

THE GAUHATI HIGH COURT

(The High Court of Assam : Nagaland: Mizoram and Arunachal Pradesh)

ITANAGAR PERMANENT BENCH

WP(C) 218 (AP)/2014

Dongru Siongju of Nafra, a registered Contractor, Proprietor of M/s. Dongru Siongju, represented by his constituted attorney Smti. A.T Khunjuju, Bomdila, West Kameng District, Arunachal Pradesh.

.....Petitioners

-Versus-

1. The State of Arunachal Pradesh, represented by the Commissioner, Rural Works Department, Government of Arunachal Pradesh, Itanagar and 7 others.

.....Respondents

WP(C) 422 (AP)/2014

Dongru Siongju of Nafra, a registered Contractor, Proprietor of M/s. Dongru Siongju, represented by his constituted attorney Smti. A.T Khunjuju, Bomdila, West Kameng District, Arunachal Pradesh.

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1. The State of Arunachal Pradesh, represented by the Commissioner, Rural Works Department, Government of Arunachal Pradesh, Itanagar and 6 others.

.....Respondents

BEFORE
THE HON'BLE MR. JUSTICE SUMAN SHYAM

For the Petitioner : Mr. D. Panging, Advocate.
For the respondents : Mr. R.H. Nabam, AAG, Arunachal Pradesh.
Mr. K. Jini, Adv.
Date of hearing : 07/12/2016.
Date of judgement : 09/12/2016

JUDGEMENT AND ORDER (CAV)

1. Heard Mr. D. Panging, learned counsel for the petitioner. Also heard Mr. R.H. Nabam, learned Additional Advocate General, Arunachal Pradesh, appearing for the State respondents as well as Mr. K. Jini, learned counsel appearing for respondent no. 7 in WP(C) 218(AP)/2014 and respondent no. 6 in WP(C) 422(AP)/2014.

2. The writ petitioner was a tenderer in respect of the Notice Inviting Tender (NIT) floated by the respondent authorities for construction of a road under the Prime Minister's Gram Sadak Yojna (PMGSY) scheme and being aggrieved by the decision of the tendering authorities holding the petitioner's technical bid as non-responsive and awarding the work to the respondent no.7, the petitioner has approached this Court by filing the instant writ petition.

3. The brief factual matrix of the case is that the Executive Engineer, Rural Works Division, Singchung, West Kameng District, Arunachal Pradesh, i.e. the respondent no. 5 had floated a Notice Inviting Tender (NIT) dated 28/01/2014, inviting bids from eligible contractors for construction of road from "Nakhu to Dishing [Stage -I, 34.12 KM], Package No. AR/11/03/008" under the Prime

Minister's Gram Sadar Yojana (PMGSY) at an estimated cost of Rs. 3932.69 lakhs. The contract in question was to be settled on the basis of E-tendering system and, therefore, responding to the e-procurement notice issued by the respondent no.5, the petitioner, besides 5 (five) other bidders, had submitted their technical as well as financial bids uploading the same in the official web portal of the Department. The earnest money/bid security amount of an amount of Rs. 78.65 lakhs was also submitted by the petitioner.

4. As per the Instruction to Bidders (ITB), the last date of submission of the tender was fixed on 15/02/2014 at 1600 hrs. and the time for opening the technical bid was fixed on 18/02/2014 at 1000 hrs whereas the financial bid was scheduled for opening on 25/02/2014 at 1300 hrs. As per the scheme of the ITB, the financial bids of those tenderers whose technical bid was found to be responsive would alone be opened by the Tender Committee.

5. The writ petitioner being eligible to participate in the aforesaid e-tender process had submitted his bid online and had also remained present in the office of the respondent no. 5 at the time of opening of the technical bid but soon after opening of the technical bids on 18/02/2014, the petitioner was verbally informed that his technical bid had been rejected due to non furnishing of Bid Validity Undertaking. Although, the representative of the petitioner had requested the authorities to open the technical bid of the petitioner once again in his presence so as to affirm that the bid validity undertaking was duly uploaded in the website, yet, the request was turned down by the authorities and thereafter, by letter dated 24/02/2014, it was informed to the parties that out of the 6 (six) bidders, the technical bid submitted by the respondent nos. 7 and 8 alone have been found to

be technically responsive and, therefore, their financial bids would be opened on 25/02/2014.

6. In the evaluation summary of the technical bid dated 24/02/2014, it was inter-alia mentioned that the petitioner's technical bid has been rejected under Clause-3 and 4 of the Standard Bid Documents (SBD). Thereafter, on 25/02/2014, the financial bids of respondent nos. 7 and 8 were opened, pursuant where to it could be found that the respondent no. 7 had quoted a price of Rs. 37,36,05,550/- whereas the respondent no 8 had quoted a price of Rs. 39,32,69,000/-. Since the rate quoted by the respondent no. 7 emerged as the lowest, hence, the work was awarded in favour of the respondent no. 7.

