

**IN THE GAUHATI HIGH COURT**

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

**(ITANAGAR PERMANENT BENCH: NAHARLAGUN)**

**WA 19(AP)/2018**

M/s. Mega Electricals .....Appellant

*-versus-*

The Union of India & Ors. ....Respondents

**:: BEFORE ::**

**HON'BLE MR. JUSTICE MANOJIT BHUYAN  
HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN**

For the Appellant	:	Mr. D.P. Sahu, Advocate.
For the Respondent Nos.2 to 8	:	Mr. K. Ete, Sr. Addl. Advocate General, Arunachal Pradesh.
For the Respondent No.1	:	Mr. N. Ratan, Advocate.
For the Respondent No.9	:	Mr. D. Panging, Advocate.
Date of Hearing	:	23.07.2018.
Date of Judgement	:	27.07.2018.

**JUDGMENT AND ORDER** (CAV)

**(Manojit Bhuyan, J)**

This intra-Court appeal is directed against the judgment and order dated 11.01.2018, dismissing WP(C) 117(AP)/2017 instituted by the appellant herein challenging order dated 11.03.2017 by which the appellant was informed of the rejection of its tender during financial evaluation by the duly constituted committee for reason of being the second lowest bidder (L-2). Challenge made to the said order dated 11.03.2017 as well as for a direction not to award the contract work to respondent no.9 was negated by the learned Single Judge.

2. On 11.04.2016, an Invitation For Bid (IFB) was issued in respect of the work, namely, "Rural Electrification works of Tirap district in Arunachal Pradesh under Deen Dayal Upadhyay Gram Jyoti Yojana (DDUGJY)". The execution of the said project is entrusted to the Department of Power, Arunachal Pradesh on behalf of the Government of Arunachal Pradesh, with financial assistance from the Rural Electrification Corporation Limited (REC)/Power Finance Corporation Limited (PFC). For the purpose of procurement

activities related to the project, the Department of Power, Arunachal Pradesh is the 'Employer' and the Government of Arunachal Pradesh is the 'Owner'. The IFB involved adoption of a Single Stage Bid Envelope Bidding Procedure followed by e-bidding for price bids as detailed in the Bidding Documents. Both the appellant M/s. Mega Electrical, Guwahati and the respondent no.9 M/s. K.T. Enterprise, Naharlagun responded and participated in the tender process.

3. The price bid of admitted bidders were opened on 07.06.2016 and evaluation thereof was minuted by the Tender Opening and Evaluation Committee (TOEC) on 13.06.2016. The TOEC recorded that on evaluation of the price bid of the appellant it was found to be Rs.7,67,40,919.70, which is 7.54% below the estimated cost of the project put to tender. It was also recorded that the appellant had submitted the price break-down as per the required Bill of Quantity (BOQ) format. The relative ranking of the appellant on the basis of the system generated BOQ chart was found to be L-2. In so far as respondent no.9 M/s. K.T. Enterprises is concerned, it was found that price quoted is Rs.7,46,97,299.47, which is 9.99% below the estimated cost of the project put to tender. Notwithstanding the fact that the relative ranking of the respondent no.9 as per system generated BOQ chart was found to be L-1, however, the TOEC observed that it did not submit the price break-down of the price bid in BOQ format and as required by the owner. In absence of the same, the basic rate, excise duty, CST, VAT and freight and insurance etc. of individual items and its total could not be ascertained. The TOEC opined that the bid quoted by respondent no.9 is not in compliance of Clause 11.3 and 11.4 of Vol-I Section-II, Instruction to Bidders (ITB) of the Bid Documents. The TOEC further observed that respondent no.9 had earlier defaulted under Clause 23.5, which pertains to non-acceptance of bid for failure to submit Performance Security, in connection with execution of Khonsa-Lazu package of RGGVY scheme under Deomali Electrical Division during 2010-11, thus rendering its bid for rejection. On such findings, the TOEC decided on rejection of the price bid of the respondent no.9 with concurrence of the competent authority. On a whole, the TOEC recommended the price bid of the appellant to be treated as L-1 for issue of Letter of Award (LoA).

