

**IN THE GAUHATI HIGH COURT  
(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM & ARUNACHAL  
PRADESH)**

**ITANAGAR BENCH  
NAHARLAGUN**

**WP (C) 568 (AP) 2017**

**M/S T. N. T. Enterprises, Class – I (A),**

Registered contractor, represented by its  
Proprietor, Shri Thinley, S/o Late Tsering,  
R/o Village Lumla, PO/PS Lumla,  
District Tawang, Arunachal Pradesh.  
Office at Old Market, Tawang,  
District Tawang, Arunachal Pradesh.

.....Petitioner.

**-VERSUS-**

**1. The State of Arunachal Pradesh,**

Represented by the Chief Secretary,  
Arunachal Pradesh, Itanagar.

**2. The Secretary/Commissioner, RWD,**

Government of Arunachal Pradesh,  
Itanagar, (AP).

**3. The Chief Executive Officer, ARRDA,**

Government of Arunachal Pradesh,  
Itanagar, (AP).

**4. The Superintendent of Engineer-cum-Chairman**

Tender Scrutiny Board, Rural Work Circle, Rupa,

Government of Arunachal Pradesh,  
Itanagar, (AP).

5. The Executive Engineer/DPIU-III,  
Rural Work Circle, Rupa,  
Government of Arunachal Pradesh, (AP).
6. M/S Samco Construction Co. represented by  
Its Proprietor, Shri Tage Sambyo, S/o late  
Son Tage Tailyang, R/O E-Sector, Opp. IDBI Bank,  
Itanagar, PO/PS Itanagar, Papum Pare, Arunachal  
Pradesh.

.....Respondents.

Advocates for the petitioner:

Mr. S. Mow,  
Mr. N. Tai,  
Mr. A. Lingi,  
Mr. M. Opo,

Advocates for the respondents:

Mr. S. Tapin, Senior Government Advocate, A.P.  
Mr. P. Taffo,  
Mr. R. Jacob,  
Mr. S. Tsering,  
Mr. N. Khete,  
Mr. T. Lamgu,  
Ms. S. Wamglat,  
Mr. B. Soram.

**:::BEFORE:::**  
**HON'BLE MR. JUSTICE KALYAN RAI SURANA**

Date of hearing - **27.11.2017.**

Date of judgment - **27.11.2017.**

## **JUDGMENT & ORDER (ORAL)**

Heard Mr. S. Mow, learned counsel appearing for the petitioner and Mr. S. Tapin, learned Senior Government Advocate appearing for the State respondent Nos. 1 to 5 as well as Mr. P. Taffo, learned counsel appearing for the respondent No. 6. The Tender in question relates to public work of construction of roads, therefore, as the pleadings are found to be complete, with the consent of the learned counsels for the parties, this matter was heard for final disposal at the "admission" stage.

**2.)** By filing this writ petition under Article 226 of the Constitution of India, the petitioner has challenged (I) Financial Evaluation Bid Memo No...RWC/R/PMGSY-XI/E-PRO/2017-18 dated 04.04.2017 and (II) Letter of Acceptance vide Memo No.RWD/PMGSY-XI/E-PRO-07/2017-18 dated 07.04.2017, with a further prayer for directing the State respondents to consider the letter of acceptance of the contract work awarded to the respondent No. 6 as well as for a direction in the nature of mandamus to the State respondents to issue a letter of acceptance and to sign an agreement with the petitioner as only the eligible bidder in respect of the NIT for construction of Pradhan Mantri Gramin Sadak Yojana(PMGSY) road from Mebua-I to Rikgiwa (stage-I) Package No.AR/03/06/022,vide NIT No.RWD/SEPPA/PMGSY/PH-XI/05-06 dated 15.02.2017, for an estimated cost of ` 1343.87 Lakh.

**3.)** The petitioner has projected that the petitioner firm is a registered Class-I (A) contractor and had participated in the tender in question. The said tender was invited by the Executive Engineer, Rupa Circle. The Tender Evaluation Committee within the jurisdiction of Superintending Engineer, Rural Works Circle, Rupa, West Kameng District opened the technical bid on 07.03.2017 and 10(ten) bids were found to be technically responsive as per Minutes dated 07.03.2017. Those names were recommended for further technical evaluation. In

the process, the names of the petitioner as well as the respondent No. 6 was found to be responsive, as being technically qualified.

**4.)** By the first impugned letter dated 04.04.2017, the Board scrutinized the tenders and recommended that the tender work be awarded to the respondent No. 6, although, both the tenderers had quoted on similar bid of `13,43,87,000/-. While recommending the award of work to the respondent No. 6, the Board found that the said respondent No. 6 had quoted less fluctuated rates comparing with the basic departmental rate than the writ petitioner. Subsequently, a letter of acceptance was issued on 07.04.2017, which is the second impugned letter in this writ petition.

