

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

ITANAGAR BENCH

W.P.(C)299(AP)2015

1. M/s Subu Tachang, represented by its Proprietor, Shri Subu Tachang, son of Shri Salla, resident of village Kalung, P.O./P.S. Ziro, District – Lower Subansiri, Arunachal Pradesh.
2. M/s Gepong, represented by its proprietor Shri Nabam Tagi, son of Shri Nabam Saha, B- Sector, Naharlagun, P.O./PS Naharlagun, District – Papum-Pare, Arunachal Pradesh.
3. M/s Dongro Sionju, Dibbin, P.O. Nafra, P.S. Bomdila, West Kameng District Arunachal Pradesh.
4. M/s Mesnia Enterprises, represented by its proprietor, Shri Tech James Tara, son of late Bapi Tech, resident of Birjuli, P.O. Nirjuli, P.S. Naharlagun, District – Papum-Pare, Arunachal Pradesh.
5. M/s Nabam Sera, represented by Shri Nabam Sera, son of Shri Nabam Saha, resident of B-Sector, Naharlagun, PO/PS Naharlagun, District – Papum-Pare, Arunachal Pradesh.

.... Petitioners

-Versus-

1. The State of Arunachal Pradesh, represented by Commissioner, PWD, Govt. Of Arunachal Pradesh, Itanagar.
2. The Chief Engineer, Public Works Department (WX), Govt. of Arunachal Pradesh, Itanagar.

3. The Superintending Engineer, (PWD) Sagalee Circle,
Naharlagun, District – Papum-Pare, Arunachal Pradesh

4. The Executive Engineer, PWD, Seppa Division, East
Kameng District, Arunachal Pradesh.

..... **Respondents**

By Advocates:

For the petitioners : Mr. P. K. Tiwari
Mr. Chorpok Modi
Mr. U. Deka
Mr. A. Saring
Mr. N. Rama
Mr. K. Gara
Mr. N. Tania
Mr. O. Modi
Mr. N. Kakki

For the respondents : Mr. R. H. Nabam, Addl. Advocate
General, Arunachal Pradesh

:::BEFORE:::

HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

Date of hearing : 09.09.2015

Date of Judgment : **01.10.2015**

JUDGMENT & ORDER(CAV)

Heard Mr. P. K. Tiwari, learned senior counsel, assisted by Mr. Chorpok Modi, learned counsel, appearing on behalf of the petitioners. Also heard Mr. R. H. Nabam, learned Additional Advocate General, Arunachal Pradesh, assisted by Ms. Pubi Pangu, learned Government Advocate, for all the State Respondents.

2. The present writ petition has been filed under Article 226 of the Constitution of India, challenging the subsequent NIT issued by the Executive Engineer, PWD Seppa Division dated 24.07.2015. The relevant facts leading to the filing of the writ petition are as follows:

The petitioners herein are registered Class-I Contractors of Arunachal Pradesh and they are eligible to participate in any Govt. tender as per the financial limit of their firm. The Executive Engineer, PWD Seppa Division floated a NIT dated 16.01.2015 published in local daily, for construction of road from NH-229 to Gumte Village under SPA. The petitioners along with 12(twelve) other contractors participated in the said tender process and their technical bids were opened on the scheduled date and after evaluation by the Office of the Chief Engineer, PWD, petitioners have been found technically qualified along with 8(eight) others. The Financial bids of the successful firms were opened on 07.05.2015 by the Executive Engineer, PWD Seppa. Ten firms along with the petitioners firms were declared financially qualified. The Executive Engineer, PWD Seppa after preparing the comparative statement forwarded the same to the Superintending Engineer and Chief Engineer, PWD, Itanagar for finalization and award of work to the most eligible firm amongst the financially qualified bidders. However, even after many months no any further intimation was received from the Chief Engineer's office.

