

THE GAUHATI HIGH COURT
(The High Court of Assam : Nagaland: Mizoram and Arunachal Pradesh)

ITANAGAR PERMANENT BENCH

WRIT PETITOPN (C) No. 229 (AP)/2017

M/s Y2 Enterprises

.....*Petitioner*

-Versus-

The State of Arunachal Pradesh & others

.....*Respondents*

BEFORE

THE HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the Petitioner	:	Mr. PK Tiwari, Sr. Adv. Mr. K. Saxena, Mr. Y. Resam, Mr. G. Talon, Advocates.
For the respondents	:	Mr. D. Soki, Addl. Sr. Govt. Adv.
Date of hearing	:	18.05.2017
Date of judgement	:	19.05.2017

JUDGEMENT AND ORDER

Heard Mr. PK Tiwari, the learned senior counsel assisted by Mr. P. Saxena, the learned counsel for the petitioner and Mr. D. Soki, learned Addl. Sr. Govt. Advocate, Arunachal Pradesh for the respondents.

2. This writ petition has been filed challenging the legality and validity of the decision taken by the tender committee whereby the bid of the petitioner Firm was rejected in connection with the NIT No. CDA/W-3/2016-17/112-20 dated 10.4.2017 by which tenders were invited for 3

separate packages which was referred to the as Package No.1, Package No.2 and Package No.3, wherein the contractors of Class-III (B & R) were eligible to participate.

3. The Firm of the petitioner had been submitted bids in respect of Package No.1 & Package No.2 which was for the construction of Boundary Wall, RCC Retaining Wall, Gate and Solar Fencing on Boundary Wall of Arunachal Pradesh Civil Secretariat, Itanagar. The NIT was issued by the Executive Engineer, Capital Division–A, APPWD. The relevant portion of the conditions for bidders is extracted below:

"Conditions for all bidders:

Tender forms shall not be sent by post and Tender papers are not transferable.

Both sealed envelopes (EMD and Tender document) marked as "Earnest Money" and "Tender" shall be submitted together in another sealed envelope superscripted with "Name of work, Package No. and due date of opening". The envelope marked "tender" shall be opened whose Earnest Money, placed in the other envelope marked as "Earnest Money" is found to be in order.

The undersigned reserves the right to accept/reject any or all the tender without assigning any reason thereof.

Propos provision under Para.20.4.3.2 of CPWD Works Manual-2014 shall be applied.

The pre bid meeting shall be conducted on 26/04/2017 at 1400 hrs in the office chamber of the Assistant Engineer, Capital Sub-Division- 5/ APWD, AP, Itanagar."

4. The said bid was opened on 11.5.2017 and the bid of the petitioner Firm was rejected and returned on the ground that "Due to non-availability of the envelope superscripted with Earnest Money. All document returned to the Bidder".

5. The learned senior counsel for the petitioner submits that the petitioner Firm being an eligible contractor for the said project had submitted his bid in accordance with the terms and condition of the NIT and submitted his Tender Bidding documents in a sealed envelope, which contained 2 separate envelopes of which one was for the Technical Bid along with a separate envelope (inside the Technical Bid) that contained the Earnest Money and the other for the Financial Bid as per the NIT. However, on 11.5.2017 his Bid was simply rejected and returned without giving him an opportunity to explain that the Earnest Money envelope was inside the

same, but in a separate envelope. It is submitted that in the said NIT, the only conditions for all the bidders in general was that the sealed envelope shall be submitted together separately and marked as "Earnest Money" and "Tender", which the petitioner did but kept it inside the envelope containing Tender Bid Document. It is submitted that nowhere in the NIT, it has been made mandatory that if Earnest Money is not found in the envelope the Bid is likely to be rejected. It is further submitted that in the NIT, it is mentioned about "both the envelopes" which means that the two envelopes has to be technical and financial bid. It is not provided that there has to be three separate envelopes, the one with only the EMD. Moreover, in the Pre-Bid meeting which was conducted on 26.04.2017 at the office of the Assistant Engineer, Capital Sub-Division-5/A, APPWD, Itanagar, it was never mentioned or brought to the notice of the bidder that if the Bid document and the Earnest Money are not submitted separately, the same would be rejected. The learned senior counsel for the petitioner submits that the ground for rejection of the tender documents of the petitioner is too technical and not at all substantial in nature. Moreover, mere non-submission of Earnest Money separately with the Technical Bid document should not be a substantial ground for the rejection of the Tender Bid document of the petitioner as the earnest money was available in the envelope and the authorities just had to open the envelope. The learned senior counsel for the petitioner submits that the said mistake is too technical to reject the bid of the petitioner, which is not in public interest and it has the effect of reducing competition.

