

THE GAUHATI HIGH COURT

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

ITANAGAR PERMANENT BENCH

WP(C) 107 (AP)/2017

1. M/s. H.B. Enterprise, registered office at Palin, Kra Daadi District, Arunachal Pradesh and another.

.....Petitioners

-Versus-

1. The State of Arunachal Pradesh, represented by the Chief Secretary, Government of Arunachal Pradesh, Itanagar and 7 others.

.....Respondents

BEFORE

THE HON'BLE MR. JUSTICE SUMAN SHYAM

For the Petitioner : Mr. T. Pertin, Advocate.
For the respondents : Dr. D. Soki, GA, AP.
Mr. T. Son, Advocate (R/8)
Date of hearing and judgement: 19/05/2017.

JUDGEMENT AND ORDER (ORAL)

Heard Mr. T. Pertin, learned counsel for the petitioners. Also heard Mr. D. Soki, learned Additional Senior Government Advocate, Arunachal Pradesh, appearing for the State respondents no. 1 to 7 as well as Mr. T. Son, learned counsel representing respondent no. 8.

1. In this writ petition, a challenge has been made to the decision of the Tender Evaluation Committee rejecting the petitioner's technical bid holding the same as non-responsive leading to the award of the contract work under Prima

Minister Gramin Sadak Yojana (PMGSY) in favour of the respondent no. 8 in violation of the conditions contained in the Standard Bidding Documents (SBD).

2. The facts leading to the filing of the present writ petition, briefly stated, are as follows :-

- i. The department of Rural Work Department (RWD), Government of Arunachal Pradesh, had issued a Notice Inviting Tender (NIT) dated 28/01/2017 inviting bids through e- tender for award of contracts in respect of as many as 7 (seven) packages, for construction of roads under the PMGSY scheme and their maintenance for 5 (five) years. In response to the NIT dated 28/01/2017, the writ petitioner herein, had submitted its bid in respect of 3 (three) packages including package No. AR/14/05/050, which is the subject matter of the present writ petition.
- ii. In respect of the aforesaid package, as many as 4 (four) tenderers including the writ petitioner and the respondent no. 8 had submitted their bids in two parts. The technical bids were opened on 27/02/2017, where-after, the bids of the 3 (three) bidders including the writ petitioner were declared to be technically non responsive. Only the technical bid of the respondent no. 8 was accepted. The technical bid submitted by the petitioner was declared to be non-responsive on two counts – (a) it violates clause 4.6 of the SBD and (b) that it contravenes section 4 of part-II of the SBD sl. No. XIII. A Letter of Acceptance dated 09/03/2017 was issued in favour of the respondent no. 8 awarding the contract at a price of Rs. 6,12,01,000/-.

3. Assailing the decision of the Technical Evaluation Committee, Mr. Pertin submits that the Committee had committed manifest illegality in deliberately omitting the work value of Rs. 21.60 crores executed by the petitioner during the year 2012-13 while evaluating its bid capacity as per clause 4.6 of the ITB. Mr. Pertin submits that if the amount of Rs. 21.60 crores of work executed by the petitioner is taken into account, the technical bid of the petitioner cannot be rejected on the ground that the same was deficient under clause 4.6 of the ITB. Mr. Pertin further submits that even the provision of section 4, Part-II of the SBD under Sl. No. XIII would not be attracted in the present case since the petitioner had submitted bids for only 3 packages under the NIT dated 28/01/2017, whereas the upper ceiling imposed by Clause-XIII is pegged at a maximum 5 (five) packages including those under execution stage under the PMGSY scheme. Mr. Pertin submits that since there is no package presently under the execution of the petitioner, the provisions of clause XIII of section 4 of the SBD could not have been applied in the case of the petitioner, so as to reject its technical bid. According to Mr. Pertin, even applying the formula provided by clause 4.6 the total bid capacity of the petitioner will be above 54 crores.

4. Referring to the pleadings contained in the petition, Mr. Pertin submits that it is the technical bid of the respondent no. 8 which should have been held to be defective since the said respondent has admittedly not furnished the required information as regards its qualification, work experience, machines, tools and plants in the prescribed format. Alternately, Mr. Pertin submits that even if it is held that the technical bid of the 3 other bidders including the petitioner was defective, even in that case, in view of the clear guidelines issued by the competent authorities providing for rejection of single tender, the authorities ought to have re-tendered

the work. On account of the aforesaid anomalies, Mr. Pertin submits, the entire tender process has been vitiated warranting interference by this Court.

