern Electrical Zone,
Department of Power, Itanagar.
3. The Superintendent Engineer (Electrical),
Arunachal Pradesh Electrical Circle,
Department of Power, Naharlagun.
4. The Executive Engineer (Electrical),
Capital Electrical Division,
Department of Power, Itanagar.
5. M/s Renia Enterprises,
D-Sector, Itanagar,
Papumpare District (A.P),
Represented by its Proprietor Takam Pario Tagar,
S/o Shri Takam Mangha.

RESPONDENTS.

B E F O R E
THE HON'BLE MR. JUSTICE HRISHIKESH ROY

For the petitioner : Mr. R. Sonar,
Mr. D. Lazi,
Mr. L. Tapa,
Mr. P.D. Nair &
Mr. G. Alam. ... Advocates.

For the respondent Nos. 1 to 4 : Mr. N. Lowang,
Addl. Sr. Government Advocate.

For the respondent No.5 : Mr. P. Taffo. ... Advocate.

Date of hearing and : **25.01.2011**
delivery of judgment

9

JUDGMENT AND ORDER (ORAL)

Heard Mr. R. Sonar, learned Counsel appearing for the petitioner. Also heard Mr. N. Lowang, learned Addl. Sr. Government Advocate who appears for the official respondents. The private respondent No.5 is represented by Mr. P. Taffo, learned Counsel.

2. This matter pertains to the Rajiv Gandhi Gramin Vidyutikaran Yojana (RGGVY) i.e. Rural Household Electrification Works for the Baliyan block being executed under the Department of Power, Government of Arunachal Pradesh. The contracts in question has been awarded to the respondent No.5 through 3 separate work order(s) dated 13th July 2009 issued by the Executive Engineer (E), Capital Electrical Division, Itanagar.

3. The awarding of contract to the private respondent is challenged on the ground that the work(s) were awarded on pick and choose basis without floating any tender notice and that the work has been awarded at an inflated price of Rs.8,40,78,000/-, in as much as in the abandoned tender process (notified through NIT dated 15th February 2007 and the corrigendum dated 16th March 2007), the total value of the work in the 3 packages was pegged at Rs.5,07,44,000/-. The petitioner further contends that the respondent No.5 did not participate in the earlier tender process and was selectively invited by the department to execute the work in question.

4. Before considering the present challenge made by the petitioner, some relevant facts pertaining to past events must be recorded.

4.1 The Department of Power issued notice inviting tender on 15th February 2007 for turnkey tender (supply and erection) for execution of 5 turnkey packages and Rural Household Electrification Works under the RGGVY. Under the guidelines notified on 21st December 2006 (Annexure-E). Such Turnkey Projects are required to be executed by publishing tender notice(s) in the regional and national newspapers.



4.2 The tentative cost for the 3 Packages under the Capital Electrical Division for the Balijan block which relates to this case was fixed at Rs.5,07,44,000/- (Rupees five crore seven lakhs forty four thousand) and the petitioner was one of the bidders who responded to the NIT dated 15th February 2007.

4.3 As the petitioner's bid security was not found to be in order, his bid was rejected. The petitioner challenged the decision through WP(C) 177(AP)/2008 but the case was dismissed by the learned Single Judge on 11.4.2008. The resultant Writ Appeal 30(AP)/2008 came up for consideration before the Division Bench on 28.4.2009 and during the deliberation in the Court, it came to light that none of the other tenderers were found to be qualified and their bids too were rejected.

4.4 Accordingly the Division Bench did not consider it necessary to examine the legality of the rejection of the writ petitioner's bid. The State Government was accordingly permitted to start a new tender process so that the work can be allotted to the eligible bidder at the earliest. By recording this observation the Division Bench dismissed the Writ Appeal.

4.5 Although the Government indicated before the Court that it was going to initiate a fresh tender process, no such tender notice was issued. Instead the Superintending Engineer (respondent No.3) address a communication dated 9th June 2009 to the respondent No.5 and three others requesting for a response as to whether they are interested to execute the RGGVY Works of Balijan Block. The 4 noticees were required to indicate their willingness within 24th June 2009.

4.6 The respondent No.5 by his letter dated 18.6.2009 expressed his willingness to execute the works of Balijan block and on the basis of the said letter of respondent No.5, the 3 work orders were issued by the Executive Engineer.

5. It may be recorded that the petitioner and other intending tenderers were kept entirely in the dark leading to issuance of the work orders in favour of the respondent No.5 and the copies of the work orders sought by the petitioner under the *RTI Act* was not furnished to them. In

BT

the response dated 7th December 2009, the Executive Engineer informed that contracts have been granted to the respondent No.5 on 13th July 2009 and contract agreement had been executed with the allottee on 30th September 2009. In the subsequent reply dated 15th January 2010 to the RTI application the letters of award of contract was specifically refused to the applicant (petitioner) on the ground of "*commercial confidence*" and "*trade secrets*".