6. The learned State counsel, per contra, submits that the works involved in the present Tender pertains to construction of the boundary wall of the Civil Secretariat and the works are required to be done in time bound manner. It is submitted that as per the Tender conditions of the NIT, it had clearly spelled out that out of both the sealed envelopes, one is required to be marked as "Earnest Money" and the other must be marked as 'tender'. It was further clarified that the tender shall be opened whose Earnest Money placed in the other envelope marked as "Earnest Money" is found to be in order. Moreover, one of the condition was also that Pre-Bid meeting shall be conducted on 26.4.2017 at 1400 Hrs in the office of the chamber of the Assistant Engineer, Capital Sub-Division-5/A, APPWD, Itanagar. Hence, it is not a question whether the mistake was bonafide or it was a clerical error in marking the envelopes because if the petitioner had any doubt, he could have obtained the clarification in the said Pre-Bid meeting. It is submitted that the petitioner took a risk of superscribing the two envelopes

differently than what was prescribed. Hence, the authorities having not found the envelope as prescribed as "Earnest Money", all the documents were returned to the representative of the petitioner in respect of Package No.1 and Package No.2. It is further submitted that this was a case of single Bid being invited and, as such, this was not a case where a Technical Bid and Financial Bid was to be submitted or scrutinized separately. Hence, the tender papers were correctly rejected and returned to the petitioner in terms of the condition of the NIT. The learned State counsel has further submitted that as the Bid/Tender of the petitioner has been returned, it could be very difficult to now arrived at a finding as to whether at the time when it was returned, the same did contain any "Earnest Money" or not, at the time of its original presentation. The bid having not been opened, there is no way that the claim of the petitioner can now be entertained at this stage after the valid tenders were opened. Hence, the learned State counsel submits that under the facts and circumstances of the case, he vehemently opposes the admission of this petition or passing of any interim direction at this stage, which could stall the time bound construction of the sensitive area like the Civil Secretariat of the State of Arunachal Pradesh.

7. Considering the arguments advanced by the learned counsel for both sides, it appears to this Court that as the Bid/Tender papers were returned by writing an endorsement that Earnest Money was not found, at this stage, if the records are called for, the official record would not contain the tenders or the Bids submitted by the petitioner in respect to Package No.1 and Package No.2. Admittedly, a photocopy of the outer envelope of 2 Bids in respect of Package No.1 and Package No.2 is annexed to this writ petition, which contains an endorsement dated 11.5.2017 by the concerned authorities "opened by me" and the endorsement about rejection of the Tender due to non-availability of a envelop superscripted with Earnest Money. It is the admitted case of the petitioner in his representation dated 12.5.2017 that as the sealed envelope contained two separate envelopes one of which was for the Technical Bid along with a separate envelope (inside the Technical Bid) which contained the Earnest Money and the other envelope for the Financial Bid as per the NIT.

8. As per the conditions of the NIT, as quoted hereinabove, this Court finds that there is a specific statement that the envelope marked as 'tender' shall be opened whose Earnest Money placed in other envelope marked as 'Earnest Money' is in order. In the conditions of the NIT, nowhere it was specified about the mentioning of "Technical Bid" and "Financial Bid". It is
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further admitted case of the petitioner that the envelope marked as 'Financial Bid' contained another envelope marked as 'Earnest Money'. Therefore, it is not incumbent upon the authorities to open an envelope to find out whether it contained Earnest Money or not. As the tender papers have already been returned, the other valid tenders of other tenderers have been opened, hence, at this stage, if this Court would have to interfere in the process, it would lead to a situation where the petitioner would be permitted to now submit his Tender, which, in the opinion of this Court, would create an incorrect precedent of permitting a party to submit its tender after the tender was rejected and the documents returned, and after other tenders were opened.

9. Moreover, on a close scrutiny of the representation dated 12.5.2017 submitted by the petitioner, on rejection of his Bid document in respect of Package No.1 and Package No.2, this Court does not find any statement that the petitioner offered a specific explanation that one envelope contained the Earnest Money, rather, it is mentioned that office of the authorities, while rejecting the Bid documents of the petitioner, not even once give him an opportunity to explain that the Earnest Money envelope was inside in a separate envelope. This Court fails to understand why the petitioner or his representative could not raise a voice when the Tenders were being opened. This Court finds that there is a condition given in the NIT dated 10.4.2017 that the Tender would be received upto a particular time or particular date and it would be opened on the same day at 1400 Hrs in the presence of the intending contractors or their representatives. It is not a pleaded case of the petitioner that the Tenders were secretly opened in absence of the intending tenderers. In a separate paragraph in the said NIT dated 10.4.2017, it has been specifically mentioned that Tender without Earnest Money shall be summarily rejected.

10. Although, this Court appreciates the strenuous arguments advanced by the learned senior counsel for the petitioner that it was a clear case of mere mistake, however, this Court also has to consider the fact that while rejecting the 2 Bids submitted by the petitioner, the Bids of the other tenderers were opened. In the present writ petition, we do not find any statement as to how many other Bids were submitted and how many Bids were opened in presence of the representatives of the petitioner Firm. Moreover, notwithstanding the fact that the mistake of the petitioner was not serious, but at the present stage, when the Bids of the petitioner was rejected and the documents returned, the only way out, in which this Court could interfere in

the matter is, by permitting the petitioner to resubmit his Bid, which would not be in public interest. Moreover, till the Bids having been opened, the Bid amount of the various bidders stand disclosed to everyone by this time. Hence, to permit the petitioner to re-submit his Bid now will not be appropriate.

11. This Court is not commenting whether the petitioner is capable of manipulating of sealed envelope to substitute the documents contained therein but with the advancement of technology nowadays, such manipulation at the end of the petitioner cannot be ruled out completely.

12. Hence, on the grounds and reasons as indicated above, this Court is not inclined to admit this writ petition.

13. Hence, this writ petition is dismissed.

14. No order as to costs.

JUDGE

MKS/