

IN THE GAUHATI HIGH COURT

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

ITANAGAR PERMANENT BENCH(NAHARLAGUN)

WP(C) 412 (AP) 2018

*M/s B. B. Enterprises, Indira Gandhi Park,
Near Central Power House, Itanagar, represented by
Shri Sepi Bagang, S/o Shri Gurnea Bagang of village
Jayang Bangang, PO/P.S. Chayang Tajo,
East Kameng District, Arunachal Pradesh.*

.....Petitioner

-/o-

1. *The Secretary of RWD, Govt. of Arunachal Pradesh, Itanagar.*
2. *The Chief Executive Officer, ARRDA, RWD, Govt. of Arunachal Pradesh, Itanagar.*
3. *The Chairman, Tender Evaluation Board Committee, Dept. of RWD, Govt. of Arunachal Pradesh, Itanagar.*
4. *The Superintending Engineer, Rupa Circle, West Kameng, Seppa, Arunachal Pradesh.*
5. *The Executive Engineer, DPIU-II, RWD, Chayangtajo, East Kameng, Seppa, Arunachal Pradesh.*
6. *M/s Mala Enterprises, Barapani Market, Naharlagun, Arunachal Pradesh through its proprietor, Shri Tassar Robin, S/o Lt. Tassar Tajang, Barapani Market, Naharlagun, Arunachal Pradesh.*
7. *M/s Hill View Traders, through its proprietor Shri Tara Bagang, S/o Lt. Sama Bangang, T-III Colony, Seppa, PO/P.S. Seppa, East Kameng District, Arunachal Pradesh.*

.....respondents

By Advocate:

For the petitioner : Mr. P.Taffo

For the respondents: Mr. K. Ete, learned Sr. Addl. Advocate General assisted by Mr. G. Tarak, for R-1 to 5.

Mr. K. Tama, learned counsel for R-6.

:::BEFORE:::

HON'BLE MR. JUSTICE HITESH KUMAR SARMA

Date of hearing : 19.09.2018

Date of Judgment : 20.09.2018

ORDER (CAV)

Heard Mr. P. Taffo, learned counsel for the petitioner. Also heard Mr. K. Ete, learned Sr. Addl. Advocate General appearing for the State respondent Nos. 1 to 5 and Mr. K. Tama, learned counsel for respondent No. 6. None has appeared on behalf of respondent No. 7.

Heard the submission of the learned counsel for the parties at length, and therefore, this Court proposes to dispose of this matter, at the admission stage itself.

2. This is a petition, under Article 226 of the Constitution of India, challenging the recommendation of the technical bid of respondent Nos. 6 & 7 as indicated in the recommendation of technical evaluation vide No. RWD/DPIU-II/PMGSY/CT- NIT/2018-19, dated 12.07.2018 for the construction of road from Pipu CO HQ to Lasak Cheda (Stage-I) and seeking direction to quash and set aside the technical evaluation, dated 20.08.2018 as well as to consider the complaint, dated 20.08.2018, filed by the petitioner.

3. The fact leading to filing of this petition is that, the respondent No. 5/ Executive Engineer, DPIU-II, Rural Works Department Chayangtajo, East Kameng, Seppa, Arunachal Pradesh, on 12.07.2018, invited item rate bids for electronic tendering system for construction of road under Pradhan Mantri Gram Sadak Yojana (herein after referred to as PMGSY) for several works including their maintenance for five years from eligible and approved contractors registered with CPWD/PWD/BRO and Public Sector Enterprises for PMGSY road and bridge works in the district of East Kameng for total 6 packages. The present petitioner had taken part in the above tender process in the said package, and on 20.08.2018, the respondent authority, vide its decision, found the petitioner non-responsive in pursuance to Clause 4.2 (d), 4.4 (B) (b) (i) and clause 4.7 (i) of the Instruction to Bidders (for short, 'ITB') and found the respondent Nos. 6 & 7 as responsive despite the fact that both the private respondents had submitted inadequate and fabricated documents for which they ought to have been declared non-responsive. The petitioner made a complaint on 20.08.2018 to the respondent No. 4/ Superintending Engineer, Rupa Circle, West Kameng District and respondent No. 5/ Executive Engineer pointing out that both the private respondents be declared non-responsive in the technical bid as both of them furnished fabricated information in the bidding documents. According to the petitioner, the said complaint was submitted in compliance to the provision of Clause 22.6 of the ITB. He has further averred in this petition that the respondent authorities have arbitrarily rejected his bid on the sole ground that in

violation of Clause 4.2 (d), Clause 4.4(B) (b) (i), the equipment invoice from M/s Kamrup Machinery Stores Pvt. Ltd furnished by him with his tender documents was fake. He has further averred that the procedure provided in clause 15.7.1.5 of the Central Public Works Manual, 2014 was not complied with by the respondent authority. The Clauses referred to by the petitioner are quoted below for convenience of discussion.

Clause 22.6 of the ITB reads as follows:-

“22.6 The result of evaluation of Part I of the bids shall be made public on e-procurement systems following which there will be a period of five working days during which any bidder may submit complaint which shall be considered for resolution before opening Part II of the bid.”