6. Assailing the awarding of the contract granted to the respondent No.5, it is contended by Mr. Sonar that under the norms notified on 21st December 2006 no contract work under the RGGVY Scheme can be awarded without floating of tender and the pick and choose process adopted by the Government to selectively award the work to the private respondent is illegal. It is also pointed that that the Government having committed in the Court during the hearing of WA 30 (AP)/2008 to initiate a fresh tender process, could not have opted to correspond with some pre chosen parties who didn't even participate in the tender process and on that basis, award contracts to a favoured contractor.

7. Seeking to defend the process of allotment of work to the respondent No.5, it is submitted by the learned Addl. Sr. Advocate that the respondent No.5 is an experienced contractor who is executing similar turnkey projects in other areas of the State and the Government in order to expedite the process and to prevent escalation of cost, had decided to do away with a regular tender process.

8. Appearing for the private respondent No.5, it is submitted by Mr. Taffo that the respondent had only responded to the invitation of the Superintendent Engineer (E) conveyed by the letter dated 9th June 2009 and after the award of work on 13th July 2009 and execution of agreement on 30th September 2009, the work(s) are being executed by the said respondent.

9. A reading of the norms notified through Memorandum dated 21st December 2006 shows that works under the RGGVY Schemes are required to be awarded to contractors through a public tender process and the scheme does not envisages awarding of contract through private offers made to chosen contractors on individual basis.

10. It further appears from the proceeding in WA 30 (AP)/2008 that the Division Bench had categorically recorded in its judgment and order dated 30.4.2009 that the Government has decided to initiate a fresh tender process.

The relevant portion of the Division Bench order is extracted hereinbelow for ready reference :

"Controverting the submissions made on behalf of the appellant, Ms. G. Deka, learned Addl. Senior Government Advocate, has submitted that the defects, in the bank guarantees, in the present case, were not formal in nature; rather, the same were so substantive that it did not meet the requirements set forth in the bidding documents. In such circumstances, according to Ms. Deka, the bank guarantees had to be rejected. It is further contended, on behalf of the State respondents, that though the appellant has raised the question of discrimination, the fact remains that at the end of the tender process, which had been initiated, none of the bidders was found qualified and, hence, their bids too have been rejected. In such circumstances, points out the learned Government Advocate, the State Government needs to be allowed to start a new tender process so that the work can be allotted to eligible bidder at the earliest and the public interest is not made to suffer.

"In the present case, when the appellant firm has been found to be disqualified to participate in the bidding process, it cannot invite the Court to look into the question as to whether the other bidders' bidding documents suffered from similar or more serious defects. That apart, what cannot be ignored is that the remaining bidders, in the instant bidding process, were, eventually, found disqualified and their bids have accordingly been rejected and the Government has decided to initiate a fresh tender process. In such circumstances, no purpose would be served in looking into the correctness of the bank guarantees and other related documents, submitted by the other bidders, which had been considered, at the initial stage of the bidding process, by the Scrutiny Committee."

11. Although the invitation of offer from selective contractors was contrary to norms laid down, the chosen process of the Government could have been found to be reasonable if there was no escalation involved, in issuing the fresh work order(s) in respect of the 3 Packages in Balijan Block. But it is seen from the 3 work orders dated 13th July 2009 that the total cost at which the private respondent No.5 has been awarded the contract is Rs.8,40,78,000/- (Rupees eight crore forty lakhs seventy eight thousand), which is Rs.3,33,34,000/- (Rupees three crore thirty three lakhs thirty four thousand) higher than the initial estimated cost of Rs.5,07,44,000/- (Rupees five crore seven lakhs forty four thousand).

12. Therefore it is apparent that in deviating from the prescribed norms, the department has not only awarded the contract on a pick choose

87

basis to a favoured contractor but had also given the contract at a much higher cost than the initially estimated value. This obviously has harmed public interest and the non-transparent process has also impacted the sanctity of the public tender process and the prescribed Government norms.

13. Considering the above and the infringement of the norms specified, the impugned process leading to issuance of the 3 work orders dated 13th July 2009 is held to be unauthorized and illegal and the same are accordingly quashed. Considering that the respondent No.5 has executed some works in the mean time because of the Court's conditional interim order, the Executive Engineer is directed to immediately measure the works (both Financial and Physical) as on today, and make his report to the Superintending Engineer under Clause 15 of the Memorandum dated 21st December 2006 (Annexure-E) so that only due payment for the works already executed by the respondent No.5 could be paid to them. For the unexecuted portion of the works, the department may take necessary steps in accordance with the applicable norms.

14. The writ petition stands allowed with the above order.


JUDGE

Datta