

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

ITANAGAR BENCH

WP(C) 95 (AP) 2017

- 1. M/s PENO ENTERPRISES,**
Registered office at Naharlagun. P.O & P.S:
Naharlagun. Papum Pare District, Arunachal Pradesh.
Email ID: penoenterprises@gmail.com. Phone No.
0360-2248798.
- 2. Shri Charu Kasa,**
S/o late Charu Taguk, resident of Dobam Village,
Karsingsa, P.O. & P.S: Banderdewa. Papum Pare
District, Arunachal Pradesh. Email ID: nil. Phone No.
9862948101

.....*Petitioners*

By Advocates:

Mr. M. Kato, Adv.

-Versus-

- 1.** The State of Arunachal Pradesh, represented by its
Secretary, Rural Roads Division, Itanagar, Arunachal Pradesh-
791111.
- 2.** The Chief Engineer,
Rural Roads Division, Itanagar, Arunachal Pradesh-791111.
- 3.** The Superintending Engineer,
Rural Works Circle, Itanagar-cum- Chairman, Technical Bids
Evaluation Committee.
- 4.** The Executive Engineer,
Rural Works Circle, Itanagar, Arunachal Pradesh.
- 5.** M/s ATW India Pvt. Ltd.

Registered office at South Jalan Nagar, Chowkidinghee,
Dibrugarh, Assam-786003.

.....*Respondents*

By Advocates:

Mr. D. Soki, learned Addl. Sr. Govt. Adv., A.P.,
Mr. T. Son, learned Adv. For respondent No. 5.

Date of hearing :01.05.2017.
Date of Judgment :01.05.2017.

::BEFORE::
THE HON'BLE MR. JUSTICE AJIT BORTHAKUR
JUDGMENT & ORDER (ORAL)

Heard Mr. M. Kato, learned counsel for the petitioner. Also heard Mr. D. Soki, learned Addl. Sr. Govt. Advocate appearing for the State respondent Nos. 1 to 4 and Mr. T. Son, learned counsel appearing for private respondent No. 5.

2]. By filing this application under Article 226 of the Constitution of India, the petitioner has challenged the operation of the impugned Minutes of Technical bids Evaluation Committee, dated 16.02.2017, whereby the respondent No. 5 has been found to be technically responsive in the tender process for Package No. AR/14/01/025 and rejected the bids of the petitioner despite having met with all the terms and conditions of the Standard Bidding Documents (for short, 'SBD').

3]. The petitioners' case, in brief, is that the Executive Engineer-cum-DPIU-II, RWD, Palin, Kra Daadi District, Arunachal Pradesh issued NIT, dated 31.01.2017, for construction of Road from Chambang to Kurayer (Stage-I) bearing Package No.AR/14/01/025, under Pradhan Mantri Gramin Sadak Yojna (PMGSY). The petitioners' Firm, being eligible to participate in the tender process, submitted bid in the prescribed format along with all the required documents within the specified time. Pursuant thereto, the Technical Bid was shown opened on 16.02.2017 and the technical bid of the petitioner No. 1-the firm was declared non-responsive. Altogether, 6 (Six) Firms/Contractors including the petitioners' firm participated in the e-tendering process. The petitioner No.1, having met with all the prerequisite qualifications, was legitimately expecting that their bid would be

declared responsive. However, the expectations of the petitioners were belied when the petitioner came to know that their bid was declared non-responsive vide the impugned Minutes of Technical Evaluation. Mr. M. Kato, learned counsel for the petitioners has submitted that the Minutes, dated 16.02.2017, is *per se* illegal and suffers from the vice of arbitrariness inasmuch as no technical evaluation was, infact, held on 27.02.2017. According to Mr. Kato, although, it is well settled position that a single bidder cannot be awarded with contract work, nevertheless, the respondent authorities are contemplating to award the work to the said private respondent No. 5 in the most illegal manner. Mr. Kato, the learned counsel for the petitioners has submitted that in the backdrop of the irregularities committed by the respondent authority, this Court may direct the respondent-authorities to issue fresh NIT, so that the petitioners' firm and others can participate in the tender process. In this connection, Mr. Kato has drawn attention to the decision of this Court rendered in RCM Infrastructure Ltd. (M/S) & ANR-vs- State of Arunachal Pradesh & Ors., reported in 2016 (4) GLT 1129. Mr. Kato, the learned counsel has further cited another decision of this Court rendered in Sterlite Technologies Ltd. & Anr.-vs-Assam Power Distribution Co. Ltd. & Ors., reported 2011 (5) GLT 600.