7. The case of the writ petitioner is that the technical bid submitted by the petitioner was rejected illegally without there being any valid reason to do so and, therefore, the petitioner submitted several verbal as well as written representation before the respondent authorities seeking reopening of the technical bid so as to point out that the bid validity undertaking was actually furnished by the petitioner. However, such representation submitted by the petitioner having failed to evoke any favourable response from the authorities, he was compelled to approach this Court by filing the instant writ petition.

8. The respondent no. 5 had filed counter affidavit denying the allegations made in the writ petition, inter-alia, contending that the petitioner's technical bid was rejected since the same was found to be technically defective due to non-furnishing of Bid Validity Undertaking. The contract was eventually awarded to the respondent no. 7 since he had emerged as the L-1 bidder. Therefore, the respondent no. 5 had prayed for dismissal of the writ petition. In para 19 of the counter affidavit, the respondent no. 5 has categorically stated that the technical

bids were opened in presence of all the bidders and their representatives and their signatures had also been recorded in the Attendance Register.

9. The respondent no. 7 has contested the averments made in the writ petition by filing a separate counter affidavit. Subsequently, the respondent no. 7 has filed another additional affidavit on 02/03/2016 bringing on record a copy of the EMD receipt signed by the petitioner to show that after the rejection of his technical bid, the petitioner had withdrawn/accepted the EMD deposit as well as the original documents on 28/02/2014.

10. The learned Additional Advocate General has produced the records for inspection by the Court.

11. Mr. Panging, learned counsel for the petitioner submits that the technical bid of his client was rejected by the authorities in a most arbitrary and illegal manner only to extend undue favour to the respondent no. 7 who was the "*Blue-eyed boy*" of the tendering authorities. Mr. Panging submits that the respondent no. 8 is a non-existent firm and hence, it could not have submitted a bid in the tender process. According to Mr. Panging, the experience certificate submitted by the respondent no. 8 bears the signature of Executive Engineer, Nagaland whereas the certificate is purported to have been issued by the official of the Government of Arunachal Pradesh and hence, was evidently a forged document. However, by ignoring the said anomalies, the bid submitted by the respondent no. 8 was held to be technically responsive for the sole malafide purpose of avoiding re-tender since otherwise as per the guidelines issued by the National Rural Roads Development Agency, Ministry of Rural Roads Development, Government of India, regarding acceptance of single bid in the tenders under PNGSY, the authorities would be

compelled to re-tender the entire work in case only a single bidder was found to be technically responsive.

12. Referring to the issue of validity of the work order issued in favour of the respondent no. 7, Mr. Panging submits that the said respondent did not have a valid registration certificate as a Class-I contractor on the date on which he had submitted the tender. Since the qualification of registered Class-I contractor was a mandatory requirement under the tender condition, hence, the respondents could not have accepted the technical bid submitted by the respondent no. 7 by ignoring such vital lacunae in the technical bid submitted by him. By referring to the decision of the Supreme Court in the case of *Ramanna Dayaram Shetty Vs. The International Airport Authority of India and others* reported in *AIR 1979 SC 1628*, Mr. Panging submits that the existence of a valid registration certificate as a contractor under the CPWD/PWD was a mandatory requirement as laid down in the bid document and the tendering authorities were equally bound by such eligibility condition contained in the tender notice. Since the bid of the respondent no 7 was technically non-responsive, hence, LOI issued in his favour, is liable to be quashed and the entire works deserves to re-tendered, thereby giving the petitioner an opportunity to participate in the tender process.

13. Mr. Nabam, learned Additional Advocate General, Arunachal Pradesh submits that the proceedings of the Tender Evaluation Committee would established that the petitioner did not submit the Bid Validity Undertaking which was a document submitted by the successful tenderers as the same was a mandatory requirement under the tender clause. Such being the position, the technical bid of the writ petitioner was found to be non-responsive and accordingly the same was rejected. He submits that the petitioner has not produced any

evidence to show that he had actually submitted the Bid Validity Undertaking along with his e-tender. Such being the position, the Tender Evaluation Committee has rightly rejected the petitioner's technical bid.

