

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

**ITANAGAR PERMANENT BENCH**  
**(NAHARLAGUN)**

**WP(C) 117 (AP) 2017**

**M/s Mega Electricals,**

A partnership firm represented by its partner  
Shri Umesh Chandra Boro,  
Having its registered office at Ground Floor  
Raj Apartment, 3, J. B. Road, Guwahati – 781003  
Police Station Chandmari  
District Kamrup (Metro), Assam.

.....Writ Petitioner.

**-VERSUS-**

1. **Union of India,**  
represented by the Executive Director, Deen Dayal Upadhyay  
Gram Jyoti Yojana(DDUGJY), Rural Electricity Corporation,  
Ministry of Power to the Government of India.
2. **The State of Arunachal Pradesh,**  
represented by the Commissioner and Secretary, Power  
Department, Itanagar 791111, Government of Arunachal Pradesh.
3. **The Commissioner (Power)-cum-C.E.O. of Arunachal  
Power Development Agency(APDA),**  
Itanagar – 791111, Government of Arunachal Pradesh.
4. **The Member Secretary (EC), Arunachal Power  
Development Agency(APDA),**  
Itanagar – 791111, Government of Arunachal Pradesh.
5. **The Section Officer,**  
Arunachal Power Development Agency(APDA), Itanagar –  
791111, Government of Arunachal Pradesh.
6. **The Chief Engineer(Power),**  
Eastern Electrical Zone, Department of Power, Itanagar – 791111,  
Government of Arunachal Pradesh.

7. **The Superintending Engineer(Electrical),**  
Miao Electrical Circle-III, Department of Power, Miao, Arunachal Pradesh.
8. **Executive Engineer (Electrical),**  
Deomali Electrical Division, Deomali, Arunachal Pradesh.
9. **M/s. K. T. Enterprise,**  
Jompu Commercial Centre, Below Rajhans Hotel, Barapani Bazari, Naharlagun, Arunachal Pradesh.

..... Respondents.

**By Advocates:**

For the petitioner: Mr. M. P. Choudhury,  
Mr. D. P. Sahu,

For the respondents: Mr. Marto Kato, CGC,

Mr. Kardak Ete, Senior Additional Advocate  
General, Arunachal Pradesh,

Mr. D. Panging,

Mr. V. Jamoh,

Ms. D. Tamuk,

Mr. M. Doji,

Ms. E. Perme,

Mr. M. Tamut,

Ms. M. Gibi,

Mr. H. Kadu,

**:::BEFORE:::**  
**HON'BLE MR. JUSTICE AJIT BORTHAKUR**

Date of hearing : **05.12.2017.**

Date of Judgment : **11.01.2018.**

## **JUDGMENT & ORDER**

Heard Mr. M. P. Choudhury, learned counsel for the petitioner.

Also heard Mr. M. Kato, learned CGC, for respondent Union of India, Mr. K. Ete, learned Senior Additional Advocate General, Arunachal Pradesh, assisted by Mr. D. Soki, learned Additional Senior Government Advocate, for the State Respondents; and Mr. D. Panging, learned counsel, for Respondent No. 9.

**2.** By preferring this petition, under Article 226 of the Constitution of India, the petitioner has prayed for setting aside and quashing of the impugned order, dated, 11.03.2017, by which the respondent No. 7, the Superintending Engineer (Electrical), Miao Electrical Circle-III, Department of Power, Arunachal Pradesh has arbitrarily and illegally rejected the petitioner's bid on the ground of L2 and also prayed for a direction not to award the Letter of Award(LOA) to private respondent No. 9, in respect of the contract work vide NIT, dated, 11.04.2016 namely " Rural Electrification works of Tirap District, Arunachal Pradesh under Deen Dayal Upadhyay Gram Jyoti Yojana (DDUGJY)".