4]. By filing an affidavit on behalf of the State respondent No. 3, Mr. D. Soki, the learned Addl. Sr. Govt. Advocate has contended that the Technical Bid was opened on 16.02.2017, in presence of all the bidders. Mr. Soki, the learned Addl. Sr. Govt. Advocate has submitted that the detailed technical evaluation was carried out by a committee and the petitioner, though submitted the completed and existing works for the last 5 years, the same was not countersigned by the Executive Engineer as required under Section 4.2 (C) of the Instruction to Bidders (ITB). Further, Mr. Soki has stated that the evaluation of the bids of the petitioners' firm revealed that the lease agreement of various items were not in order and there had been overwritings on the agreement papers and as such, the same could not be taken into account for the purpose of the evidence of ownership or lease/ rent. Mr. Soki, the learned Addl. Sr. Govt. Advocate has further submitted that a criminal case has been registered against the petitioners' firm at Seppa Police Station, based on the allegation that the petitioners' firm had misappropriated the sanctioned fund allocated for construction of road from Sangbia Camp to Paffa Road under PMGSY Scheme and it is also learnt that the proprietor of the petitioners' firm is now on bail and as such, the bid of the petitioners was rejected on this ground and also for

swearing false affidavit. According to Mr. Soki, the technical evaluation was done by the technical evaluation committee consisting of four members and the evaluation of the bids was done in free and fair manner in strict compliance of the terms and conditions of the SBD for PMGSY. Mr. Soki, the learned Addl. Sr. Govt. Advocate has further submitted that the petitioners have no *locus standi* to file the instant application on behalf of the firm for want of a duly executed Power of Attorney and in this connection has drawn the attention to two previous decisions of this Court rendered in WP (C) 103/2015 and WP (C) No. 70/2017. Mr. Soki refuting the submission of Mr. Kato, the learned counsel for the petitioners that sole responsive bidder cannot be awarded with the contract work, has drawn this Court's attention to the Apex Court decision rendered in Central Coalfields Limited and Anr-vs-SLL-SML(Joint Venture Consortium) and Others reported in (2016) 8 SCC 622.

5]. The respondent No. 5 also by filing his affidavit and Mr. T. Son, the learned counsel appearing on his behalf has submitted that the petitioner No. 2 was only authorized to collect tender documents and to deposit the same in the tender process. The petitioner No. 1-the firm did not give any Power of Attorney to initiate legal action in court in favour of the petitioner No. 2 and therefore, the petitioner No. 2 has no *locus standi* to file this writ petition against the respondent authorities. Mr. Son, the learned counsel has further submitted that in W.A. No. 10 (AP) 2015, a Division Bench of this Court upheld the decision of the learned Single Judge pertaining to the requirement of the Power of Attorney in the case of M/S Lokam Brothers & Ors vs State of Arunachal Pradesh & Ors. decided on 15.05.2015. Mr. Son has submitted that in the aforesaid judgment, it was observed that the letter of authority given by any firm to an authorized person is very much limited and here the petitioner No. 2 was authorized only to collect/ receipt and to submit tender documents on behalf of the petitioner No. 1-the firm and without the Power of Attorney duly authorizing him to institute a legal proceeding. Therefore, Mr. Son has vehemently emphasized that the instant writ petition being not maintainable is deserved to be dismissed at the threshold with cost. Mr. Son, has further submitted that the respondent No. 5-firm fulfilled all the norms of Tools and Plants as sought by the Tender Selection Board. However, the others bidder firms including the petitioner No. 1 were found non-responsive and accordingly, the private respondent No. 5 was found responsive in respect of the work, bearing Package No.AR/14/01/025 and declared as successful bidder in the Technical Bid. Accordingly, the Tender

Selection Board requested the private respondent No. 5 (M/S ATW India Pvt. Ltd., Dibrugarh, Assam) to attend the financial bid as a sole bidder on 03.03.2017.