14. The learned AAG also questioned the bonafide and the locus of the petitioner to maintain the writ petition on the ground that the technical bid of the petitioner having been rejected on 24/02/2014 and the EMD deposit having been taken back by him along with original documents in the month of February, 2014, he had remained silent up till 02/07/2014 on which date the writ petition was filed before this Court. Mr. Nabam submits that there is no explanation in the writ petition as to why the petitioner had remained silent for such a long period. The petitioner had also not mentioned about the fact that he had withdrawn the EMD and the original documents long before filing the writ petition. Mr. Nabam also submits that all the six tenderers had uploaded a large number of documents along with their e-tender and on scrutiny of the said documents, the authorities did not find any valid ground to reject the technical bids submitted by the respondent nos. 7 and 8. That is the reason, their technical bids were accepted and the work order was eventually awarded in favour of respondent no. 7. In such view of the matter, according to Mr. Nabam, the writ petition is not maintainable and is liable to be dismissed.

15. Mr. K. Jini, learned counsel for the respondent no. 7 submits that the financial bid in this case was opened on 25/02/2014 and thereafter, an agreement was signed between the respondent no. 7 and the department for execution of the contractual work on 05/03/2014. A proceed order was issued in favour of the respondent no. 7 on 05/03/2014, pursuant whereto, the work had also commenced. Neither the work order nor the agreement signed by the parties is under challenge

in the instant proceeding. As such, according to Mr. Jini, the writ petition is liable to be dismissed on such count alone.

16. Mr. Jini submits that the writ petitioner has suppressed material facts in the writ petition, inasmuch as, he has failed to mention the fact that on 28/02/2014, the petitioner had taken back the EMD and other documents. The learned counsel for respondent no. 7 further submits that the writ petition is also barred by laches and negligence on the part of the writ petitioner and is liable to be dismissed on such count as well. He submits that having failed to qualify in the technical bid, the writ petitioner has first withdrawn the EMD and thereafter indulged in negotiation with the respondent no. 7 for obtaining undue benefits. When such negotiation/demands had failed to yield any favourable result, it was only then the petitioner had approached this Court on 02/07/2014 by filing the instant writ petition.

17. By producing a copy of the registration certificate dated 13/07/2016 bearing no. CE/APT(II)/16-17/14139 issued by the Public Works Department, Assam, granting registration as a Class 1-A contractor to the respondent no. 7 valid till 2016-17, Mr. Jini submits that his client had all along held a valid registration certificate as a Class-1A contractor under the PWD Assam and, therefore, the allegation made in the writ petition are totally false and baseless and hence, liable to be rejected.

18. Replying to the contentions made by the learned counsel for the respondents, Mr. Panging, learned counsel for the petitioner has placed reliance upon a decision of this Court in the case of *Rana Construction and Engineers and another Vs. Food Corporation of India and others* reported in 2007 (3) GLT 506 to contend that mere fact that the EMD was withdrawn by the petitioner would not in

any way defeat his claim made in the writ petition. Mr. Panging has further submitted that the withdrawal of the EMD was on account of the fact that the same was given back by the department to the writ petitioner.

19. I have considered the submissions made by the learned counsel for the parties and have also gone through the records produced by the learned Government Advocate.

20. It appears that the writ petitioner had submitted his e-tender in two part, viz, technical and financial bid, in response to the NIT dated 28/01/2014 for construction of "Nakhu to Dishing [Stage -I, 34.12 KM], Package No. AR/11/03/008" under the PMGSY scheme. The technical bid was opened on 18/02/2014 where-after all the technical bids were placed before the Bid Evaluation Committee for preparing a comparative statement. From a perusal of the "Check List for evaluation of technical bid" I find that the petitioner had not furnished the "Undertaking for bid validity". In the evaluation table, it has also been mentioned that as per Clause 12.1.IV read with clause 15.1. of the ITB, the petitioner's technical bid was found to be defective. Clause 12.1.IV requires the bidder to furnish an "Undertaking that the bid shall remain valid for the period specified in clause 15.1 of the ITB". Clause 15.1. provides that the bid shall remain valid for a period of 90 days from the dead line date for bid submission as specified in the ITB.

21. From a conjoint reading of the aforementioned clauses in the ITB, it is thus clear that the bidders were required to furnish an undertaking to the effect that the bid security shall remain valid for a period of 90 days as indicated in clause 15.1 of the ITB. Although, the petitioner has stated that he has uploaded the undertaking, yet, no such undertaking could be produced by the petitioner. It is significant to note that a Bid Validity Undertaking is required to be furnished in the form of

affidavit and, therefore, if the petitioner had actually uploaded the same, the said document (hard copy) ought to have been made available by the petitioner for consideration by the Evaluation Committee at the stage of opening of the technical bid. Not to speak of producing the same before the Bid Evaluation Committee, the petitioner has failed to produce the said document even before this Court. Such being the position, the plea taken by the petitioner that the "*Bid Validity Undertaking*" had been submitted by him along with the tender does not command acceptance by this Court. Since it is not the case of the petitioner that "*Bid Validity Undertaking*" is not a document that was required to be submitted by the bidders, hence, it is evident that the bid submitted by the petitioner was technically non-responsive and the same had been rightly rejected by the Bid Evaluation Committee.