**3.** The petitioner is one of the partners of the partnership Firm, namely, M/s. Mega Electricals and till date, there is no adverse remark against the petitioner. The petitioner participated in NIT, dated, 11.04.2016 for the work "Rural Electrification of Tirap District" under DDUGJY along with others. According to the petitioner, after computer generated comparative statement, respondent No. 9 was declared to be L1 and the bid of petitioner was L2. However, after proper evaluation by the Tender Evaluation Committee (for short, 'TEC'), it was found that the respondent No. 9 was found non-responsive, thereby holding the petitioner to be the technically qualified lowest bidder. The said TEC of Miao Electrical Circle further rejected the price bid of respondent No. 9, as it had defaulted under Clause 23.5 of ITB in connection with execution of Khonsa-Lazu PACKAGE of RRVY scheme under Deomali Electrical Division during 2010-11. The petitioner was also found to be the lowest bidder as per guidelines given in the bid documents of DDUGJY and further, the bid of respondent No. 9 was rejected on the ground that it has opted for direct mode of transaction and

had quoted only the base rates and did not quote their rates for applicable taxes and duties separately. When the petitioner came to know that the respondent authorities were not issuing the Letter of Award ('LoA', for short), the petitioner filed an RTI application. After perusal of the related documents given in response to his application, it was seen that the respondent no. 9 did not fill the columns of taxes and duties separately by showing the price break down of his price bid which was in violation of Clauses 11.3 and 11.4 of the ITB. It is the further case of the petitioner that the respondent No. 3, the Commissioner (Power) cum CEO of Arunachal Power Development Agency (APDA) negated the findings of the respondent No. 6 and the TEC and directed the concerned authority to examine the price bids of all the bidders as per the advice of the Executive Director of Rural Electrical Corporation and finally forwarded the matter for approval in favour of respondent No. 9 by rejecting the bid of the petitioner stating that he was found to be L2 vide the impugned letter, dated 11.03.2017.

**4.** In the affidavit-in-opposition filed by the respondent No. 1-the Union of India, it has been contended that the Govt. of India launched the 'DDUGJY', which is a central Govt. sponsored scheme to electrify the rural areas and the Rural Electricity Corporation, Ministry of Power is the nodal agency for implementation of the scheme. It has been stated that in the course of the review meeting of the rural electrification with the APDA in Arunachal Pradesh, it was noted that though respondent No. 9 had in Schedule-1 of its price bid (i.e. 'Schedule rates and prices' in relation to 'Ex. Works Supply of Materials') mentioned the 'Mode of Transaction as Direct; in schedule-4 of its Price Bid (i.e. 'Summary of taxes and duties applicable on equipments & Materials'), the respondent No. 9 had not indicated any price towards excise duty, taxes etc. therefore, it was opined that as per Clause 11.4 of the ITB, in respect of a 'Direct Transaction between the employer and the contractor, the EXW price shall be exclusive of duties, taxes etc., the price of which duties, taxes etc., would be indicated in Schedule-4. However, in case of 'Bought Out' finished items, which shall be dispatched directly from the sub-vendor's works to the

employer, the EXW price shall be inclusive of duties, taxes etc., and for which no separate price would be indicated in Schedule-4. The aforesaid position is also fortified by Clause-11.1 of the ITB which states the 'Items against which no price is entered by the bidder will not be paid for by the Employer when executed and shall be deemed to be covered by the prices for other items. It has been further stated that respondent No. 9 had furnished an undertaking to the effect that the prices quoted in the price bid were inclusive of all taxes and as such, had not been shown for separately and therefore, it was opined that the mention of 'Direct Mode of Transaction in Schedule-1 by respondent No. 9, in the absence of any separate indication of taxes, duties etc in schedule-4, would, therefore, be deemed to be taken as a 'Bought Out' mode of transaction. Consequently, the respondent No. 1 contended that the writ petition seeking to question the correctness of the evaluation of the bid by APDA is wholly misconceived and erroneous. Hence, prayed to dismiss the petition.

**5.** Respondent Nos. 2, 3, 4 & 5 in their affidavit-in-opposition contended that as per Schedule- 4 of the price schedule contained in Volume-II, Section-III of SBD, in case of those items against which the mode of transaction has been mentioned as 'Direct/Bought Out' or has been left blank, the same deemed to be 'Bought Out' for the purpose of evaluation and award of contract and the price indicated against such items shall be deemed to be inclusive of all such taxes and duties. It has been further contended that the tender process was initially kept in abeyance due to a complaint received during the evaluation of DDUGJY tender of upper Subansiri District that the respondent No. 9 had suppressed the litigation history in connection with the execution of RGGBY, Khonsa-Lazu package of Tirap District under Deomali Division and accordingly, an enquiry committee comprising of 3 (three) Superintending Engineers of the Department of Power was constituted to enquire into the allegations and upon receipt of the enquiry report of the committee that the allegations made against the respondent No. 9 is not substantiated, the kept in abeyance order was withdrawn and as such, the Clause 23.5 of the ITB is not applicable in the instant case and further, after re-evaluation of the price bids of all the bidders as