6]. The learned counsel for the respondent No. 5 Mr. T. Son has stated that one of the most important pre-requisites laid down in clause-3.2 of the ITB is that the Bidders shall not be under a declaration of ineligibility for corrupt and fraudulent practices by the Central Government, the State Government or any public undertaking, autonomous body, authority by whatever name called under the Central or the State Government. Mr. T. Son, the learned counsel for the respondent No. 5 has submitted that a criminal case has been pending against the petitioner No. 1 at Yupia before the learned Special Judge for misappropriation of Rs.6,72,31,404.00/- arising out of an FIR, dated 11.08.2016, lodged by one Shri Rinya Biyu and subsequently, a Criminal case got registered against the firm under Sections 409/420/120B IPC which was not disclosed in the affidavit as required. Mr. T. Son, the learned counsel for the respondent No. 5 further submitted that the petitioner has intentionally and deliberately committed cheating by furnishing fictitious registration number of vehicles. The learned counsel for the respondent No. 5 has further submitted that the Evaluation Committee in respect of Package No. AR/14/01/025 declared the respondent No. 5 responsive in a transparent manner, without any extraneous consideration by the Committee and the petitioners failed to qualify in a technical bid inasmuch as the respondent No. 5 was the sole bidder for the financial bid and accordingly, the Selection Board recommended the name of the respondent No.5-the firm M/s ATW India Pvt. Ltd., as a successful bidder, on 03.03.2017. Mr. Son, the learned counsel has drawn this Court's attention to the decisions rendered by the Apex Court in the cases of Tata Cellular-vs-Union of India reported in (1994) 6 SCC 651 and Maa Binda Express and Anr-vs-North East Frontier Railway and Ors., reported in (2014) 3 SCC 760.

7]. I have considered the submissions of the learned counsel for the parties, perused the pleadings including the documents annexed to such pleadings and also the materials produced before this Court by both the sides.

8]. The dispute in the present writ petition relates to making the petitioners' firm non-responsive in the technical bids for the reasons quoted in the Minutes of the Technical Bids Evaluation adopted on 16.02.2017 and evaluated on 27.02.2017, which is quoted below:-

**"GOVERNMENT OF ARUNACHAL PRADESH
OFFICE OF THE SUPERINTENDING ENGINEER::RURAL WORKS CIRCLE
ITANAGAR**

MINUTES OF THE TECHNICAL BIDS EVALUATION ON 16.02.2017

The technical bid evaluation has been done by the Board member on 27.02.2017, at Superintending Engineer, Rural Works Circle, Itanagar. The Technical Bids of each firm has been Evaluated item wise on 27.02.2017 and after evaluation, following finding were notified as per package show below:-

