

GAHC040000622023



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

Case No. : WP(C)/13/2023

M/s O.Darang Enterprises and Anr.
Pasighat, Arunachal Pradesh,
A Registered Proprietorship firm and enlisted as Class III Contractor under Govt. of
AP, having its registered office at Pasighat, PO/PS Pasighat, East Siang District,
Arunachal Pradesh and being represented through its sole proprietor Shri Kaling
Darang. 2: Kaling Darang
Age:
Occupation

VERSUS

THE STATE OF AP and 4 Ors.
Represented by the Secretary, Department of Town Planning and Urban Local Bodies,
Govt. of Arunachal Pradesh, Itanagar. 2:The Director
Age: 0
Occupation :

3:the Chief Executive Officer
Age: 0
Occupation :

4:M/s ATW (India) Pvt. Ltd.
Age: 0
Occupation :

5:M/s Agam Construction
Age: 0
Occupation

Advocate for the Petitioner : D Tatak

Advocate for the Respondent : GA (AP)

**BEFORE
HONBLE MR. JUSTICE KARDAK ETE**

ORDER

Date : 24.11.2023

Heard Mr. T. Talang, learned counsel for the petitioner. Also heard Ms. G. Ete, learned Additional Senior Government for the respondents no. 1 & 2, Mr. S. Deb, learned counsel for the respondent no. 3; and Mr. D. Soki, learned counsel for the respondent no. 4.

2. Challenges made in this writ petition is the approval order dated 16.06.2022 issued vide File No. DTP/SC-114/2022-23 by the Secretary to the Government of Arunachal Pradesh, Department of Town Planning and Urban Local Bodies, Arunachal Pradesh, whereby, the approval has been accorded for floating of tender on Engineering Procurement and Construction (EPC) mode by clubbing various works of different amounts into one composite tender and consequent Notice Inviting E-Tender (in short NIeT) dated 07.07.2022 floated by the Chief Executive Officer, Pasighat Smart City Development Corporation Limited (in short PSCDCL) Pasighat, Arunachal Pradesh, by which , two NIeTs have been issued for execution of various works on Engineering Procurement and Construction (EPC) mode by clubbing various works of different amounts into one composite tender.

3. The petitioner who claims to be an enlisted contractor in works department in Class-III (B&R) under civil category, contends that the respondent authority had illegally accorded approval No. DTP/SC-114/2022-23/960 dated 16.06.2022

for floating of NIeT whereby as many as 8 (eight) separate and distinct works have been clubbed together and the impugned NIeT dated 07.07.2022 has been issued by the respondent authority at a much higher value of the work in order to deprive the petitioner who is a Class- III contractor and eligible to participate in the tender, the value of which work does not exceed Rs. 3 crores.

4. The brief fact is that two NIeT were issued on 07.07.2022 by the Chief Executive Officer, PSCDCL, Pasighat in 2 (two) packages, namely Package – A and Package – B. The estimate cost of the NIeT Package - A is Rs. 20.79 Crores (Rupees Twenty Crores Seventy Nine Lakhs) only for execution of various works namely construction of Recreation Centre (Indoor Game Set), Integrated Rehabilitation Centre for substance abuse under Pasighat Smart City Mission and the estimate cost of NIeT Package – B is Rs. 21.285 Crores (Rupees Twenty one crores, twenty eight lakhs and fifty five thousand) only for construction of Vending Zone at Sabji Mandi, near IGJGHS, Pasighat, Footpath and Cycle Track, District Library and Children E-Learning centre, Junction Beautification, APST Bus Depot (Retrofitting and Enhancement), Internal Roads retrofitting of Bakin Pertin Hospital and Urban PHC and Procurement of Ambulance and other equipments, Digital and Non-Digital road signages, retrofitting of roads other than smart roads under Pasighat Smart City on Engineering, Procurement and Construction (EPC) mode in two bid system.

5. Mr. T. Talang, learned counsel for the petitioner submits that the petitioner being a Class-III contractor was not eligible to participate in the said tender as the total estimate was 20.79 crores and 21.285 crores respectively. In terms of the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentive, Development and Promotional) Act, 2015 and its Rules [hereinafter referred to as APDBEP (ID&P) Act 2015 in short] and its amendment from time

to time, a Class-III contractor domiciled within the territorial jurisdiction of Assembly Constituency is not eligible to participate in a tender where the estimate cost put to tender exceeds Rs. 3 crores (Three crores).

