



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

Case No. : WP(C)/238/2022

M/s Asean Agencies
PO and PS Itanagar,
Papumpare District, Arunachal Pradesh, duly represented by its Proprietor Shri Tarik
Talom,
S/o Shri Tarok Talom, Resident of Village Jomo, PO and PS Rumgong, Siang District,
Arunachal Pradesh.
Email NIL
Contact No. 9706090000

VERSUS

THE STATE OF AP and 3 Ors.
Represented by the Chief Secretary,
Govt. of Arunachal Pradesh, Itanagar.
Age: 0
Occupation :

2:The Commissioner (PWD)

3:The Chief Engineer
Age: 0
Occupation :

4:The Executive Engineer
Age: 0
Occupation

Advocate for the Petitioner : Ninnong Ratan

Advocate for the Respondent : GA (AP)

BEFORE
HONBLE MR. JUSTICE NELSON SAILO

::: B E F O R E :::

HON'BLE MR. JUSTICE NELSON SAILO

Date of Hearing : 18.08.2023

Date of Judgment : 22.08.2023

JUDGMENT & ORDER

Heard Mr. D. Soki, learned counsel for the petitioners and Mr. S. Tapin, learned Senior Govt. Advocate for the State respondents.

[2.] By filing this Writ Petition, the petitioner has prayed for setting aside of the order dated 31.05.2022 (Annexure - 9) by which the technical bids of the petitioner was found to be non-responsive due to non-fulfillment of Clauses 4.5.4, 4.5.9 & 4.5.10 under Section 1 of the Standard Bidding Document (SBD). The petitioner has also prayed for a direction to the respondent authorities to give an opportunity to the petitioner to clarify or modify his technical bids as provided under Clause 23.4 (ii) of the Invitation For Bids (IFB). The petitioner has also prayed for a direction to the respondent authorities to award the work order to the petitioner for the work mentioned in the IFB dated 21.07.2019 (Annexure - 3).

[3.] The facts of the case in brief is that the respondent No. 4 published the IFB dated 21.07.2019 for construction of road from Rumgong ADC Headquarter

to connect Kaying EAC Headquarter 64 km (PH-I) (Molom to Bogne village 23.00 km in Siang District, Arunachal Pradesh) with approximate value of work at Rs. 3910.00 lakhs. There were seven (7) tenderers who participated in the tendering process and ultimately, after evaluation of the tender documents, the petitioner was recommended for allotment of the work. The respondent No. 3 then wrote to the respondent No. 2 vide letter dated 17.02.2020 seeking the approval of the competent authority for allotment of the work to the petitioner. However, due to certain complaint submitted by the MLA for cancelling the tender process alongwith a proposal to call for re-tendering, a decision was taken by the State Government in the Public Works Department (PWD) to call for a fresh tender while rejecting the recommendation for selecting the petitioner for the work as was conveyed by the respondent No. 3 to respondent No. 2 on 17.02.2020 (Annexure - 4). The said decision was conveyed by the Under Secretary to the Govt. of Arunachal Pradesh, PWD to the respondent No. 3 vide letter dated 28.08.2020 (Annexure - 7).

[4.] The petitioner being highly aggrieved with the above communicated filed WP(C) No. 245(AP)/2020 challenging the said communication and with a further prayer for a direction to the respondent authorities to award the work to the petitioner. The writ petition was disposed of vide Judgment & Order dated 22.02.2022 whereby, the impugned communication dated 28.08.2020 was set aside and quashed and at the same time, the communication dated 17.02.2020

(Annexure - 4) by which the petitioner was recommended for approval of the competent authority to be allotted the work was also set aside. This Court was of the view that since the IFB issued on 21.07.2019 was not concluded in the manner as was indicated in the IFB and the instruction issued to the bidder (ITB), remanded the matter back to the respondent authorities to finalize the IFB dated 21.07.2019 in accordance with the IFB and ITB by considering afresh the bid of the petitioner in the manner indicated in the judgment since none of the bidders except the petitioner had approached the Court.

[5.] After the writ petition was disposed of in the above manner, the respondent authorities concerned upon considering the bid of the petitioner afresh, issued the impugned order dated 31.05.2022 wherein, it was stated that the bid of the petitioner is found to be non-responsive due to non-fulfillment of certain clauses of the SBD as already mentioned herein above. Aggrieved, the petitioner is once again before this Court.