3. Surprisingly, the respondent authorities again published NIT in the local daily dated 24.07.2015 for the same work. In the said re-tender, the eligibility criteria to participate in the bid will be as per the Arunachal Pradesh Dist. Based Entrepreneurs and Professional (Intensive, Development and Promotional) Rules, 2015. According to the Act, registered contractors domiciled within the territorial jurisdiction of Assembly Constituency only are eligible. The said Act was published in gazette notification dated 13.04.2015 in order to give preference to local entrepreneurs. The tender in question was floated on 16.01.2015, before the notification of the Act and will not be governed by the new Rule. Further, the petitioners were not given notice before re-tendering of the same work. The authorities cannot re-tender without releasing the earnest money deposited by the petitioners in the earlier tender. Hence, the respondent authorities have committed patent illegality in floating fresh tender, during the subsistence of earlier tender process and prayed for setting aside the impugned fresh Notice Inviting Bid dated 24.07.2015 as illegal and arbitrary and for a direction to the respondent authorities to consider the case of the qualified bidders, including

that of the petitioners and award the contract work to the most suitable firm, qualified in the technical and as well as in the price bids as per NIT dated 16.01.2015.

4. The Respondent No. 3 i.e. the Superintending Engineer, PWD Sagalee Circle, Naharlagun filed affidavit-in-opposition refuting the claim of the respondents and submitted that there was absolutely no arbitrariness in ordering the cancellation of tender and going in for retendering. There were serious lapses in the process of opening and evaluation of tender. The decision for re-tender was taken on the following grounds:

- (i) Thirteen bidders were found to be technically qualified but Circle/Division office forwarded financial bids of only ten bidders to the office of the Chief Engineer, Western Zone, PWD, AP, Itanagar, the tender accepting authority, without citing any valid reasons for dropping the bids of three bidders.
- (ii) EMD of one of the bidders, Messrs T.L. Construction was returned back by the Divisional Office without any valid ground.
- (iii) There was no mention of EMDs of three bidders for acceptance namely (i) Messrs Puna Hinda, Itanagar, Arunachal Pradesh (ii) Messrs O.A. Construction Pvt., Yingkiong, Arunachal Pradesh and (iii) Messrs Vivek Enterprises, Itanagar, Arunachal Pradesh.
- (iv) There was no mention of date of opening of Financial Bids in Appendix-24, memo forwarding tenders to Chief Engineer for acceptance.
- (v) There was no mention of Bid Opening Board in Appendix-24, memo forwarding tenders to Chief Engineer for acceptance.

5. It was further contended that under Clause 32; Award of Contract; the Department concerned reserves the right to accept or reject any or all tenders without assigning any reason, whatsoever, and to cancel the bidding process. The said Department has contemplated to initiate action for the lapse committed in the process of adherence for evaluation and acceptance of tenders at the Divisional level. It is the stand of the Respondent No. 3 that since Bid was not finalized due to the aforesaid grounds, therefore, the Department reserves the

right to reject the bid and to cancel the same, at any time, prior to award of contract. They have no any obligation to inform the bidders about such rejection. Regarding issuance of NIT for re-tender, it has been submitted that it was issued on 24.07.2015 (after rejection of the earlier NIT on 20.07.2015), under the recently enacted legislation. The Government of Arunachal Pradesh notified a new Act namely Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentive, Development and Promotional) Act, 2015, which came into effect on 30.04.2015. Prior notice to bidders were given by the Divisional Office over telephone and verbally and notice inviting tender was posted on website. Thus, it is submitted that fresh tender was issued on valid grounds, without any biasness as alleged by the petitioners. No action for retender was given during subsistence of earlier tender process, but it was taken up after the cancellation of earlier tender process as on 20.07.2015.