Name of Works:- C/O Road from Chambang to Kurayer (Stage-I)			
Package No. AR/14/01/025			
Tender Amount=Rs.2205.63 Lakhs			
Sl.No.	Name of Bidder/firm	Responsive/non-Responsive	Remark
1.	ATWINDIA PVT.Ltd.	Responsive	
2.	LUMINOS CONSTRUCTION	Non-responsive	(i)Clause 1.1 of Section 3 (ii)Clause 4.4A(b) of ITB (iii)Clause 4.6 of ITB (iv) Section 4 of Part-II of SBD Sl. No. XIII (v)Clause 4.2d of Section 2 of ITB (vi)Clause 4.4B(a) (i) of ITB
3.	M/S Kakum Enterprise	Non-responsive	(i)Clause 4.4A(a) of ITB (ii)Clause 4.4A(a) of ITB (iii) Clause 4.6 of ITB (iv)Section 4 of Part=II of SBD sl. No.XIII, (v) Clause 1.4 of Section 3 (vi) Clause 4.4B (b) of section 2 of ITB (vii)Clause 4.2d of ITB of section 2 (viii)Clause 1.5 of section 3 (ix)Clause 1.7 of section 3
4.	M/s Peno Enterprise	Non-responsive	(i)Section 4 of part-II of SBD Sl. No.XIII (ii) Clause 4.2 d of Section 2 of ITB (iii) Clause 1.9 of Section 3
5.	M/s RAGIA ENTERPRISE	Non-responsive	(i)Section 4 of Part-II of SBD Sl. No. XIII (ii)Clause 13.3 of Section 3 (iii)Clause 1.6 of Section 3 (iv)Clause 1.7 of Section 3
6.	SUMAN CONSTRUCTION	Non-responsive	(i)Section 4 of Part-II of SBD Sl. No. XIII (ii) Clause 1.5 of section 3 (iii)Clause 1.4 of Section 3 (iv)Clause 4.2d of section 2 of ITB

The responsive bidders are directed to attend the Financial Bid on 3rd March, 2017 at conference hall, Rural Works Department, Itanagar at 11.00 hrs.

Sd/-
Er. T. K. Tagin, SE,
Rural Works Circle, Itanagar,
Chairman
Sd/-
M. Bagra,
CO, Capital Complex
Member

Sd/-
Er.Rido Allo
DPIU-II, Kra-Daadi, Palin
Member Secretary
Sd/-
T. K. Baruah,
A.O., PMGSY, Itanagar,
Member".

9]. Section 4 of Part-II of the SBD Sl. No. XIII provides that 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 the notification of the Government of Arunachal Pradesh vide No. SRWD-116/PMGSY/2016-17, dated 18.11.2016. Also Clause 4.2 (d) of Section 2 of the ITB requires the bidders to produce evidence of ownership of major items of construction equipments named in Clause 4.3B(b) (i) of ITB or evidence of arrangement of possessing them on hire/ lease/ buying as defined therein. Further, Clause 1.9 of Section 3 requires the bidders to furnish information on current litigation in which the bidder is involved. The petitioner No. 1-firm was found to be non-responsive on these three vital clauses, while the respondent No. 5 was found responsive during the Technical bid evaluation held on 27.02.2017.

10]. The contentions of the respondents, in brief, are that the detailed technical evaluation took a reasonable time of more than 2 (two) days beyond the stipulated period of 5 (five) days as per Section 22.5 of the SBD in respect of 7 (seven) packages under the PMGSY, where several bidders participated and the process continued and completed on 27.02.2017. The respondents' plea is that the petitioner firm's certificate required to be submitted under Section 4.2 © of the ITB was not counter-signed by the Executive Engineer and suppressed the fact of participation in other tenders in the bid. Further, the lease agreements of various items showed overwritings thereon and the documents pertaining to up to date insurance on machineries were not produced in violation of 4.3B(b) (i) of the ITB. Another major ground of making the petitioner-firm non-responsive was that the petitioner suppressed the information that a criminal case has been registered vide Seppa P.S. Case No. 71/2016 against him at Seppa P.S. alleging misappropriation of the sanctioned fund for construction of road from Sangbia Camp to Paffa under PMGSY, where the proprietor of the said firm is now on bail.

11]. The technical bids of all the 6 (six) bidders including the petitioner No.1-firm were opened on 16.02.2017, whereafter, the Evaluation Committee evaluated on 27.02.2017 and the respondent No. 5-firm was found responsive.

12]. In *Maa Binda Express Carrier & Anr.vs.N.F. Railway & Ors*, reported in (2014) 3 SCC 760, the Apex Court while discussing the scope of judicial review in

matters relating to award of contracts by the State and its instrumentalities held that ***"All the participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."***

13]. In Monarch Infrastructure (P) Ltd-vs-Commissioner, Ulhasnagar Municipal Corporation & Ors., reported in (2000) 5 SCC 287, the Apex Court summed up the legal position in the matter of scope of judicial review of a contractual matter, as under:-

"(i) The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest and for valid and good reasons".