Clause 15.7.1.5 of the Central Public Works Manual, 2014 reads as follows:-

“15.7.1.5 After opening of the Technical bids, Executive Engineer shall prepare a list of deficiencies found in the bids of each bidder vis-à-vis requirements as per Notice Inviting Tender(NIT) within one week and send these lists to individual bidders by Speed Post with a request to furnish required documents within one week of receipt, failing which it will be presumed that they do not have any further documents to furnish and decision on bids will be taken accordingly.”

Clause 4.2 (d) reads as follows:-

“evidence of ownership of major items of construction equipment named in Clause 4.4 B (b) (i) of ITB or evidence of arrangement of possessing them on hire/lease/buying as defined therein.”

Clause 4.4 B (b) (i) reads as follows:-

“(b) Each bidder must demonstrate:

(i) Availability for construction work, either owned, or on lease or on hire, of the key

equipment stated in the Appendix to ITB including equipments required for establishing field laboratory to perform mandatory tests, and those stated in the Appendix to ITB”.

4.7 Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have:

Clause 4.7 (i) reads as follows:-

“(i) made misleading or false representations in the forms, statements, affidavits and attachments submitted in proof of the qualification requirements.”

4. Coming to the argument of the learned counsel for the petitioner that Clause 22.6, quoted above, has been violated by the respondent authorities in so far his complaint, dated 20.08.2018, has not been disposed of and yet private respondent Nos. 6 & 7 are selected in the bid. Controverting the argument, learned Sr. Addl. Advocate General has submitted that in accordance with the said provision, the petitioner is to make the complaint within 5 working days after publication of the result of the evaluation of the tender bids. According to him, the result of the evaluation was made public on 21.08.2018 and the petitioner filed his complaint on 20.08.2018, and as such, he has not complied with the aforesaid provision, and therefore, his complaint cannot be entertained. In response to such submission made by the learned Sr. Addl. Advocate General, the learned counsel for the petitioner submitted that the minutes of the evaluation were prepared on 20.08.2018 and on that day he had made the complaint. But, by an affidavit filed by the State respondents, it has been submitted that the result of the evaluation was made public on 21.08.2018. So, it appears to be an admitted position that on 20.08.2018 minutes of evaluation were prepared and the same were made public on 21.08.2018.

On perusal of the minutes of the tender evaluation committee, it appears that in the minutes prepared on 20.08.2018, one of the member signed on 21.08.2018. This technical evaluation is placed on record as Annexure-5 by the petitioner. As per the conditions of the ITB, the petitioner did not raise the complian within 5 working days after making the recommendation of the tender evaluation public. He filed the complaint on 20.08.2018 itself when the minutes were drawn by the evaluation

committee. Thus, the petitioner could not have made the complain on 20.08.2018 itself. Admittedly, the minutes were not made public on that day. It is a settled position of law that notings in the file, unless it is made public, cannot give rise to any cause of action. The Clause 22.6 of the ITB having unequivocally provided that the complain can be made within 5 working days of making the recommendation public, such tender condition is required to be followed rigidly, more so, when the petitioner is a party to the said tender process. The petitioner having aggrieved to such a condition cannot resile back from the said position so as to violate the same and also to fall back on the aforesaid provisions of the CPWD Manual.

5. During the course of hearing, there appears to have no controversy as regards the date of preparing the minutes of the evaluation as well as the date of making the evaluation public. Therefore, it does not appear that Clause 22.6, mentioned above, has been violated by the respondent authority in the instant case.

6. Now, referring to the CPWD Manual, 2014, particularly, Clause 15.7.1.5, it has been submitted by the learned counsel for the petitioner that he ought to have been given one week time after bids and preparing the list in respect of deficiencies found in the bids of each bidder. This provision of 15.7.1.5 of the CPWD Works Manual, 2014 has already been quoted in Paragraph-3 above:

7. The learned counsel for the petitioner has strenuously argued that this provision has been complied with by the respondent authority in violation only. However, the learned Sr. Addl. Advocate General for respondent Nos. 1 to 5 and learned counsel for respondent No. 6 are heard saying, with reference to Clause 4.7 (i) of the ITB that even though, the bidders met the qualified criteria, yet they can be disqualified, if they have, as per the provision of (i) of Clause 4.7 made misleading or false representation in the forms, statements, affidavits and attachments submitted in proof of the qualification requirements.

8. In the instant case, the invoice No. 1016 dated 21.04.2017 issued by Kamrup Machinery Stores Pvt. Ltd. and filed by the petitioner with his tender documents was found to be fake as stated in the affidavit. Therefore, on

submission of such fake document, the case of the petitioner is governed by the provisions of Clause 4.7 (i) of the ITB. But, the learned counsel for the petitioner has submitted that out of 3 invoices issued by the aforesaid Kamrup Machinery, 2 are found to be genuine and the 3rd one is said to be not issued by the said Kamrup Machinery and which has also been revealed from the affidavit-in-opposition filed by the respondent Nos. 1 to 5. According to the learned counsel for the petitioner, the respondent authority has found the document, aforesaid, to be fake, whereas some fake documents filed by the respondent Nos. 6 & 7 were not considered and as such, the petitioner was not similarly treated. It appears, on the materials placed before this Court that the respondent authority obtained the information from the aforesaid Kamrup Machinery to the fact that the invoice, referred to above, was not issued by them, meaning thereby, that the said invoice was a manufactured one in view of the provision of Clause 4.7 (i). Therefore, this provision is applicable for arriving at a decision by the respondent authority while evaluating the tender bids of the petitioner.