6. Giving reply to the counter affidavit, the petitioners have also sworn another affidavit vehemently opposing the contentions so raised by the respondents. It has been contended that the grounds shown by the Chief Engineer in his reply while rejecting the tender are frivolous and following grounds has been shown as a counter to the reply in the letter under reference:

- (i) The first ground itself is completely wrong that out of 13 bidders which qualified in technical bids were forwarded to financial bids which was opened on 07.05.2015, no bidders were dropped. Three bidders were rejected in the financial bids for using white fluid. The reason shown by the Chief Engineer is unjustified.
- (ii) As regard ground two regarding returning of EMD to one bidder, shall not affect the remaining bidders who were waiting for result. It cannot be a ground for rejection.
- (iii) As regard ground three regarding non-mention of EMD of three bidders, it would not affect the respondent authority to proceed on declaration of the result. Further, the said three firms who have been rejected on the ground of using white fluid hence, they have no option other than withdrawal of EMD. No objection was raised from

the concerned Division and even if there was minor mistake in the department, the entire process cannot be cancelled.

- (iv) As regard the fourth contention raised by the Respondent authority, it has been stated that financial bid was opened with intimation to the bidders and they were also present on the date fixed. Therefore, if the same was not mentioned in the letter, it will not affect the tender process.
- (v) As regards, last reason for cancellation of tendering process that members of the Bid Opening Board was not mentioned in Annexure-24, cannot be at all a reasonable ground. There is nothing to show that financial bid was not opened in presence of qualified bidder and members of the Bid Opening Board.
- (vi) Reacting to the averments made by the respondent department that under the clause 32.1, the department reserves the right to accept or reject all tenders without assigning any reason, it has been stoutly protested by the petitioners by saying that it is not the absolute right on the part of the Department to take shelter under the same for mala fide intention. If the said statement is accepted, then there can be no fair play in any tender process and the authority shall have unrestricted authority while accepting or rejecting such documents and may have an adverse bearing in the entire process.

7. Objecting to the process of re-tendering, it has been submitted by the petitioner that as per Clause 20.5 of CPWD Manual, the way of re-tendering is only a single process which speaks as below :-

"If the lowest tenderer back out, there should be a retendering in a transparent and fair manner. In such situation, the NIT approving authority may advise to call for limited or short notice tender if so justified in the interest of the work and to take decision on the basis of the lowest tender. While retendering for the work, the tender will not be issued to the contractor who has backed out."

8. Therefore, the ground taken by the respondents for retendering is not in greater public interest, rather, it will jeopardize the development activities. The reasons shown by the respondent authorities that in view of the new enactment of the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentive, Development and Promotional) Act, 2015, for re-tendering, it will not at all justify the given background. The said Act of 2015 came into force on 1st May, 2015 and not on 13.04.2015, as shown by the Respondents, whereas earlier NIT was dated 16.01.2015 and the new Act have no any retrospective effect. Thus, the plea of new Act cannot be made applicable in this case and the respondent authority has cancelled the earlier NIT in a malafide manner without any valid ground and fresh NIT has been issued by taking undue advantage which is not sustainable in the eye of law. Thus, it is the contention of the petitioners that for any procedural mistake on the part of the Department itself, the fundamental rights of the petitioners cannot be denied who have invested lot of amount in the tender process and were duly qualified for the tender and unduly rejected by the Department/Respondents concerned.

9. Basing upon the above pleadings between the parties, the learned senior counsel for the petitioner Mr. Tiwari, has submitted that the petitioners being the participating bidders to the Notice Inviting Tender(NIT) are entitled to fair and non-discriminatory treatment in the evaluation of their bids/tenders and then the decision to cancel the tender. Such tender process is open to judicial scrutiny on the well recognized principle of judicial review. Referring into various documents annexed in the record, it has been pointed-out that the petitioners duly participated in the Notice Inviting Tender(NIT) which was published on 16.01.2015 and the petitioner was duly informed by the authority that they have been qualified in the technical bid vide Annexure-3 and they were also asked to attend the office on 07.05.2015 for opening the financial bid and accordingly, in their presence, financial bids was opened on 07.05.2015 and thereafter, vide annexure-4, same was forwarded to the Chief Engineer, but the Chief Engineer vide his letter under reference, has refused to accept the said bid and whole tender process was cancelled. It has also been urged that as per clause 20.5 of the Central Public Works Department Manual, the authority could have called for