4. From the office records produced in original, the findings and recommendations of TOEC did not find favour with the Commissioner (Power) cum CEO of Arunachal Power Development Agency (APDA), who directed the concerned authority to examine the price bids of all the bidders as per advise of the Executive Director (DDUJY), the Chief Project

Manager and other officials of REC Limited, who during their visit to Itanagar had informed that the grounds on which the bid of respondent no.9 was rejected are not enough to reject the bid. In the re-evaluation/re-examination exercise so conducted, it was recorded that the respondent no.9 had submitted an undertaking that the rate quoted in the price bid is inclusive of all taxes and, therefore, the taxes were not separately shown. Also, that the respondent no.9 have authorized the Department that they are agreeable for deduction of all taxes by the Department as per the terms and conditions of the Notice Inviting Tender. Notice was also had to a noting of the Department which clarified that the respondent no.9 is not a manufacturer as per its Trading Licence, VAT and CST registration certificates. Therefore, the respondent no.9, not being a manufacturer and since the mode of transaction in the online BOQ was left blank, as such, the Standard Bidding Document empowered the Department to treat the items as 'Bought Out' and for making financial evaluation accordingly. The price bids/BOQs of all 3(three) bidders were re-evaluated by treating all of them to have opted 'Bought Out' as the mode of transaction, finding respondent no.9 as the L-1 bidder. It was recorded that since the rates of respondent no.9 are inclusive of all taxes and the mode of transaction is considered 'Bought Out' for evaluation, the BOQ has been evaluated by making back calculation for extracting VAT @ 12.50% and Service Tax @ 15% from the unit rate. What followed thereafter was the impugned letter dated 11.03.2017 rejecting the tender of the appellant during financial re-evaluation for reason of being L-2 bidder.

5. The primary issue for determination is as to whether (i) the price bid of the appellant could be rejected and be held as L-2 bidder on comparative assessment of the price bid of that of the respondent no.9; (ii) whether the respondent no.9, who has been adjudged as L-1 bidder, had tendered price bid by deviating from the critical provisions under the General Conditions of Contract (GCC), thereby rendering itself as non-responsive and (iii) whether the respondent no.9 whose bid was not found responsive by the Tender Opening and Evaluation Committee (TOEC) could subsequently be made responsive by making a re-evaluation of the price bids and altering the mode of transaction from 'Direct' to 'Bought Out'. To reach a definite conclusion, it would be essential to take notice of the relevant clauses under the Instruction to Bidders (ITB) and that of the General Conditions of Contract (GCC). In this connection, it would be worthwhile to take note of an important aspect that the respondent no.9 participated in

the tender process declaring the mode of transaction as 'Direct', as would be evident from the Annexure-VI series at page 161 of the memo of appeal. To start with, Clause 11.3 of ITB requires the bidders to give a break-down of the price in the manner and details called for in the Price Schedules and the manner in which the prices are to be presented is shown thereto. The separate Schedules as shown in Clause 11.3 of ITB, which are to be up-loaded, pertains to the following elements:

"Schedule 1:	Plant and Equipment to be supplied
Schedule 2:	Transportation, Insurance and other incidental services applicable for supply of Plant & Equipment
Schedule 3:	Installation Services for Erection, Testing and Commissioning including Local Transportation,
Schedule 4:	Taxes and Duties not included in Schedule 1 to 3
Schedule 5:	Grand Summaries (Schedule Nos.1 to 4)"

Clause 11.4 of the ITB, particularly at 'a.' thereof which is most relevant in the case in hand, *inter alia*, reads as:

**11.4** In the Schedules, Bidder shall give the required details and a break-down of their price as follows:

- a. Plant and equipment shall be quoted on an EXW (ex-factory, ex-works, ex-warehouse or off-the-self, as applicable) basis and to be quoted in Schedule 1.

In respect of direct transaction between the Employer and the Contractor, EXW price shall be **exclusive** of all cost as well as duties and taxes (viz., customs duties & levies, duties, sales tax/VAT etc.) paid or payable on components, raw materials and any other items used for their consumption incorporated or to be incorporated in the Plant & Equipment.

Sales tax/VAT, excise duty, local tax and other levies for equipment/items under direct transaction including octroi/entry tax as applicable for destination site/state shall not be included in the EXW price but shall be indicated wherever applicable in respective column of Schedule 4."

6. Without any dispute the respondent no.9 did not indicate that duties and taxes in its price bid as required in the BOQ format. The aforesaid Clause 11.4 of ITB makes it clear that in respect of direct transaction between the Employer and the Contractor, the ex-work price shall be exclusive of all cost as well as duties and taxes and such taxes and duties under direct transaction are to be indicated, wherever applicable, in the respective column of Schedule 4. Going by Clause 11.3 of ITB, the same are to be reflected in the grand summary of price proposal in the Schedule 5 format. This being the clear prescription under the terms and condition, it cannot be held that the basic rate offered by respondent no.9 can be deemed to be inclusive of all duties and taxes, that too when the declared mode of transaction was a direct transaction between the Employer and the respondent no. 9.