per the terms and conditions of the SBD, the bid of the respondent No. 9 found to be the lowest one. It has been further contended that the Govt. of India has formulated the principles and laid down conditions known as Standard Bidding Document (SBD) to govern a tender process undertaken for selecting a contractor for execution of a contract. Therefore, the tender documents clearly reveal that there was no point of any deviation from the Apex Court Judgments while selecting the respondent No. 9 as the Lowest Bidder.

**6.** The respondent No. 9 in his affidavit-in-opposition stated that the rate in price bid quoted was inclusive of all taxes and therefore, the duties and taxes were not separately indicated in the bid. According to the respondent No. 9, bids of all the bidders were re-evaluated by the authority and after such re-evaluation, the authority found that the bid of the respondent No. 9 was Rs.7,46,97,318.81/- Lakhs and the bid of the writ petitioner was Rs.80,70,1358.04 Lakhs which is Rs.60,04,040/- Lakhs less than the bid of the petitioner's firm. It has been further stated that the Hon'ble Supreme Court has held in a catena of decisions that award of a contract, whether it is by private party or by a public body or state, is essentially a commercial transaction and set the guidelines in this regard and further, held that if any decision is arrived at for legitimate reasons after a fair consideration of all offers, the Court should hesitate to intervene unless the process adopted or decision made is mala-fide or intended to favor someone. Hence, prayed to dismiss the writ petition.

**7.** The petitioner has filed affidavits-in-reply against the affidavits-in-opposition filed by the respondents denying all the averments made by them. According to the petitioner, on a perusal of the price bid evaluation, dated 07.06.2016, issued by the EEC, it is evident that the respondent No. 9 has not fulfilled the mandatory conditions of the tender documents and as such, the TEC rejected the price bid of the respondent No. 9 in the light of the mandatory terms and conditions stipulated in Sub-Clause a. of Clause 11.4 & Clauses 11.4, 22.3.1, 22.4 of the ITB. The petitioner has contended that on bare perusal of the bid documents submitted by the respondent No. 9, it is abundantly clear that the respondent No. 9 has intentionally and with full knowledge has opted for

“Direct Mode of Transaction” which is further confirmed by the Attachment 5 (Annexure-VI). The respondent No. 9 has recently been held to be a defaulter by the Govt., on the ground of fraudulent practice in securing bank guarantee and accordingly, the LoA pertaining to some other works under the same respondent authorities issued in favor of the respondent No. 9 was annulled by the concerned authorities on 15.03.2017 (Annexure-A to the affidavit-in-reply, dated 18.05.2017). It is further stated that bids containing deviation from critical provisions relating to GCC Clause 2.4 (governing law), 8 (terms of payment), 9.3 (performance security), 10 (taxes and duties), 21.2 (completion time guarantee), 22 (defect liability), 23 (functional guarantee), 25 (patent indemnity), 26 (limitation of liability), 38 (settlement of disputes), 39 (arbitration) & Appendix to the form of contract agreement (price adjustment) are considered as non-responsive. However, the respondent authorities purposefully changed the rule of the game to favor the respondent No. 9/firm.

**8.** On scrutiny of the rival contentions of the parties, it appears that the petitioner’s case rests primarily on 3 (three) grounds, firstly, while rejecting the bid of the petitioner, the respondent authorities under the influence of respondent No. 3 i.e. the Commissioner (Power)-cum-CEO of APDA violated the rule of fair and transparent tender process and went against the ITB by negating all the mandatory provisions required to be followed by every bidder in the tender process and rejected the bid of the petitioner even after recommendation made in favour of the petitioner by the Tender Opening and Evaluation Committee (TEC), after proper verification; secondly, even after the respondent No. 9/ M/S K.T. Enterprise choose ‘direct’ mode of transaction, the respondent authorities have shown keen interest to issue the LoA in favour of the respondent No. 9/ firm by deeming the mode of transaction as ‘Bought out’ which is clearly an act of biasness and favoritism; and thirdly, that if the Rule is changed for a particular bidder then it amounts to violation of rights of other bidders, for equal treatment, which hampers the entire tender process jeopardizing its genuineness and transparency and as such, the Rule of Tender system should be equal for all the bidders in the Tender System.