re-tender instead of fresh Notice Inviting Tender(NIT) which reflects the *mala fide* and arbitrariness of the respondent Department. The learned senior counsel for the petitioner has referred to the case law reported in **1999(4) ALT 176, Tata Cellular v. UOI (1994) 6 SCC 651**(Paragraph No. 77). Giving counter to the case of the respondent, it has been answered that though bidders participating in the bidding process cannot insist that their bids/tenders should be accepted but the participating bidders are entitled to fair and equal treatment in evaluation of their tenders. The Hon'ble Apex Court also held that in the matter of award of contracts, the Government and its agencies have to act reasonably and fairly at all point of time and to this extent, the tenderer has an enforceable right in the Court which has the competence to examine whether the aggrieved parties have been treated unfairly or discriminated against to the detriment of the public interest. It is the pleaded case of the petitioner that by cancelling the tendering process without any sound and cogent reasons, the State respondents unfairly treated the petitioner, so the subsequent Notice Inviting Tender(NIT) floated by the respondent authorities is liable to be interfered with by invoking the power of judicial review.

10. Per contra, Ms. Ete, learned Addl. Senior Govt. Advocate, has contended that the Notice Inviting Tender(NIT) was cancelled for the certain irregularities as mentioned in the letter by the Chief Engineer under reference. There was no other mala fide or arbitrariness while floating the fresh Notice Inviting Tender (NIT). The act of the respondent authorities is also well protected by the clause 32(1) which was also incorporated in the Notice Inviting Tender(NIT) that the Department has the right to accept or reject any bid without assigning any reasons. On the basis of above clause, it is contended that the State Respondents have absolute right to cancel the bidding process and the same cannot be subjected to challenge in a writ proceeding. Placing reliance on the Hon'ble Apex Court in **MAA Binda Express Carrier & anr. V. North East Frontier Railway & ors., (2014) 3 SCC 760**, it has been argued that in the event of deficiency in the tender process, the government is entitled to cancel the tender process and the participating bidders in the tender process cannot insist that their bids should be accepted.

11. I have considered the rival submissions of the learned counsel for both the parties and also scrutinized the pleadings and position of law laid down by the Hon'ble Apex Court pertaining to the judicial review by the writ jurisdiction in such contractual matters. From the factual aspects, it is an undisputed position that since participation in the bids by the petitioners till opening of technical bids as well as financial bids, no irregularities were detected by the Department concerned and lastly, when all the matters were forwarded by the Division to the Chief Engineer, then he opined that the said bid cannot be accepted on the grounds as have been discussed above. But the disturbing factor in the aforesaid letter of the Chief Engineer is that he has noticed some irregularities which were not so vital to reject the entire process of tender. Because he showed his anxiety as to why the names of some bidders were cancelled; as to why the date of opening the financial bid was not mentioned; as to why the EMD was returned to one of the bidders; as to why the amount of EMD was not mentioned but all the aspects could have been cleared from the concerned Division itself instead of cancelling the whole tender process. The same reflect that either he has not applied proper application of mind or he has intentionally skipped out the proper course to be followed. Dropping of 3 contractors is clearly mentioned in the financial bid with reasons thereof and those persons have not challenged the said findings also. The petitioners are participating in the tender process by depositing heavy amount and they should have been informed prior to such cancellation of the tender process. It is also noted that the Chief Engineer has not taken any serious action towards the erring officers nor he even tried to discuss and resolve the matter by calling the concerned persons but he at his own wisdom has cancelled the entire tender process. All the grounds assigned by the Chief Engineer do not stand to sound reasons and principles.