22. I find from the record that the Bid Evaluation Committee consisting of 4 (four) members including the Superintending Engineer, RWC, Rupa as the Chairman, on a threadbare analysis of the bid submitted by all the six bidders, had prepared a comparative chart signed by all the four members and according to the said chart, only the respondent nos. 7 and 8 has been found to be technically qualified. The said decision has not been challenged by any other bidder except the petitioner.

23. Mr. Panging had contended that the respondent no. 8 is a non-existent firm and, therefore, the entire process has been carried out in a fraudulent manner only to keep the respondent no. 7 afloat in the tender process. However, on perusal of the record, I find that the respondent no. 8 was duly represented by Shri Goboi Rijju, who had also submitted the certificate of registration bearing no. 12020197156 against his firm M/s. G.R. Construction along with a photo identity

card of the representative. That apart, the record also contains a certificate dated 10/01/2012 issued by the office of the Chief Engineer, PWD (Roads; Audit-II Branch), Chandmari, Guwahati-3, which shows that the respondent no. 8 has been given registration vide No. APD/R/1(A)/ST/2007-08/00230 and the renewal registration of the year 2012-13 was issued under No. APW/R/1(A)/ST/2012-13/00491. The representative of the respondent no. 8 had also recorded his presence at the opening of the technical bid by signing the register. The petitioner has failed to bring any material to controvert the aforesaid factual position. Therefore, the submission made by Mr. Panging that the respondent no. 8 is a non-existent firm does not merit acceptance and the same is accordingly rejected.

24. In so far as the validity of registration of respondent no. 7 is concerned, as has been indicated above, the learned counsel for respondent no. 7 has already produced registration certificate dated 13/07/2016 which is valid till 2016-17. That apart, from the records produced by the learned AAG, I find that vide original registration No. APW/R/1(A)/GEN/2008-09/00002, registration certificate was issued by the Office of the Chief Engineer, PWD (Roads, Audit-II Branch) Chandmari, Guwahati, which was also renewed for the year 2013-14 under renewal No. APWD/R/1(A)/GEN/2013-14/00246. The aforesaid document being on record, the respondents could not have rejected the technical bid of the respondent no. 7 on the ground projected in the writ petition. The petitioner has also not been able to show that the said registration certificates issued in favour of respondent no. 7 were not genuine. It is also not in dispute that the respondent no. 7 had emerged as the L/1 bidder. In that view of the matter, the submission made by the learned counsel for the petitioner that the contract has been awarded in favour of the respondent no. 7 only to accord undue favour to the said respondent at the cost of

other eligible tenderers, is found to be wholly without any substance and is accordingly rejected.

25. It has been noticed by this Court that the writ petitioner appears to more aggrieved by the tender having been awarded in favour of the respondent no. 7 rather than questioning the decision of the authority in rejecting his technical bid. Save and except stating that the petitioner has been making repeated representation before the authorities to reconsider his technical bid, there is also no explanation in the writ petition as to why the petitioner had to wait till 02/07/2014 to approach this Court when his technical bid was admittedly rejected on 24/02/2014. There is absolutely no explanation as to why the petitioner had suppressed the fact that he had withdrawn the EMD deposits and the original documents on 28/02/2014 itself, Although, Mr. Panging has submitted that the petitioner was compelled to accept the EMD deposit under pressure from the departmental authorities, yet, from the records I find that the petitioner had not lodged any protest while accepting the EMD deposit. Once the petitioner has withdrawn the EMD and the original documents without raising any protest, he had effectively withdrawn from the tender process for all purpose and intent and, therefore, the petitioner would be barred by the Principal of Estoppel and acquiescence from seeking a mandamus in the instant proceeding directing the authorities to reconsider his technical bid at such a belated stage.