7. What would be the consequence in the event there is violation of Clause 11.4 of ITB, that is, when taxes and duties in respect of direct transaction are not indicated wherever applicable in respective columns of Schedule 4 and which must find reflected in the grand summary in Schedule 5. The consequence is given in Clause 22.3.1 of the ITB, which reads as under:

**“22.3.1.** Bids containing deviations from critical provisions relating to GCC Clauses 2.14 (Governing Law), 8 (Terms of Payment), 9.3 (Performance Security), 10 (Taxes and duties), 21.2 (Completion Time Guarantee), 22 (Defect Liability), 23 (Functional Guarantee), 25 (Patent Indemnity) 26 (Limitation of Liability), 38 (Settlement of Disputes) 39 (Arbitration) and Appendix 2 to the Form of Contract Agreement (Price Adjustment) will be considered as non-responsive”.

Apparently, Clause 11.4 of the ITB do not find mention in the aforesaid Clause 22.3.1. However, clear reference is made to Clause 10 (Taxes and duties) under the General Conditions of Contract (GCC) wherein Clause 10.3 is a *pari materia* provision to Clause 11.4 of ITB.

8. The records of the case discloses that an undated undertaking was submitted by respondent no.9 to the Superintending Engineer (E), Miao Electrical Circle-III, Department of Power stating that the rate quoted in the price bid is inclusive of all taxes and, therefore, the same were not shown in the price bid. By the said undertaking, the respondent no. 9 had also agreed for deduction of all taxes by the Department as per the terms and conditions of the Notice Inviting Tender. This undated undertaking of the respondent no.9 to correct the deficiency in its price bid was acted upon to subsequently make the bid of respondent no.9 as responsive. Whether the same is permissible under the terms and conditions, reference can be had to Clause 22.4 of the ITB, which reads as under:

**“22.4** If a bid is not substantially responsive, it will be rejected by the Employer, and may not subsequently be made responsive by the Bidder by correction of the nonconformity. The Employer’s determination of a bid’s responsiveness is to be based on the contents of the bid itself without recourse to extrinsic evidence.”

9. A plain reading of Clause 11.4 of the ITB, which is a *pari materia* provision as in Clause 10.3 of GCC, read with Clause 22.3.1 of ITB, it is clear that the price bid submitted by respondent no.9 was not in compliance of the price bid requirement, thereby rendering itself as non-responsive. This was a categorical opinion of the TOEC, which was subsequently reversed on re-evaluation by bringing in extrinsic evidence to

make the price bid of respondent no.9 as responsive and placing the respondent no.9 as L-1 bidder.

10. It is argued on behalf of the State respondents that the employer is empowered under Clause 22.2 of the ITB to waive any non-conformity or irregularity in a bid that does not constitute a material deviation and which do not prejudice or affect the relative ranking of any bidder as a result of Technical and Commercial evaluation. Under the terms and conditions, particularly under Clause 22.3 of the ITB, a material deviation is also defined to mean as one where the rectification would unfairly affect the competitive position of other bidders who are presenting substantially responsive bids. In the instant case, the office records clearly goes to show that not only the undated undertaking of the respondent no.9 was acted upon but also the mode of transaction which was declared by respondent no.9 as 'Direct', was treated as 'Bought Out' while undertaking re-evaluation of the price bids. By doing so, the bid of the respondent no.9 was held to be responsive and was also adjudged as L-1 bidder. In our considered opinion, this was a material deviation which not only caused prejudice to the appellant but also affected the competitive position of the appellant who had presented a substantially responsive bid. It is also argued on behalf of respondent no.9 that the case of the appellant is misconceived as no case is made out demonstrating violation of Clause 10 of the GCC. It is submitted that under the scheme any violation of Clause 11.4 of the ITB would not attract the provision under Clause 22.3.1 of ITB rendering the price bid as non-responsive. In our understanding, the said submission is far-fetched, inasmuch as, both Clause 11.4 of ITB as well as Clause 10 of the GCC, particularly, Clause 10.3, are *pari materia* provisions. Clause 22.3.1 of the ITB is squarely applicable in the case to hold that the price bid of the respondent no.9 was not substantially responsive.