**9.** Clause 11.3 of the ITB provides that the bidders shall give a break down of the prices in the manner and detail called for in the price schedules and where no price schedules are included in the bidding documents, bidders shall present their prices in separately numbered schedules to be uploaded for each element. The total amount from each schedule 1 to 4 shall be summarized in a grand summary of price proposal (Schedule-5) giving the total bid price to be entered in the Bid Form. Clause 11.3.1 of the ITB further specifies that it shall be the responsibility of the bidders to pay the statutory taxes, duties and levies to the concerned authorities for surplus material, which would otherwise have been lawfully payable. Also the bidders shall submit an indemnity bond to keep the employer harmless from any liability, before release of such material to the bidder by the employer. Further, Clause 11.4 specifies that 'in respect of direct transaction between the employer and the contractor, EXW price shall be exclusive of all costs as well as duties and taxes, viz. customs duties and levies, duties, sales tax, VAT etc. paid or payable on components, raw materials and any other items used for their consumption incorporated or to be incorporated in the plan and equipment'.

**10.** Further, sales tax/ VAT, excise duty, local tax and other levies for equipment/ items under 'direct transaction including octroi/ entry tax as applicable for destination site/ state shall not be included in the EXW price but shall be indicated wherever applicable in respective column of schedule'.

**11.** With regard to the above first ground, it is seen that as per clause 11.3 of the ITB, bidders are required to give a breakdown of the quoted prices in the manner provided in the price schedule and where no price schedules are included in the Bidding Documents, the bidders shall present their process as per schedule 5 providing grand summaries. Clause 11.3.1 of the ITB casts a responsibility on the bidders to pay all statutory taxes, duties and levies to the concerned authorities for surplus materials and shall submit an indemnity bond to keep the Employer free from any such liability. Additionally, clause 11.4, *interalia*, species that in respect of direct transaction between the Employer and the Contractor, EXW price shall be exclusive of all costs as well as duties and



taxes paid / payable on the components, raw materials and any other items used for their consumption.

**12.** It needs to be kept in mind that schedules 1 to 5 of the ITB prescribe in detail the bid documents, which, of course, may vary depending upon the mode of transaction, which a bidder is required to opt from either 'Direct' or 'Bought Out' mode of transaction. In both the aforesaid transactions viz. 'Direct and 'Bought Out', there are different additional taxes, which is the bidder's responsibility to pay and to be shown in the schedule 4 in the prescribed format as provided in the tender documents.

**13.** Mr. M. P. Choudhury, learned counsel for the petitioner submitted that the respondent No. 9/ firm violating this mandatory provision quoted only the base price in the price bid, without specifying separately the taxes in Schedule 4 of the bid documents. Mr. Choudhury further submitted that as stated in clause 22.3.1 of the ITB, Clause 10 of the GCC needs to be complied with and there can be no deviation from the aforesaid clause and therefore, respondent No. 9/ firm's price bid was out and out non-responsive and accordingly, at the initial stage, the Tender Opening and Evaluation Committee (TEC) rightly held the respondent No. 9 to be non-responsive.

**14.** Mr. K. Ete, learned Senior Additional Advocate General, Arunachal Pradesh, however, refuted the above argument of the petitioner's side and submitted that the respondent No. 9/ firm kept the mode of transaction blank and uploaded an undertaking to the effect that the rates quoted in the price bid/BOQ are inclusive of all taxes and duties. Mr. Ete further submitted that the Tender Evaluation Committee (TEC), though inadvertence, did not take it into consideration, which resulted in rejection of the financial bid. Mr. D. Panging, learned counsel for the respondent No. 9/ firm, drawing attention to Annexure 'A' appended to its affidavit in opposition, has supported the aforesaid contention made by Mr. Ete.