5. Mr. D. Soki, learned Additional Senior Government Advocate, Arunachal Pradesh, on the other hand, submits that as has been noted in the minutes of the Technical Evaluation Committee, the petitioner's technical bid was found to be non-responsive on account of the reasons mentioned therein. The learned Government Advocate has, however, fairly submitted that the work executed by the writ petitioner during the year 2012-13, which was valued at Rs. 21.60 crores, has not been apparently considered by the Technical Evaluation Committee for assessing its responsiveness under Section 4.6 of the ITB.

6. Mr. T. Son, learned counsel representing the respondent no. 8 submits that the petitioner did not furnish the correct information pertaining to the work executed by it during the year 2012-13 as a result of which the work executed during the said period for Rs. 21.60 crores has not been considered by the Technical Evaluation Committee. Under the circumstances, no fault can be attributed to the evaluation process meriting interference by this Court in exercise of powers conferred under Article 226 of the Constitution of India.

7. I have considered the submissions made by the learned counsel for the parties and have also perused the materials available on record.

8. At the out-set, it requires to be noted herein that by the NIT dated 28/01/2017, the RWD Department, Kra Daadi District, Government of Arunachal Pradesh, had invited bids for settlement of as many as 7 packages under the PMGSY scheme. The aforementioned 7 packages together with description of work and the estimated cost are given herein below in tabular form :-

| Sl. No. | District | Package No. | Name of the work | Period of completion | Estimated cost (Rs. In Lakh) | | Total cost (Rs. In Lakh) |
|---------|-----------|--------------|--|----------------------|------------------------------|--|--------------------------|
| | | | | | Construction | Maintenance (for State-II/Full/Up-gradation Construction only) | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 1 | KRA DAADI | AR/14/05/050 | Road from Yaglung to Bangte (State-I) | 12 months | 792.38 | 0.00 | 792.38 |
| 2 | | AR/14/05/014 | Road from HSH BRTF Yangte-Jhome road to Dari (Stage-I) | 12 months | 931.29 | 0.00 | 931.29 |
| 3 | | AR/14/01/025 | Road from Chambang to Kurayer (Stage-I) | 24 months | 2250.63 | 0.00 | 2250.63 |
| 4 | | AR/14/01/052 | Road from Chambang-Hurayer road to Sengching (Stage-I) | 24 months | 2298.16 | 0.00 | 2298.16 |
| 5 | | AR/14/01/005 | Road from Bokam to Chambang (Stage-II) | 24 months | 2387.17 | 238.81 | 2625.98 |
| 6 | | AR/14/01/001 | Road from Bokam to Amji (Full stage) | 12 months | 403.52 | 40.35 | 443.87 |
| 7 | | AR/14/05/050 | Road from BRTF Ynagte Road to Yaba (Stage-I) | 12 months | 645.28 | 0.00 | 645.28 |

9. It is not in dispute that the writ petitioner herein had submitted its bid for 3 packages appearing at Sl. No. 2, 6 and 7 of the above table. The petitioner has emerged as successful bidder in respect of package no. AR/14/05/014 at Sl. No. 2, the estimated cost of which is Rs. 931.29 lakhs. The package No. AR/14/05/050 at Sl. No. 7 which is the subject matter of the present writ petition was valued at Rs. 645.28 lakhs.

10. As noted above, the technical bid of the writ petitioner was rejected on the ground of being non-compliant with the Clause 4.6 of the ITB as well as section 4, Part-II, Sl. No. XIII of the SBD. The clause 4.6 of the ITB is quoted herein below for ready reference :-

"4.6. Bidders who meet the minimum qualification criteria will be qualified only if there available bid capacity for construction work is equal to or more than the total bid value excluding maintenance. The available bid capacity will be calculated as under :

*Assessed Available Bid Capacity = (A*N*M-B)*

Where

A= Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the last year at the rate of 8 percent a year) taking into account the completed as well as the works in progress.

N= Number of years prescribed for completion of the works for which bids are invited (period up to 6 months to be taken as ½ and more than 6 months as 1 year).

M= 2 or such higher figure not exceeding 3 as may be specified in the Appendix to ITB.

B= Value, at the current price level, of existing commitments and on-going works to be completed during the period of completion of the works for which bids are invited."

11. As can be seen from the above, the aforesaid clause lays down a formula to compute the minimum qualification criteria of the bidders so as to assess their bid capacity.