**5.)** Mr. S. Mow, learned counsel appearing for the petitioner has submitted that the respondent No. 6 did not complete the qualifying work within the allotted time period of 05(five) years preceding the submission of tender and therefore, the documents submitted by the respondent No. 6 does not reflect the correct position and, as such, the bid of the respondent No. 6 was liable to be disqualified for having given false information, which is in violation of clause 4.7(i) of Standard Bid Document, which prescribes that the bidders making false representations will stand disqualified. It is further submitted that as per clause 4.4 A(b) of Appendix-2 of ITB, the respondent No. 6 was required to show completion of work of at least `6,71,93,500/-, being the value of similar nature of work performed equal in value to 50 % of the estimate cost put to tender. It is submitted by referring to annexure-H (PP. 142) that the respondent No. 6 had two similar qualifying works. Out of the 02(two) works referred therein, in the year 2012-2013, the respondent No. 6 had projected that he was doing works contract of about `7.40 Crore relating to construction of Gumto station building, passenger platform, approach road, etc., and the second work related to Construction of road from Pachi-Pipu road to Kapu Dada ( Stage-I) for a value of `6.57 Crore.

**6.)** By referring to the RTI reply dated 07.07.2017 received by the petitioner, it is projected that in so far as the first work of NF Railway, the value of related road work completed was valued at `3,03,118.20. The said RTI reply dated 07.07.2017 was received from the Deputy Chief Engineer/CON, NF Railway, Silapathar. In so far as the second work is concerned, the same related to construction of the road. As per another RTI reply, the status reflected is that the work was still "Work in Progress". Therefore, it is projected that as both the works had not been completed, the respondent No. 6 does not qualify for being successful bidder for opening of the financial bid. As the respondent No. 6 was not technically qualified, he could not have been recommended in the technical evaluation of the bids. It is further submitted that in so far as the writ petitioner is concerned, the documents produced by him in the writ petition as well as before the tender committee could show that he was otherwise qualified to do allotted the contract work. It is also projected that the decision of the evaluation committee declaring another bidder, namely, M/s Gepong - M/s Mepung Enterprises (JV) to be non-responsive, the said order was set aside by this Court by judgment dated 07.09.2017 passed in WP(C) 163 (AP) 2017. By referring to the said order, it is submitted that as the recommendation of the technical evaluation was set aside, this is a fit case where the tender authorities may be directed to make a fresh evaluation of the technical bid after looking into the grievances of the writ petitioner in the present case.

**7.)** The learned counsel for the petitioner further submits that acceptance of the tender bid of the respondent No. 6 was designed to oust the petitioner and therefore, as this Court has already allowed a third participant as qualifying for opening of their financial bid, it would meet the ends of justice, to allow the State respondents to re-evaluate the technical bids of all the three bidders afresh.

**8.)** Mr. S. Tapin, learned Senior Government Advocate has referred to the RTI reply which was furnished to the petitioner by the Public

Information Officer, ARRDA, RWD, Itanagar dated 02.03.2017 to project that the petitioner was holding the requisite informations prior to the decision taken by the Tender Evaluation Committee on 07.03.2017, whereby 10(ten) tenderers were to be responsive for further technical evaluation. By referring to the same, it is submitted that the petitioner could have raised the issues which are now being raised in the writ petition before the Tender Evaluation Committee. However, the petitioner chose to remain silent during the entire period and in the meantime, financial bids were opened and the work was allotted to the respondent No. 6 and only thereafter, having found themselves to unsuccessful in the tender process, the present writ petition had been belatedly filed on 18.07.2017.

**9.)** It is further submitted that the recommendation by the Tender Evaluation Committee vide memo No.RWC/R/PMGSY-XI/E-PRO/2017-18 dated 27.03.2017, was that the bids of the petitioner as well as the respondent No. 6 were technically qualified as per clause 3 & 4 of ITB under the PMGSY guidelines. The Board recommended the said two bidders to participate in the financial bid on 28.03.2017. However, it has been pointed out that the said recommendation for opening the financial bid by the said memo dated 27.03.2017 (Annexure 4 of the Affidavit in opposition by State Respondents No. 1 to 5) and the Financial Bid Opening summary which has been annexed as Annexure-5 of the affidavit-in-opposition filed by the State respondent Nos. 1 to 5, have not been challenged in the present writ petition and therefore, the subsequent communication vide impugned letter dated 04.04.2017, was only a fallout of the said two recommendations of the financial bid by the Tender Evaluation Committee and in the absence of challenge to the same, subsequent orders cannot be successfully challenged. It is further submitted that there was a tender condition in clause 4.4 A(b) that value of the rate work completed by the bidder under PMGSY in a manner under stipulated period of time shall be counted as 120% and as such, the bid submitted by the respondent No. 6 on the basis of his qualifying work was found to be in accordance with the tender