**15.** In the case of ***Central Coalfields Limited & Anr. Vs. SII-Sml (Joint Venture Consortium) & Anr.***, reported in ***(2016) 8 SCC 622*** held that:

***"48. .... whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."***

**16.** Perusal of the respondent No. 9's document vide Annexure- 'A' shows that the rate in price bid submitted electronically was inclusive of all taxes, for which reason the taxes in price bid were not shown repeatedly and agreed for payment of the same, if any, as per NIT terms and conditions. The petitioner has not challenged the authenticity/ existence of this vital document by way of justifying non-quotation of the taxes and duties, which are normally required to be shown separately as per schedule 4. Therefore, it is found that there was no non-compliance of clause 11.3.1 and clause 22.3.1 of the ITB and also clause 10 of the GCC.

**17.** So far the second issue, that is, when the respondent No. 9/ firm allegedly chosen 'Direct' mode of transaction, the respondent authorities can not treat the mode of transaction as 'Bought Out' and thereby award the contract. According to Mr. M. P. Choudhury, learned counsel for the petitioner, the respondent No. 9, after going through the entire tender documents and understanding the relevant rules, on own volition has chosen the 'Direct' mode of transaction and sealed by submission of the Attachment 5 vide Annexure VI of the tender document, whereby the respondent No. 9 has categorically noted in capital letters as "DOES NOT ARISE" indicating thereby the 'Direct' mode of transaction'. Mr. K. Ete, learned Senior Additional Advocate general, Arunachal Pradesh, however, refuted it contending that as per schedule 4 of the price

schedule contained in Volume-II, Section-III of SBD, in case of those items against which the mode of transaction has been mentioned as 'Direct/Bought Out' or has been left blank, the same needs to be deemed to be 'Bought Out' for the purpose of Evaluation and award of contract and further, the price indicated against such items shall be deemed to be inclusive of all such taxes and duties.

**18.** Perusal of the Annexure 5 submitted by the respondent No. 9/ firm goes to show that the said firm has used the expression 'DOES NOT ARISE' thereby in ordinary parlance, non-applicability of either 'Direct' or 'Bought Out' mode of transaction, which was not the intention for providing the Attachment 5 by the Employer. However, having considered the fact that the respondent No. 9/ firm quoted the rates in the price bid/BOQ inclusive of all taxes, it cannot be inferred in substance that there was non-compliance of requirements of clause 6.1 of the ITB or deviation from the terms and conditions of the ITB as a whole.

**19.** Coming to the third issue, which is pertaining to the grievance of change of rule by the respondent authorities so as to ensure favour to the respondent No. 9/ firm, in awarding the contract, it is noticed that there is no evidence to show that after NIT was issued and bidders submitted their bids, the rules of bidding and evaluation have been altered in any manner, behind the back of the other bidders. It is apparent that the respondent No.9/ firm quoted bid of case price of Rs.7,46,97,299.47 and as such, being the L-1 with a differential less bid amount of Rs.60,04,040/- to the petitioner/ firm's amount of Rs.80,70,1038.04. In ***Jagdish Mandal*** case, reported in ***(2007) 14 SCC 517***, the Apex Court held:

***"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial***

*functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even of a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual dispute. The tenderer or contractor with grievances can always seek damages in a civil Court.”*

**20.** In the instant case, a fair appreciation of the documents of bidding submitted by the respondent No. 9/ firm, it transpires that the said firm’s bid for the tender work was found to be L-1 in financial evaluation by the concern committee and the petitioner’s bid to be L-2, with a difference of an amount of Rs.60,04,040/- saving to the State Exchequer. Therefore, it is undoubtedly a correct approach on the part of the respondent authority to reject the petitioner’s bid in public interest for the aforesaid work which is a commercial transaction. The writ petition appears to have not clearly established that the respondent authority failed in duty to apply the same yard sticks applied to the respondent No. 9/ firm and the writ petitioner. In the case of ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn. Ltd.***, reported in **(2016) 16 SCC 818** held that:

**“13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision.**

**15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the**

**understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.”**

**21.** Thus, having carefully scrutinized the bid documents submitted by the respondent No. 9/ firm and those of the writ petitioner, this Court is of the considered opinion that the respondent authorities have not deviated from the aforementioned set rules of NIT while awarding the contract in favour of the respondent No. 9 who is the L-1, in any manner depriving the writ petitioner, who is the L-2, in the financial evaluation of the bids.

**22.** Consequently, **the writ petition stands dismissed.** No cost.

Let a copy of this judgment and order be furnished to the respondent No. 1- the Union of India.

Cha Gang

**JUDGE**