26. It appears from the record that by order dated 03/07/2014, this Court, while issuing notice of motion, had passed an interim order directing the parties to maintain *status-quo* as on that date. Interpreting the said order of *status-quo*, the petitioner had contended before this Court that notwithstanding the order of *status-quo*, the respondent no. 7 was going ahead with the work in full swing. Taking note

of the aforesaid submission of the petitioner's counsel, this Court had passed an order dated 26/04/2016 directing the respondent no. 5 to make an enquiry and thereafter, file an affidavit indicating as to whether any work has been done and if so to what extent. In terms of the order dated 26/04/2016, the respondent nos. 1 to 6 have filed an additional affidavit, whereby they have indicated that substantial amount of work had already been carried out even before the order of *status-quo* was passed by this Court. The statement made in paragraph 5 of the said affidavit filed on 02/06/2015 is reproduced herein below for ready reference :-

"5. That after getting the order dated 26 .4.2016, the present deponent went to the spot and after verification he found as follows

:-

- I. At take off point of the road 1 No. Excavator machine is laying abandon i.e. without driver and Chowkidar.*
- II. Upto date formation cutting not fully completed but motorable is only 4.00 km and beyond 0.10 km was not motorable.*
- III. One more excavator and 1 No. Drilling M/C was laying abandon at 4.0 km pt. without caretaker.*
- IV. Not even a single labour of contractor was found at the site during inspection.*
- V. After the court status quo order dated 03/07/2014, not even a single staff of PWD, Singchung was inspected the site as reported by the site Engineer in-charge Sri D. Sora (JE, PWD, Nafra Section)."*

The state respondents had also produced photographic evidence to support the averments made in para 5 above.

27. The writ petitioner has not filed any rejoinder controverting the correctness of the statement made in para 5 of the aforementioned affidavit. It is, therefore, evident that the respondent no. 7 had already executed substantial part of the work

after receipt of the proceed order dated 15/03/2014 but the work had to be stopped on account of the order of *status-quo* passed by this Court on 03/07/2014. It is in such factual background that the un-explained delay in filing the writ petition raises a serious doubt about the bonafide of the writ petitioner and in my view, such delay would clearly amount to laches on the part of the petitioner having a fatal bearing in the outcome of the writ petition.

28. Having heard the learned counsel for the parties and on perusal of the record, I am of the view that the bid submitted by the petitioner was not technically responsive and as such, the same had been rightly rejected by the authorities due to non-furnishing of Bid Validity Undertaking as per the requirement of clause 12.1.IV read with clause 15.1 of the ITB. The mere fact that reference to Clauses- 3 and 4 of the ITB has been made in the letter dated 24/02/2014 as the reason for rejection of the petitioner's bid, cannot in my opinion render the said decision as illegal and arbitrary.

29. As regards the challenge made to the acceptance of the technical bid of the respondent no. 8, I find that the said respondent had produced all necessary documents and had met the requirement of the NIT so as to qualify in the technical bid. From the records, I also find that the representative of the respondent no. 8 was present all along the tender process and, therefore, the argument of the petitioner that the respondent no. 8 is a non-existent firm is found to be wholly untenable in the facts and circumstances of the case.

30. In so far as the challenge made to the technical bid of the respondent no.7 on the ground of non-availability of registration certificate, the said argument also does not have any legs to stand in view of the certificates having been produced by the respondent no. 7 not only for the year 2013-14 but also certificates which are

valid upto the period of 2016-17. Therefore, the conclusion of the Tender Evaluation Committee that the technical bids submitted by the respondent nos. 7 and 8 was technically responsive is correct and the same does not suffer from any infirmity warranting interference by this Court. Since the price bid of the respondent no. 7 was lowest, hence, the said respondent was rightly awarded the contract.

31. It is settled law that in exercise of power of judicial review under Article 226 of the Constitution of India, the Court would not look into the merit of the decision but consider the decision making process adopted by the authorities for arriving at a conclusion. In the present case I do not find any trace of arbitrariness in the decision making process adopted by the Tender Evaluation Committee. Moreover, since the petitioner has failed to make a specific challenge to the Work Order issued to the respondent no. 7, the question of interfering with the same, in the fact of the case also does not arise.

32. In view of the above, the writ petition is held to be devoid of any merit and the same is accordingly dismissed.

33. Before parting with the record, it would be relevant to mention herein that during the pendency of the writ petition being WP(C) 218(AP)/2014, the petitioner appears to have filed a representation dated 20/08/2014 before the respondent authorities with a prayer for cancellation of the contract awarded in favour of the respondent no. 7 as well as for rejection of the technical bid of respondent nos. 7 and 8. When the said representation did not evoke any response, the petitioner had approached this Court once again by filing WP(C) 422(AP)/2014 on 19/11/2014. This Court while issuing notice in the matter had tagged both the writ petitions together. However, in view of what has been observed hereinabove, nothing

survives for adjudication in WP(C) 42(AP)/2014 and the same also stands disposed of in terms of the observations made hereinabove.

Having regard to the facts and circumstances of the case, there would be no order as to costs.


JUDGE

Sukhmay