[6.] Mr. D. Soki, learned counsel for the petitioner submits that the recommendation made in favour of the petitioner for being awarded the work and for which approval of the competent authority was sought for vide letter dated 17.02.2020 was not approved and rejected vide the communication dated 28.08.2020 mainly because of the interference of the Member of Legislative Assembly (MLA) of 32nd Rumgong (ST) Assembly Constituency who had who

had written U.O Note dated 17.02.2020. According to the MLA concerned, the petitioner did not fulfill the criteria and the requirements stipulated in the IFB and SBD since there were three (3) errors in the bidding documents of the petitioner. On account of his complaint, the respondent authorities concerned came up with the communication dated 28.08.2020 rejecting the communication made in favour of the petitioner while deciding to call for fresh tender. The learned counsel submits that the unwarranted interference of the MLA concerned by pointing out three (3) errors on the tender document of the petitioner was interfered with by this Court through the Judgment & Order dated 22.02.2022 in WP(C) No. 245(AP)/2020 but to the surprise of the petitioner, the respondent authorities concerned have yet again come up with a similar finding that there are three (3) errors in the tender documents submitted by the petitioner. The learned counsel submits that the same is a repetition of what was pointed out by the MLA concerned on the earlier and therefore, the element of biasedness against the petitioner still remains. The learned counsel submits that even if the respondent authorities concerned had found some discrepancy in the tender documents submitted by the petitioner, they could have easily sought for a clarification from the petitioner by invoking Clause 23.4 (ii) of the ITB.

[7.] The learned counsel submits that against the three (3) minimum Key Technical Personnel for the project, the petitioner submitted two (2) Key Technical Personnel only and thereby, there was a short fall of one (1) to qualify in the bidding process. In this connection, the learned counsel submits that as per the proviso provided in Annexure-1 of the ITB, which refers to Clause 4.5.4, a certain amount as specified in Annexure-3 of the ITB can be deducted from the contractor's bill per month on pro-rata basis. Therefore, non-submission of three (3) Key Technical Personnel will not be fatal leading to the disqualification of the petitioner from the tender process. The learned counsel further submits that since the petitioner did not have any ongoing work as per his enlistment as a Contractor of SS Class in the Border Road Organization (BRO), there was nothing for him to disclose. Therefore, the application of Clause 4.5.9 by the respondent authorities against the petitioner is unwarranted. Further, the stand of the State respondents that the petitioner failed to disclose the ongoing commitment as SS Class Contractor is also misconceived in view of the fact that only ongoing contract work undertaken by the petitioner is as Class-I Contractor under the PWD (RNB) of the State Government for construction of Pasighat - Ledum - Tene Road (20.00 km - 40 km). The learned counsel therefore submits that the impugned order dated 31.05.2022 is only a finding similar to the errors claimed to have been detected by the MLA concerned and therefore, the same being clearly biased against the petitioner, the order dated 31.05.2022 should

be set aside. In the alternative, the petitioner should be given an opportunity to make any clarification, if so required in terms of Clause 23.4 (ii) of the ITB. The learned counsel in support of his submissions relies upon the following authorities:-

(1) Poddar Steel Corporation -Vs- Ganesh Engineering Works & Ors. (1991) 3 SCC 273.

(2) Oryx Fisheries Private Limited -Vs- Union of India & Ors. (2010) 13 SCC 427.

[8.] Mr. S. Tapin, learned Senior Govt. Advocate on the other hand submits that the allegation of biasness about the interference made by the MLA concerned has already been taken care of in the earlier round of litigation vide Judgment & Order dated 22.02.2022 passed in WP(C) No. 245(AP)/2020. While disposing of the writ petition, this Court had given liberty to the respondent authorities to consider the bid of the petitioner afresh after finding that the IFB issued on 21.07.2019 was not concluded in terms of the IFB as well as the ITB that was issued subsequently. Therefore, the respondent authorities after scrutinizing the tender of the petitioner afresh came to the conclusion that his bid was not responsive due to non-fulfillment of the requirements under Clauses 4.5.4, 4.5.9 & 4.5.10. He submits that the findings have been arrived at by the respondent authorities after due scrutiny and that if there is a similarity with the findings

made earlier, there cannot be any restriction for making a conclusion in that regard. By referring to page 73 of the writ petition, the learned Senior Govt. Advocate submits that the discrepancies found are clearly stated. He submits that Clause 1.4 of Section 2 of the ITB clearly provides that the tenderer concerned has to provide information on bid capacity both on existing commitment and ongoing works and works for which bids are already submitted. However, the petitioner had stated NIL against such requirement. Upon scrutiny, it was found that the petitioner had one (1) ongoing commitment as SS Class Contractor, which otherwise would have limited his bid capacity. Non-disclosure of the same therefore has clearly led to the finding that his bid is not responsive. The learned Senior Govt. Advocate further submits that it is up to the respondent authorities concerned to call for clarification by invoking Clause 23.4 (ii) of the ITB and the petitioner cannot insist upon the same as a matter of right. He thus submits that the writ petition has no merit and the same should be set aside.