12. In the case of *Lanco Construction Ltd. V. Govt. of Andhra Pradesh* (supra), while dealing with similar situations, has made an observation as below:

"There is no dispute about the parameters of interference that can be undertaken by the process of judicial review under Article 226 of the Constitution of India in respect of contractual matters. I need not to refer to catena of decisions on this respect which were dealt with by

the Apex Court, time and again, and this Court, on number of occasions. Suffice it to say the power of judicial review is not directed against the decision taken by the administrative authority but it is only against the process adopted by the authorities in arriving at a decision. The decision became immaterial. But if the process is found to be illegal or contrary to the principles settled by the Apex Court, it is always open to the Court to interfere and issue appropriate directions."

13. In *Tata cellular v. UOI*(supra), the Apex Court had an occasion to consider the applicability of judicial review in contractual matters and observed as follows:

"It cannot be denied that the principles of judicial review would apply to the exercise of contractual matters by the Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of finances 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 Government. But the principles laid down in Article 14 of the Constitution, had to be kept in view of while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power."

14. Of course, if the said power is exercised for any collateral purpose, the exercise of that power to be struck down. Judicial quest in administrative matters has been find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy, thus, they are not essentially justiciable and need to remedy any unfairness. Such unfairness is set at right by judicial review. The Apex Court recorded the finding as to the limits within which the court has to confine as below:

1. Whether decision making authority exceeded its power?
2. Committed an error of law
3. Committed breach of rules of natural justice
4. Reached a decision which no reasonable tribunal would have received.
5. Abused its powers.

15. Turning to the matter at hand, if we test the decisions so arrived at by the Chief Engineer/respondent No. 2; it will be found that the said order of Chief Engineer suffers from above infirmities.

16. It is also noted that the said Chief Engineer did not himself file the counter affidavit and only one Executive Engineer has filed the said counter affidavit and the other respondents concerned who carried-out the entire tender process have refrained themselves from giving reply to the specific averments of the petitioners. From the sequence of events as narrated in the petition, and the manner in which the State Respondents took the impugned decision cancelling the tender process and issued fresh Notice Inviting Tender(NIT) dated 24.07.2015, restricting the participation in the tendering process only to the Contractors domiciled within the Pakke-Kesang Assembly Constituency, it reflects that the Department has not taken note of the position of the petitioners who has been deprived of participating in the fresh Notice Inviting Tender(NIT) event for no fault of their own. It is evident that they have been treated unfairly and neither they were informed about the cancellation of the tender process and nor their earnest money was returned.

17. The impugned decision so taken by the Chief Engineer/ respondent No. 2 is wholly bereft of any reason and violative of Article 14 of the Constitution of India nor it is in the public interest that bids should be cancelled.

18. The contention of the respondent authorities that they are at liberty to reject any tender process, cannot be accepted in view of the legal proposition already discussed above.

19. It is to be noted that the earlier Notice Inviting Tender(NIT) was floated on 16.01.2015 and in response to which, the petitioners participated in the Tender process and they were qualified in both technical bid and financial bid as

on 07.05.2015 and the entire tender process was cancelled on 20.07.2015(which was not made known to the petitioners) and in the meantime, a new Act viz. Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentive, Development and Promotional) Act, 2015, was published on 13.04.2015 and came into force on 01.05.2015. By that time, the entire process of tender was completed and while issuing the fresh Notice Inviting Tender(NIT), the respondent authorities have issued the same, on the basis of the new Act and in that aspect, the petitioners, herein, who hail from different districts of the State of Arunachal Pradesh, cannot take part in the new tender process, thereby, depriving the legitimate claim of the petitioners.

20. In view of all above, the writ petition succeeds. The impugned fresh Notice Inviting Tender(NIT) dated 24.07.2015 is hereby quashed and set aside with a direction to the respondent authorities to consider the case of the qualified bidders including that of the present petitioners and to award the contract work, in question, to the suitable Firm as per procedure and as per the terms and conditions of the earlier Notice Inviting Tender(NIT) dated 16.01.2015, without further delay.

21. With the above directions, this writ petition stands disposed of. However, there shall be no order as to costs.

JUDGE

Bikash