11. It is true that there are inherent limitations in the exercise of power of judicial review. Also true is that the right of the Government to get the best person or the best quotation or the right to choose cannot be considered to be an arbitrary power unless the same is exercised for any collateral purpose. The role of the Court is not to sit as a Court of appeal but to review the manner in which the decision was made. The discretionary power under Article 226 has to be exercised with great caution and should be exercised only in furtherance of overwhelming public interest. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides*. While interfering in tender or contractual matters in exercise of

power of judicial review, Court should satisfy itself whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone, whether public interest would be affected and whether the decision can be said to be such a decision that no responsible authority acting reasonably and in accordance with relevant law could have reached. As discussed in the foregoing paragraphs, the decision making process to adjudge the respondent no.9 as L-1 bidder, despite being a non-responsive bidder *vis-à-vis* the critical provisions under the GCC, clearly portrays that the entire re-evaluation exercise was intended to favour respondent no.9. The decision so taken smacks of arbitrariness and the respondents cannot urge overwhelming public interest to protect its actions. Rural electrification work is definitely a matter in public interest but the delay in the execution of the work is wholly attributable to the action of the respondents in setting in motion a re-evaluation exercise to reverse the recommendation of the TOEC. The project in question has not commenced and it is not a case that the work had progressed substantially but could not be taken forward because of pending litigation.

12. In the case of *Khudiram Das vs. The State of West Bengal*, reported in *AIR 1975 SC 550*, the Apex Court held that where in a case the authority had arrived at a conclusion so unreasonable that no reasonable authority could ever reach, then interference by the Court is not as an appellate authority but as a judicial authority. The proposition of law laid down is that there is nothing like unfettered discretion that can be immune from judicial reviewability.

13. In the case of *Ramana Dayaram Shetty vs. International Airport Authority of India and Ors.*, reported in *(1979) 3 SCC 489*, the Supreme Court having regard to a requirement in the tender notice which was an essential condition of eligibility, examined the question as to whether the authority could have validly condoned the shortcoming in the tender of the beneficiary. It was held that the action amounted to illegal discrimination. Further held that the power or discretion of the Government in the matter of grant of largesse must be confined and structured by rational, relevant and non-discriminatory standard and norm and a departure thereof would make the action of the Government liable to be struck down.

14. In the case of *Poddar Steel Corporation vs. Ganesh Engineering Works*, reported in *(1991) 3 SCC 273* and in the case of *B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.*, reported in *(2006) 11 SCC 548*, the Supreme Court laid down the proposition of law

as regards the essential and ancillary conditions in a tender notice. It was held that as a matter of general proposition an authority issuing the tender has the latitude not to give effect to every term indicated in the tender in meticulous details, save and except a technical irregularity which cannot be waived or ignored. It was held that an essential condition has to be punctiliously and rigidly enforced.

15. The grounds of challenge in the instant appeal which are founded on Clause 11.4, Clause 22.3.1 and Clause 22.4 of the ITB read with Clause 10.3 of GCC makes the case of the respondents as suffering from the law laid down by the Supreme Court in the cases referred to above. The facts of the case have compelled this Court to interfere with the administrative action of the respondents. The apparent deficiency in the price bid of the respondent no.9 could not have been condoned having regard to the essential conditions, as indicated above. As a whole, the action of the respondents to choose and adjudge respondent no.9 as L-1 bidder was an arbitrary exercise of power and not in furtherance of any overwhelming public interest. It was clearly intended to favour the respondent no.9.

16. In view of the discussions and findings above, we unhesitatingly hold the action of the respondents as illegal and arbitrary in adjudging respondent no.9 as L-1 bidder. The said respondent no.9 having tendered price bid by deviating from the critical provisions under the ITB and GCC had rendered itself as a non-responsive bidder. The respondents could not have subsequently found the respondent no.9 as substantially responsive by waiving or ignoring the essential conditions of the terms and conditions of the tender. Accordingly, the letter dated 11.03.2017 (Annexure-IV) rejecting the tender of the appellant on ground of being L-2 bidder is set aside. As a corollary, the present appeal is allowed and the judgment and order dated 11.01.2018 passed in the related WP(C) 117(AP)/2017 is set aside. The State respondents shall now take consequential steps following the declaration made by this Court holding the price bid of the respondent no.9 as non-responsive. Let the consequential steps for starting with the Rural Electrification works in question by appointing a valid bidder be done as expeditiously as possible, preferably within a period of 6(six) weeks from today.

**JUDGE**

**JUDGE**

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