14]. In Central Coal fields Ltd. Case, reported in (2016) 8 SCC 622, the Apex Court held that ***"As pointed out in Tata Cellular [(1994) 6 SCC 651], there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial process. The soundness of the decision may be questioned if it is irrational or malafide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached".***

15]. Before discussing on the above issues relating to making the petitioner non-responsive in the tender process, in question, this Court finds it expedient, firstly to decide the maintainability of the instant writ petition regarding the authority (locus standi) to initiate legal proceeding by the petitioner No. 2 on behalf of the petitioner

No. 1, a registered firm, which participated in the tender process and secondly, whether the petitioner No. 1 suppressed the material information, required to be disclosed as per Clause 1.9 of Section 3 of SBD, regarding pendency of any case against it.

16]. So far the first issue is concerned, in Para 1 of the Writ petition, it is stated that the petitioner No. 1, M/S Peno Enterprises is a Class-I (B & R) registered contractor, under civil category and the petitioner No. 2 is its authorized representative. However, the record shows that no document of such authorization or Power of Attorney has been annexed in support of the aforesaid claim that the petitioner No. 2 is the duly authorized representative of the petitioner No.1-the firm, which was the unsuccessful bidder in the aforesaid tender process. Referring to the decision of the Apex Court rendered in Jasbhai Motibhai Desai-vs-Toshan Kumar and Ors., reported in AIR 1976 SC 578, a Division Bench of this Court in the case of M/s Lokam Brothers and Ors-vs- State of Arunachal Pradesh, reported in 2015 Legal Eagle (Gau) 936 held that "to have *locus standi* in invoking extra-ordinary jurisdiction under Article 226, the applicant should ordinarily be one who has a personal or individual right in the subject matter". It is apparent on record that the writ petitioner No. 2, being the unauthorized person cannot initiate legal proceedings on behalf of the unsuccessful bidder, that is,the petitioner No. 1-the firm for want of Power of Attorney or any legal instrument. Therefore, this Court has no hesitation in holding that the petitioner No. 2, being not authorized to file the instant petition, has no *locus-standi* to file the writ petition on behalf of the petitioner No. 1-the firm, which was the unsuccessful bidder in the tender process.

17]. With regard to the second issue which relates to clause 1.9 of Section 3 of the SBD, it is noticed that in the affidavit, sworn before the Executive Magistrate by the proprietor of the petitioner No. 1-the firm, namely, Bamang Mangha, declared that there is no litigation or case pending against him and his said firm in any court of law. However, the respondent's documents vide Annexure-3 series reveal that based on an FIR, dated 10.08.2016, lodged by one Rinya Biyu, Seppa P.S. Case No. 71/2016, under Sections 409/420/120B IPC, dated 11.08.2016, was registered against the said proprietor of the petitioner No. 1-the firm and others accusing misappropriation of fund in connection with construction of road from Sangbia camp to Paffa, Stage-II, PH-X, Package No.AR-030-1034 for 15.82 Km in the year 2013,

under the PMGSY road scheme for rural village development. This non-disclosure of material fact and making a false declaration that there is no litigation or case pending in the Court of law being an utter intentional breach of the aforesaid clause 1.9 of Section 3 of the SBD does make the petitioner No.1-the firm disqualified in the tender process, which is brought to the notice of this Court by the respondents' side.

18]. The basic essence of fair play in action enshrined in Article 14 of the Constitution was not violated by the State-respondents, while scrutinizing the bids of the participating six bidders in the interest of the State towards execution of the project in question and therefore, no interference by Court in the above decision making process is warranted.

19]. Therefore, this Court is of the further opinion that the petitioners' grievances do not call for any further judicial scrutiny requiring interference in the impugned tender process.

Accordingly, the writ petition stands dismissed. No cost.

JUDGE

talom