6. Mr. Talang, learned counsel submits that after a period of 2 (two) months of the NIeT, the petitioner came to know that tender, particularly Package-B, was issued by clubbing various 8 (eight) works for an estimated cost ranging from Rs. 1.50 crores to Rs. 3 crores. The different 8 (eight) works have been clubbed and the NIeT has been issued into one composite tender which directly curtailed the right of the petitioner to participate in the tender. The petitioner would have been eligible to tender but due to clubbing of the said 8 (eight) different works of different estimate amount ranging from 1.5 crores to 3 crores and issuance of the NIeT particularly under Package-B has deprived the petitioner. He further submits that such action has been illegally approved by the Secretary, Department of Town Planning and Urban Local Bodies vide order dated 16.06.2022. Mr. Talang learned counsel submits that clubbing of various tender into one composite tender directly infringes the right of the petitioner as well as all other Class-III contractors enlisted under the APDBEP (ID&P) Rules 2015. He submits that clubbing of the various works in composite tender is totally arbitrary as it violates the right of the petitioner to participate in the tender. Therefore, learned counsel for the petitioner prays for setting aside of the approval order dated 16.06.2022 for allowing the floating of NIeT by clubbing various works and for a direction to cancel the NIeT dated 07.07.2022. He further prays for cancellation of the NIeT dated 07.07.2022 and issue fresh NIeT by splitting the composite tender into a split tender so as to enable the petitioner to participate by implementing the concept of "Level Playing Field", a doctrine embodied under Article 19(1)(g) of the Constitution of India.

7. Mr. Talang, learned counsel, in support of his submissions has placed reliance on the case of **Reliance Energy Ltd. and anr. Vs. Maharashtra State Road Development Corpn. Ltd. and Ors.**, reported in **(2007) 8 SCC 1**, wherein the Hon'ble Supreme Court has held which is reproduced hereinbelow:

“36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free- standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life" includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in I.R. Coelho vs. State of Tamil Nadu, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.”

8. On the other hand, Mr. S. Deb, learned counsel for the respondent no. 3, while referring to the minutes of the proceedings of the Board of Directors of PSCDCL dated 01.06.2022, submits that the Board has taken a resolution for floating of tender by clubbing the different works into a composite work to

achieve quality work and for faster execution of the work which is in the public interest. The NIeT dated 07.07.2022 of two packages have accordingly been floated after due approval from the competent authority. Therefore, there is no illegality in either approval or issuance of NIeT by clubbing the different works enlisted in the project in order to form a composite work.

9. Mr. Soki, learned counsel for the respondent no. 4 submits that the PSCDCL is a limited company incorporated under the Companies Act of 2013 which is a Special Purpose Vehicle (SPV) created for implementation of Smart City Mission by ensuring operational independence and autonomy in decision making and mission implementation. The PSCDCL being a registered company has its own legal entity.

10. Mr. Soki, learned counsel submits that the APDBEP (ID&P) Act, 2015 and its amendment and Rules are applicable to agencies and departments of the State. It is not applicable to the PSCDCL in as much as Rule 3 of the APDBEP (ID&P) Rules 2015 provides that the Rules shall be mandatorily applied to all the works undertaken by various agencies, Departments under the Government of Arunachal Pradesh including works and Development Departments such as Public Works Department (PWD), Rural Work Department (RWD), Water Resource Department (WRD), Public Health Engineering Department and Housing Department (PHED), Hydro Power Department (HD), Urban Department and Housing Department (UD and HD), Department of power (Elect), Forest Department, Agriculture, Horticulture, Animal Husbandry and Veterinary and Dairying, Rural Development Department etc. The petitioner does not have any indefeasible right to claim for issuing of NIeT in terms of the Act, 2015. He submits that NIeT under Package-B has been issued in composite manner in the interest of the work and the development of the Smart City;

therefore, there is no illegality. Thus, the writ petition is not maintainable at all and such same is liable to be dismissed. Mr. Soki, learned counsel informed the Court that by now 95% of the works have been completed.

11. I have considered the submissions of learned counsel for the parties and materials available on record.

12. The grievance of the petitioner is that the respondent authorities ought not to have issued the impugned NIeT dated 07.07.2022 particularly Package-B in composite tender of estimated cost of 21.285 Crores (Rupees twenty one crores, twenty eight lakhs and fifty thousand) only and such course of action of PSCDCL ought not have been approved on the ground that 8 (eight) different works have been clubbed and the NIeT has been issued into one composite tender which directly curtailed the right of the petitioner to participate in the tender. The petitioner would have been eligible to participate in the tender but due to clubbing of the said 8 (eight) different works of different estimate amount ranging from 1.5 crores to 3 crores and issuance of the NIeT particularly under Package-B has deprived the petitioner.

13. The PSCDCL is a limited company incorporated under the Companies Act of 2013 which is a Special Purpose Vehicle (SPV) created for implementation of Smart City Mission by ensuring operational independence and autonomy in decision making and mission implementation. Under the Mission Statement and Guidelines, the key functions and responsibilities are prescribed which are as follows:

- i. Approve and sanction the projects including their technical appraisal.
- ii. Execute the Smart City Proposal with complete operational freedom.
- iii. Take measures to comply with the requirements of MoUD with respect to the implementation of the Smart Cities programme.

- iv. Mobilize resources within timelines and take measures necessary for the mobilisation of resources.
- v. Approve and act upon the reports of a third party Review and Monitoring Agency.
- vi. Overview Capacity Building activities.
- vii. Develop and benefit from inter-linkages of academic institutions and organizations.
- viii. Ensure timely completion of projects according to set timelines.
- ix. Undertake review of activities of the Mission including budget, implementation of projects, and preparation of SCP and co-ordination with other missions / schemes and activities of various ministries.
- x. Monitor and review quality control related matters and act upon issues arising there-of.