conditions and the bids of respondent No. 6 was duly qualified for award of the contract work in question. It is further submitted that there was no infirmity in the decision of the Financial Evaluation Committee to hold the bid of the Respondent No. 6 to be most responsive by arriving at their finding that the petitioner had quoted higher fluctuated rates and that the respondent No. 6 had quoted less fluctuated rates, comparing with basic departmental rates. It is submitted that the correctness of the said test have not been questioned in the present writ petition. It is submitted that this Court ought not to substitute its opinion on the considered decision taken by the said Tender Committee.

**10.)** Mr. P. Taffo, learned counsel appearing for the respondent No. 6 has referred to the information disclosed under RTI by NF Railway on 07.07.2017 (Annexure-I Series of the petition), wherein to project that the work of construction of Gumto Railway Station was the work which fell within the authority of the Chief Engineer, NF Railway, North Lakhimpur and the application seeking RTI information dated 28.06.2017, was filed before the said authority. However, the Deputy Chief Engineer/Com, NF Railway, Silapathar had issued the RTI reply relating to the works executed by the respondent No. 6. It is submitted that these works have nothing to do with the construction of the Gumto Railway Station.

**11.)** In this regard Mr. S. Mow, learned counsel for the petitioner has referred to his affidavit filed on 15.09.2017 to the RTI reply dated 13.09.2017 by the Deputy Chief Engineer/ Com, NF Railway, Silapathar has indicated that he was authorized to furnish the information related to RTI application filed before the Deputy Chief Engineer, NF Railway, North Lakhimpur.

**12.)** Having considered the submission made by the learned counsel for both the sides and on perusal of the materials on record, this Court is of the considered opinion that merely because the ARRDA authority have disclosed in their RTI reply that status of the work relating to

construction of road by the respondent No. 6, was "Work in Progress", is not a good reason to dis-believe the correctness of the completion certificate dated 23.05.2016, by which the Executive Engineer, Rural Works Division, Seppa had certified that the actual date of completion of the contract work valued at `657.63 Lakh was 30.12.2015. The correctness of the said certificate dated 23.05.2016 is not the subject matter of this present writ petition. It has been successfully demonstrated by the learned Senior Government Advocate that the petitioner did have the requisite information with him, as disclosed by the RTI reply dated 02.03.2017, which was provided even before the Technical Evaluation of Bid was opened on 07.03.2017. Therefore, immediately after such information was disclosed to the petitioner, he did not make any complaint in writing before the competent authority for rejection of the bid submitted by the respondent No. 6. The question, as to why the concerned authorities have certified the work shown to be completed as on 31.12.2016 as "Work in Progress", would be a disputed question of facts. Therefore, if the petitioner is aggrieved by the information issued by the competent authority on the ground that the certificate or the RTI reply was false, the petitioner was free to approach the competent Court for appropriate remedy as may be permissible in law. However, as the certificate appended to be issued on 23.05.2016, clearly records that the work valued at `657.63/- Lakh was completed on 31.12.2015, this Court would not like to venture to adjudicate the correctness of the said certificate so as to make a roving enquiry to disqualify the respondent No. 6, because the petitioner had those relevant information which he could have produced before the competent authority before the bids were technically evaluated on 07.03.2017. This Court is aware that there is no prescribed period of limitation to challenge the memos dated 04.04.2017 and 07.04.2017, but in the present case in hand, the petitioner had chosen to withhold his grievances on 07.03.2017 when the bids were first evaluated technically, under such circumstances a valuable right was allowed to be created in favour of the Respondent No. 6 and the contract work



involves a public work of road construction. Hence, in this case the delay in approaching this Court is found to have vitiated this challenge.

**13.)** As already indicated above, the bid document prescribes that if the bidders have completed the rate work under PMGSY, the value of the completed work shall be counted as 120 % under clause 4.4 A (b) of the tender document. Therefore, on loading/adding the value at 120 % of `657.63/- Lakh, the bid submitted by the respondent No. 6 cannot be faulted with.