[9.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record. As already stated above, this is the second time the petitioner is before this Court. The allegation of biasness has been considered by this Court in the earlier round of litigation and that is why the impugned communication dated 28.08.2020 was set aside. Since this Court found that the IFB issued on 21.07.2019 having not been

concluded in the manner indicated in the IFB and in the ITB issued subsequently, directed the respondent authorities to consider the bid of the petitioner afresh after setting aside the recommendation made in favour of the petitioner vide letter dated 17.02.2020 (Annexure - 4). Pursuant to such reconsideration, the respondent authorities concerned has issued the order dated 31.05.2022. As may be noticed, the tender of the petitioner has been found to be non-responsive for non-fulfillment of Clauses 4.5.4, 4.5.9 & 4.5.10. Clause 4.5.4 deals with personnel capabilities. As per Annexure - I of the ITB, relating to Clause 4.5.4, there should be three (3) minimum Key Personnel for the project. The petitioner admittedly has provided only two (2). Proviso to Annexure - I provides that in the event of absence/non-deployment of Key Personnel during the contract period, the amount stated at Annexure - III, are to be deducted per month on pro-rata basis from the contractor's bill. It may be seen that the short fall refers during the subsistence of the contract period and not a short fall at the time of initial tender process. Therefore, I find force in the submission made by the learned Senior Govt. Advocate in this regard in the above lines.

[10.] Moving on to Clause 4.5.9 of the ITB, it is seen that the same is regarding bid capacity. Clause 4.5.9 may be abstracted hereunder for ready reference:-

“4.5.9 Bid Capacity:

The Applicants who meet the minimum qualification criteria will be qualified only if their available bid capacity at the expected time of bidding is more than the total estimated cost of the works. The available bid capacity will be calculated as under:

*Assessed available bid capacity = (A *N*2-B), Where*

A = Maximum value of works executed in any one year during the last five years (updated to the current price level) rate of inflation may be taken as 10% per year which will take into account the completed as well as works in progress.

B = Value at current price level of the existing commitments and ongoing works to be completed during the next 24 month (period of completion of work for which bids are invited); and

N = Number of years prescribed for completion of the works for which bids are invited.

Note : { In case of a joint venture, the available bid capacity will be applied for each partner to the extent of his proposed participation in the execution of the works} N/A.”

[11.] From the above abstract, it may be seen that the applicants having the minimum qualification criteria will be qualified only if their available bid capacity at the time of bidding is more than the total estimated cost of the works in the manner provided. Further, Clause 1.4 of Section 2 of the SBD also provides for information to be given on bid capacity. The bid capacity is for the works for which bids have been submitted and works which are yet to be completed as on the date of the current bid. Admittedly, the petitioner had declared NIL on the information regarding the ongoing commitment. Therefore, it only appears that there has been violation on the part of the petitioner to comply with the requirements of Clause 4.5.9, which apparently attracted Clause 4.5.10.

Although the petitioner has also pointed out that the respondent authorities could have invoke Clause 23.4 (ii) of the ITB but the fact remains that the discretion to invoke the said Clause is left upon the authority concerned if the same is found necessary. In other words, there is no compulsion for the authority concerned to seek for clarification before coming to a finding that the tender of a particular tenderer is not responsive.

[12.] The learned counsel for the petitioner has tried to impress upon the Court about the fact that in a Tender Notice, the requirements can be classified into two (2) categories i.e., those which lay down the essential conditions of eligibility and the others, which are merely ancillary or subsidiary with the main object to be achieved by the condition by relying upon the case of *Poddar Steel Corporation* (supra). However, in my considered view, the said decision does not come to the rescue of the petitioner in view of the fact that the relevant clause mentioned in the impugned order dated 31.05.2022 being a part of the technical bid cannot be considered to be ancillary or subsidiary with the main object to be achieved in a tender, which has a value of work amounting to Rs. 39.10 Crores. Likewise, the case of *Oryx Fisheries Private Limited* (supra) in my considered view has no application to the present case.

[13.] Thus, upon due consideration and having heard the learned counsels

for the rival parties, I find no merit in the writ petition and accordingly, the same is dismissed. Any interim order passed earlier shall stand merged with this Judgment. No cost.

JUDGE

Comparing Assistant