12. Clause 4 of Part-II of SBD in Sl. No. XIII reads as follows :-

"XIII. The limit to each successful bidder has been pegged at maximum 5 (five) packages including those presently under execution stage under PMGSY within the State of Arunachal Pradesh as per notification of the Government of Arunachal Pradesh vide no. SRWD-116/PMGSY/2016-17 dtd. 18th Nov' 2016".

13. From the materials available on record, I find that the writ petitioner had furnished relevant data indicating that in the year 2012-13 it had executed road construction work of similar nature valued at Rs. 21.60 crores, during 2013-14 the

work executed by the petitioner was valued at Rs. 6,14,67,000/-. The technical bid of the petitioner has been rejected by applying the formula mentioned in clause 4.6 by holding that after deducting the bid capacity of the petitioner in connection with the other package, the balance bid capacity of the petitioner would amount to only Rs. 1.97 crores. The assessment of the bid capacity of the petitioner as made by the Technical Evaluation Committee has been annexed as Annexure-I to the affidavit-in-opposition filed by the respondent no. 4. For the purpose of ready reference, the assessment made by the Committee is given herein below in tabular form :-

“As per Clause 4.6 of the ITB information on Bid Capacity as on the date of this Bid submission.

ASSESSED AVAILABLE BID CAPACITY

Name of Firm : M/S H.B. Enterprises.

| <i>ANNUAL CIVIL ENGINEERING WORKS</i> | | | | | <i>Remarks</i> |
|---|---|---------------------------|------------------|--|------------------------------------|
| <i>Financial Year</i> | <i>On the basis of Supporting Documents (Rs.)</i> | <i>Updated Formula</i> | | <i>Updated Value (Rs.) As on 2015-16</i> | |
| <i>2011-2012</i> | | | <i>0.00</i> | <i>0.00</i> | |
| <i>2012-2013</i> | | | <i>0.00</i> | <i>0.00</i> | |
| <i>2013-2014</i> | <i>61467000.00</i> | <i>61467000*1.08*1.08</i> | <i>716951.09</i> | <i>62183951.09</i> | |
| <i>2014-2015</i> | <i>63412655.00</i> | <i>53412655*1.08</i> | <i>684856.67</i> | <i>64097511.67</i> | |
| <i>2015-2016</i> | | | <i>0.00</i> | <i>0.00</i> | |
| <i>BID CAPACITY OF THE FIRM</i> | | | | | |
| <i>A= Maximum value of civil work executed in any one year during the last five years</i> | | <i>=</i> | | <i>64097511.67</i> | |
| <i>N= Nos. Of years prescribed for completion of the work</i> | | <i>=</i> | | <i>1</i> | |
| <i>M= Considered</i> | | <i>=</i> | | <i>2.50</i> | |
| <i>B= Value, at the current price level, of existing commitments and on-going works to be completed during the period of completion of the works for which bids are invited (Cumulative of last five years)</i> | | <i>=</i> | | <i>92621000.00</i> | <i>As per clause 1.3.3 of ITB.</i> |
| <i>BID CAPACITY = A*N*M-B</i> | | <i>=</i> | | <i>112875622.43</i> | |
| <i>Total bid Capacity Value (A)</i> | | | | <i>11.29</i> | <i>Crores</i> |
| <i>Amount of work put to Tender (B)</i> | | | | <i>9.32</i> | <i>Crores</i> |
| <i>Balance bid capacity</i> | | <i>=</i> | | <i>1.97</i> | <i>Crores</i> |

14. From a bare perusal of the aforesaid calculation sheet, it is apparent that the figures pertaining to the year 2012-13 wherein the petitioner had executed work worth more than Rs. 21.60 crores has been left out from consideration while calculating the bid capacity. If the aforesaid amount is added to the balance bid capacity of Rs. 1.97 crores worked out by the respondents, than the ultimate figure would work out at Rs. 23.57 crores. Considering the fact that the estimated cost of the package in question is fixed at Rs. 6,45,28,000/-. Viewed from any angle, the bid submitted by the petitioner could not have been rejected by holding the same as non-responsive to clause 4.6 of the ITB.

15. Although, an attempt has been made by the learned counsel for the respondent no. 8 to submit that the complete figures were not available before the Technical Evaluation Committee, the said submission has been strongly refuted by Mr. Pertin by stating that the documents annexed to the writ petition in the form of Annexure-24A, which furnishes the list of works executed by the petitioner over the last five years indicating the value of contract works therein, had been downloaded from the official web portal of the department after the bids were opened. Mr. Soki, learned Government Advocate, Arunachal Pradesh has not been able to deny the aforesaid claim of the petitioner's counsel.