9. With reference to Clause 15.7.1.5 of the CPWD Works Manual, 2014, referred to above, this Court is of the view that the said provision is not applicable in the instant case since the said provision is in respect of deficiencies found in the bids of each bidder *viz-a-viz* requirements as per the Notice Inviting Tender(NIT). In the instant case, it is not a deficiency of any document this Court is dealing with. It is a case of furnishing of fake document. That apart, as the learned Sr. Addl. Advocate General has raised a question as to whether this Clause is applicable in the instant case or not in view of the fact that this CPWD Works Manual, does not have statutory backing and the Notice Inviting Tender(NIT) involved in this case is a self contained one with the terms and conditions laid therein. On an examination of the ITB, it is found, particularly, in Clause 22.6, that a 5 day period is provided to file complain after making of public of the result of the evaluation public. As this Court is in agreement with the learned Sr. Addl. Advocate General that since ITB is self contained one contemplating a complain against violation of conditions of the tender bids, it would not be appropriate to take resort of the CPWD Works Manual, 2014, being not relevant. Even assuming that the said manual is applicable then also the

grievance raised by the petitioner is not relating to deficiencies. His entire allegation is that the respondent Nos. 6 & 7 were selected on the basis of inadequate, fabricated and fake documents furnished with the tender documents. Even, if the CPWD Manual is held applicable then also the grievance raised by the petitioner does not fit into the said provision.

10. On a meticulous examination of the petition, it is found and has also been submitted by the learned counsel for the respondents that the petitioner has taken 2 grounds in his petition challenging the selection of the respondent Nos. 6 & 7 and those are violation of the provisions of Clause 4.4 (B) (b) (a) (i) and Clause 15.7.1.5, referred to above. The learned counsel for the petitioner has referred to some allegedly inadequate, incorrect, false information given by the other bidders in the bid documents. But, in the affidavit filed by the respondent authority, in Paragraph No.-8, it has been specifically mentioned that evaluation committee meticulously scrutinized the bids documents submitted by the respective bidders and taken a lenient view to all the bidders where the defects are not substantial in nature. Above all, this minor shortcomings were taken into account by the evaluation committee, and therefore, this Court is of the view that it is not necessary to go into such facts and re-open the issues afresh.

11. The learned counsel for the petitioner has referred to the following decisions,

(1) G. J. Fernandez-vs-State of Karnataka and Others, reported in (1990) SCC 488;

(2) Union of India and Anr., vs-International Trading Co. and Anr., reported in (2003) 5 SCC 437;

(3) Michigan Rubber (India) Limited.vs- State of Karnataka and Ors., reported in (2012) 8 SCC 216; and

(4) Jagdish Mandal.vs-State of Orissa and Ors., reported in (2007) 14 SCC 517.

12. The learned Sr. Addl. Advocate General for the State respondent Nos. 1 to 5 has also relied the decisions at Serial No. 3 & 4, above referred by the petitioner.

13. On perusal of the decisions, referred to by the learned counsel for the petitioner, this Court has relied upon the decision in the case of Jagdish Mandal (Supra) which appears to the most applicable in the context of the case at hand. Paragraph 22 of the said decision is quoted below being relevant in the case.

"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 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. It 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 unsuccessful 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 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 favour 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. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse".

14. The aforesaid decision of the Hon'ble Supreme Court has to be looked into taking into account the fact of furnishing of fake document in the form of "invoice" referred to above. During the course of hearing, to a pointed query, the petitioner has not claimed the said invoice to be genuine but said that it is not fake. The petitioner did not make any positive assertion in respect of the genuineness of the document i.e. the "invoice", which was necessary in the face of the information obtained by the respondent authority from Kamrup Machinery Stores Pvt. Ltd., that it was not issued by it. Therefore, it does not appear that there is any specific business or malafide in the decision by the respondent authority in rejecting the bid of the petitioner and also no arbitrariness is being noticed in the action of the State respondents.

15. In the absence of arbitrariness or malafide in the rejection of the tender bid of the petitioner, in the considered view of this Court, no ground has been made out by the petitioner to interfere with the impugned decision exercising the power of judicial review under Article 226 of the Constitution of India. The Court is concerned with the decision making process and not the decision as such. Once it is found that the tender evaluation committee took the impugned decision following the prescribed procedure, this Court, on a judicial review, cannot make a roving enquiry involving disputed question of facts.

16. For all the aforesaid reasons, this Court does not find merit in the petition. Therefore, this petition is dismissed. No order as to costs.

The interim order passed in this petition stands vacated.

JUDGE

Talor