**14.)** In the case of *Elite Computers & Communications Pvt. Ltd. Vs. the State of Assam & Ors.*, 2017 (3) GLT 634, the passage from the case of *Jagdish Mandal Vs. State of Orissa*, reported in, (2007) 14 SCC 571, was quoted-

*"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 if 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 disputes. The tenderer or contractor with a grievance can always seek damages in a Civil Court. Attempts by successful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade Courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the*

*project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*

*(i) Whether the process adopted or decision made by the authority is mala fide or intended to favor someone;*

*OR*

*Whether the process adopted or decision made is so arbitrary and irrational that the Court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";*

*(ii) Whether public interest is affected.*

*If the answers are in the negative, there should be no interference under Article 226. ...."*

**15.)** The submission was made by the learned counsel for the petitioner that the authorities had evaluated the price bid on the basis of fluctuated rates, by comparing the rates quoted by the petitioner and respondent No. 6 with the basic departmental rates, being not within the scope of the bid document, the impugned orders were not sustainable. In this context, this Court is of the view that the tender authority is required to have a free hand in the matter of evaluating the price bids. It is quite possible that a successful bidder may do the work where his quoted price bids rates are lucrative, but raise a subsequent dispute to avoid doing work where his rates are lower than the departmental rates. Therefore, the said decision is not found to be arbitrary, discriminating, *mala fide* or actuated by bias. Under the circumstances, this Court will be slow to interfere with the said decision because this Court does not have the necessary competence to itself venture into realm of evaluation of tender. Moreover, in the present case in hand, as the price bids submitted by the petitioner as well as the respondent No. 6 are same, there is no way that public interest is affected. In the case of *Jagdish Mandal (spura)*, the Hon'ble Supreme Court of India had observed as follows:-

"33.... The fifth respondent had submitted an unduly low rate in regard to Item 19 (CC lining). It was the last item of work to be executed, and constituted nearly one-fifth of the total estimated value of the work. In regard to the said work, as against the rate of Rs.2020.50 per cu m, estimated by the Department, the fifth respondent quoted an absurdly low rate of Rs 20 only which was less than 1 % of the estimated rate. It is obvious that he could not have executed the work at that rate. The CC lining being the last work, there was every likelihood of the tenderer executing the other items of work for which he had quoted much higher rates than others and leave out the last item, or raise same dispute thereby jeopardizing the work and causing delay. It is true that a contractor could have an answer by contending that he had priced the other items of work in a manner which enabled him to quote a very low rate for one of the items. But then the Committee is entitled to consider the effect of such freak rates. Where the absurdly low rate is in regard to a large item of work, which has to be executed at the very end, it is possible for the Committee to suspect some ulterior motive on the part of the tendered. If the Committee felt that there was a reasonable possibility of the contractor leaving the work midway on account of the rate quoted for the last item of work being found to be unworkable, thereby putting the work in jeopardy, it can certainly reject the tender as it effects the reliability of the contractor to perform the work. Unduly low and unworkable rate or rates, is a ground for rejection of tenders (vide note to Clause 3.5.18). The modus operandi of quoting low rates in regard to some items of work and thereby securing the contract and then raising disputes by making large claims, is not uncommon among the contractors. The very purpose of constituting a committee for scrutinizing the tenders is to find out whether any freak low rate will affect the work of the contract is awarded to the tenderer. If the Committee found that the tender of the fifth respondent should be rejected on that ground, the said decision cannot be

*termed as unreasonably or arbitrary. The Committee has applied its mind and rejected the tender by assigning a reason which is neither irrational nor arbitrary. Neither the High Court nor this Court can sit in appeal over such technical assessment. There is no infirmity in the decision-making process or the decision."*

**16.)** Considering the fact that this Court by order dated 07.09.2017, passed in WP(C) 163 (AP) 2017 has permitted the bid of the third player to be considered for financial evaluation, this Court is not inclined to interfere with the tender process.

**17.)** At this stage, learned counsel appearing for the petitioner has further retreated that the authorities may look into his grievances as raised in the present writ petition. In this connection, this Court is of the view that if such liberty is granted, any decision taken by the authority would be subject to second round of litigation. In the present case, as the petitioner is found to have the requisite information as per the RTI reply dated 02.03.2017, which were not placed before the competent authority when the evaluation of bid was done for the purpose of finding out the technical responsive bid, therefore, granting of such liberty to the petitioner would not be in the interest of the work in question, as it will lead to further delay, so, such prayer made by the learned counsel for the petitioner is refused.

**18.)** Hence, this writ petition stands dismissed.

**19.)** In terms of the previous order of this Court dated 07.09.2017 passed in WP(C) 163 (AP) 2017, the State respondents are directed to proceed with the evaluation of the financial bid of the relevant three parties viz., petitioner, Respondent No. 6 and M/s Gepong - M/s Mepung Enterprises (JV) in accordance with law.

**JUDGE**

Cha Gang