14. It transpires from the resolution dated 01.06.2022, that the Board of Directors of the PSCDCL has taken a conscious decision to club the different 8 (eight) works enlisted in the project in order to form a composite work to achieve quality work and for faster execution of work. Such a conscious decision, in the considered view of this court, cannot be held to be arbitrary as the Guideline provides, inter-alia, to ensure timely completion of projects according to set timelines.

15. This Court also takes note that the APDBEP (ID&P) Act, 2015 and the Rule 2015 clearly provides its applicability which is for all the works undertaken by various agencies, Departments under the Government of Arunachal Pradesh including works and Development Departments such as Public Works Department (PWD), Rural Work Department (RWD), Water Resource Department (WRD), Public Health Engineering Department and Housing Department (PHED), Hydro Power Department (HD), Urban Department and Housing Department (UD and HD), Department of power (Elect), Forest Department, Agriculture, Horticulture, Animal Husbandry and Veterinary and Dairying, Rural Development Department etc.

16. On careful perusal of the record, there is nothing to show that clubbing of different works in a composite tender is impermissible. This Court put a pointed query in view of the nature of the grievance raised in this petition as to whether there is any guideline/Rule which provides for execution of the different works without clubbing into a composite tender. The learned counsel for the petitioner has failed to show that the 8 (eight) different works which have been clubbed and put to composite tender dated 07.07.2022 is not permissible. The learned counsel for the petitioner also failed to canvas that guideline/rule require splitting of 8(eight) works into different tenders. Since there is no guideline or rule which supports the claim of the petitioner, this Court is constrained to reject the grievance raised by the petitioner. It is the authority who is empowered to decide whether to recourse to composite tender or split tender for the interest of works for the development of the Smart City. Thus, this Court finds no infirmity in the approval order dated 16.06.2022 issued vide File No. DTP/SC-114/2022-23/960 by the Secretary to the Government of Arunachal Pradesh, Department of Town Planning and Urban Local Bodies.

17. This Court has carefully perused the judgment of the Hon'ble Supreme Court relied on by the learned counsel for the petitioner. The case relied on by the learned counsel for the petitioner is not at all applicable and seems to have relied on misconception of the principle of law laid down in the above case. The present case both in facts and law has no relevance with the above judgment.

18. In fact, in the case of **Union of India and ors. vs. Bharat Forge Ltd. and Anr.** reported in **AIR 2022 SC 3821**, the Hon'ble Supreme Court has considered the **Reliance Energy Ltd** (supra) and held at paragraph 23 that the observations made by the Court in *Reliance Energy Ltd. (supra)*, undoubtedly, draw inspiration from factual matrix essentially involved in the culling out of the

principle of level playing field, which was found to be impaired on the basis of a lack of legal certainty, as found established by the material available on record. In the course of observations in paragraph-36, this Court held that Article 19(1) (g) confers a Fundamental Right to carry on a business to a company. We would accept it, subject to the caveat that Article 19 confers a right on the citizens, who are natural persons. However, we take it that, what the Court had in mind was a situation where the company is in the party along with one or more shareholders, who are citizens of India. However, there can be no quarrel with the position at law, having regard to the undeniable and breathtaking advances made by the Courts, drawing inspiration from Article 14 that equals must be treated equally and more importantly, the other facet of Article 14, viz., that all actions of State must be fair, which constitutes the major plank of attack against State action in the arena of contracts. This again is subject to the self-restraint in matters, the scope of which has been dealt with in regard to various aspects of the matter, starting with cases relating to challenge to the very terms of the tender and culminating in the actual award of the contract. Unless such actions are found to be clearly arbitrary, illegal, malafide or contrary to any Statute, the courts would be loathe to fetter even the limited area of freedom of the State has to take decisions which are fair in cases relating to contractual matters.

19. The grievance that has been stressed upon by the learned counsel for the petitioner that the issuance of NIET dated 07.07.20022 by clubbing the 8 (eight) different works into composite tender has curtailed his right which violates the doctrine of "Level Playing Field", in my considered view, is a fallacy. The doctrine of "level playing field" undoubtedly is an important doctrine which is embodied in Article 19(1)(g) of the Constitution, however, is subject to public interest. It provides space within which equally-placed competitors are allowed to bid so as

to sub serve the larger public interest. On his own showing, the petitioner being class-III category contractor is not equally placed competitor to bid in the subject tender. Thus, doctrine of "Level Playing Field" has no application in the present case.

20. In the light of the above discussion, this Court is of the considered view that the grievance raised by the petitioner in this proceeding is absolutely beyond the power of judicial review. No direction can be given for fresh tender by splitting the composite tender so as to enable the petitioner to participate. The respondent authorities had issued the NIeT dated 07.07.2022 in accordance with the permissible guidelines as applicable to such works after taking a conscious decision. More so, the tender was issued in the year 2022 and it is informed that the 80% of the works have already been completed by now. The consideration of the writ petition itself is become academic discussion. Be that as it may, since this court has considered the matter on merits and having been viewed herein above, I find no merit in the writ petition.

21. In view of the above, writ petition stands dismissed being devoid of merit.

No order as to costs.

JUDGE

Comparing Assistant