16. Coming to the next issue regarding the upper ceiling of five packages that could have been executed by the petitioner, there is nothing on record to show that, save and except the 3 packages in respect of which the petitioner had submitted its bid, it was involved in execution of any other package under the PMGSY scheme in the State of Arunachal Pradesh. If that be so, it is not understandable as to how the petitioner's bid could have been rejected on the ground of contravention of Section 4, Part-II, Sl. No. XIII of the SBD.

17. The purpose of inviting tenders is to conduct a competitive bidding process so as to ensure that the work can be awarded to the most qualified contractor at a competitive rate. For the said purpose, the employer undertakes the exercise of evaluating the bid so as to assess the technical ability of the tenderers, in order to find out which of the qualified bidders is offering the most competitive price.

18. In the case in hand, , I find that the grounds on which the technical bid of the petitioner was rejected was wholly arbitrary, illegal and irrational in the facts and circumstances of the present case. The technical bid of the petitioner could not have been held to be non-responsive on the grounds mentioned in the minutes of the Technical Bid Evaluation Committee meeting. However, due to the rejection of the technical bid of the writ petitioner, its price bid was not opened as a result of which the respondent authorities had to accept the single bid of the respondent no. 8 on the basis of the price quoted by it.

19. Law regarding award of Government contract is fairly well settled. In a number of judicial pronouncement, the Supreme Court has held that in awarding Government contract, the state and its agencies have a duty to act in a fair and non-discriminatory manner. I do not wish to burden this judgement by quoting all those decisions In the case of Maa Binda Express Carrier Vs. North East Frontier Railways reported in (2014) 3 SCC 760, the Supreme Court has observed that while awarding Government contract, the State must act reasonably and fairly at all point of time and to that extent, the tender will have an enforceable right. It is also settled law that in exercise of power of judicial review the Court will examine the decision making process so as to reach a satisfaction that the evaluation process is free from arbitrariness, irrationality and is non-discriminatory in nature.

20. From the facts and circumstances of the case, I find that the provisions of Section 4.6 of the ITB and Section 4, Clause –XIII of SBD has been erroneously applied in the case of the writ petitioner so as to reject its technical bids.

21. In view of what has been discussed above, it is held that the rejection of the technical bid of the petitioner was done in a completely arbitrary and illegal manner. Consequently, the Letter of Acceptance dated 09/03/2017 issued in favour of respondent no. 8 is held to be un-sustainable and the same is accordingly set aside.

22. Since the price bid of the writ petitioner has not been opened yet and considering the fact that the work under PMGSU scheme has remained suspended due to the operation of interim order dated 14/03/2017 passed by this Court, hence, I do not find any impediment to direct the respondents to open the price bid of the petitioner and thereafter award a fresh Letter of Acceptance in favour of the L-1 bidder. The said recourse, in the opinion of this Court, is not only called for in the interest of public at large but is also permissible in the facts and circumstances of the case, since the other two bidders, whose technical bids have been rejected, have not approached this Court by filing any writ petition.

23. Although the petitioner's counsel has raised an objection on the ground of acceptance of single tender of the respondent no. 8 by the authorities, I am not inclined to go into the said aspect of the matter at this stage in view of the determination and direction made hereinabove.

24. Before parting with the record, it is apposite to mention herein that Mr. D. Soki, learned Government Advocate, Arunachal Pradesh, has submitted that after the opening of the bids, the materials uploaded in the web-site gets automatically deleted and, therefore, re-assessment of the financial bid would not be possible. I am afraid, the said submission of the learned Government Advocate cannot be

accepted primarily for two reasons. Firstly, as per the clause 5 of Section I of the SBD for PMGSY, the bidders are required to submit the hard copy of the documents up-loaded in support of their tender. Secondly, it cannot be accepted that the financial bid of the tenderers were not submitted in sealed cover besides uploading the same in the website.

25. Since the Court has already held that the rejection of the technical bid of the petitioner was illegal, hence, all that is required to be done in the present case is that the price bid of the petitioner be opened and thereafter, a fresh Letter of Acceptance be issued to L-1 bidder. There is no reason why the said exercise cannot be carried out on the basis of the records available with the authorities.

26. For the reasons stated hereinabove, this writ petition stands allowed to the extent indicated hereinabove.

27. The directions passed by this Court shall be carried out as expeditiously as possible but at any rate not later than 15 (fifteen) days from the date of receipt of the certified copy of this order.

There would be no order as to costs.

JUDGE

Sukhamay