



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

Case No. : WP(C)/403/2023

M/s Capital Enterprises
represented by its proprietor Smty Senbom Taipodia, D/o Mahen Tai Podia, R/o ESS
Capital Home Complex, C sector, Naharlagun, P.O/P.S Naharlagun, Papum Pare
District, Arunachal Pradesh 791110. Mob. No. 9957137907

VERSUS

The State of AP and 5 Others
represented by the Principal Secretary, (PWD) Govt. of Arunachal Pradesh, Itanagar.
2:The Chief Engineer

Age: 0
Occupation :
(APPWD)
(Central Zone) B
Pasighat
East Siang District
Arunachal pradesh.

3:The Executive Engineer

Age: 0
Occupation :
(APPWD)
Pasighat
East Siang District
Arunachal pradesh.

4:M/s Badri Rai and Company

Age: 0
Occupation :
represented by its partner Shri Arun Kumar Rai
having its office near Radha Krishna Mandir
Station Road
Duliajan
Dibrugarh
Assam 786602

5:TRIBENI CONSTRUCTION LIMITED

Age: 0
Occupation :
Guwahati
C/o Mr. Oni Dai
Pasighat
PO/PS Pasighat
East Siang District
Arunachal Pradesh.

6:The Screening Committee on Opening of Tender Bid

Age: 0
Occupation :
under the Chairman of the Executive Engineer
Pasighat Division
PWD
Arunachal Pradesh

Advocate for the Petitioner : Kaku Potom

Advocate for the Respondent : GA (AP)

Linked Case : WP(C)/376/2023

M/s Ragia Ku Enterprises
Age: 0
Occupation :
Address:Represented by its Proprietor
Shri Langkung Ragia

aged about 42 years

S/o Late Langkung Tasuk

R/o ESS Sector
Itanagar
PO/PS Itanagar
Papumpare District
Arunachal Pradesh 791111.
Mob No. 7085758116

VERSUS

THE STATE OF AP and 5 Ors.

Age: 0
Occupation :
Address:Represented by the Principal Secretary
(PWD) Govt. of Arunachal Pradesh
Itanagar.
2:the Chief Engineer

Age: 0
Occupation :
Address:(AAPWD)
(Central Zone) B
Pasighat
East Siang District
Arunachal Pradesh.

3:the Executive Engineer

Age: 0
Occupation :
Address:(AAPWD) Pasighat
East Siang District
Arunachal Pradesh.

4:M/s Badri Rai and Company

Age: 0
Occupation :
Address:Represented by its partner Shri Arun Kumar Rai

having its office near Radha Krishna Mandir
Station Road
Duliajan
Dibrugarh
Assam 786602

5:TRIBENI CONSTRUCTION LIMITED

Age: 0
Occupation :
Address:Guwahati

C/o Mr
Oni Dai

Pasighat
PO/PS Pasighat
East Siang District
Arunachal Pradesh.

6:the Screening Committee

Age: 0
Occupation :
Address:on Opening of Tender Bid
under the Chairmanship of the Executive Engineer

Pasighat Division
PWD
Arunachal Pradesh.

Advocate for : Nalo Pada

Advocate for : GA (AP) appearing for THE STATE OF AP and 5 Ors.: Advocate
appearing for 2, 3, 4, 5, 6, respectively.

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

HON'BLE MR. JUSTICE NELSON SAILO

Date of Hearing : 23.08.2023

Date of Judgment : 25.08.2023

JUDGMENT & ORDER

Heard Mr. N. Pada, learned counsel for the petitioner in WP(C) No. 376(AP)/2023, Mr. K. Potom, learned counsel for the petitioner in WP(C) No. 403(AP)/2023, Mr. S. Tapin, learned Senior Govt. Advocate for all the official respondents in both the writ petitions and Mr. R.B. Phukan, the learned counsel for the respondent No. 4 in WP(C) No. 376(AP)/2023. Since the issues involved in both the writ petitions are one and the same, they are being disposed of by this common order.

[2.] The facts of the case in brief is that a Notice inviting e-tender was floated by the Executive Engineer, Arunachal Pradesh Public Works Department, Pasighat on 22.06.2023 for upgradation of Bakin Pertin General Hospital, Pasighat to 300 bedded hospital in East Siang District, Arunachal Pradesh for an

estimated cost of Rs. 99.03 Crores. As per the milestone date of the e-tender, the date of publication in the website was 24.06.2023 at 1030 hrs and the period of downloading of bidding documents was from 24.06.2023 (1200 hrs) to 10.07.2023 (1400 hrs). The commencement of online bid submission was from 27.06.2023 (1100 hrs) and the last date of submission of online bid was 10.07.2023 at 1400 hrs. The date, time and venue of pre-bid meeting was 26.06.2023 at 1030 hrs in the PWD Division Office at Pasighat. The physical submission of Earnest Money Deposit (EMD), tender fee, hard copy and technical bid documents and signed copy of SBD was 14.07.2023 at 1030 hrs in PWD Division Office at Pasighat. The date and time of opening the technical bid was 14.07.2023 at 1130 hrs and the date and time of opening of financial bid was to be notified later on for participation of those who qualified in the technical bid only. According to the petitioners, the Notice Inviting Tender (NIT) was not widely circulated by publication in the local newspaper apart from the claim of the respondents that the same was uploaded in the website/web portal. Because of the non-publication of the NIT in the local newspaper, the petitioners were unaware about the same and could not participate. They came to learn about the same only after the last date of submission of the online bid. According to the petitioner in WP(C) No. 403(AP)/2023, the petitioner came to learn about the NIT on 12.07.2023 and immediately wrote to the President, Arunachal Pradesh Registered Contractors Association (AARCA). The petitioner

was informed by AARCA that a representation was already submitted by the Association before the authorities concerned. The Director, Medical Education under instructions wrote to the respondent No. 2 to file parawise reply to the representation/complaint and suspend the tendering process. However, the same was not complied. AARCA ultimately approached this Court by filing WP(C) No. 349(AP)/2023 but the same was dismissed by this Court vide order dated 07.08.2023 after finding AARCA to have no locus standi to file the writ petition. It is thereafter that both the writ petitions have been filed by the petitioners concerned.

[3.] Mr. N. Pada, learned counsel for the petitioner in WP(C) No. 376(AP)/2023 submits that as per notification dated 19.08.2020 (Annexure - X), the Chief Secretary to the Govt. of Arunachal Pradesh in supersession of the earlier notifications has notified that in view of Government policy of Vocal for Local and Atma Nirbhar Bharat to encourage local entrepreneurs, the first priority on any procurement of goods and services shall be done locally through normal tender and further that only when items are not available locally through normal tender, procurement shall be done through Government e-Market (GeM). The said notification is with immediate effect. However, the respondent authorities concerned without adhering to the notification dated 19.08.2020 had issued the tender notice through e-tender only and thereby, the same not having the effect of wide publicity and circulation, the petitioners being unaware have been

deprived from participating in the tender process. The learned counsel further submits that as per Clause 16.1 (d) of the Invitation For Bids (IFB) dated 22.06.2023, the original instrument in any form as was stipulated should be deposited in the Office of the respondent No. 3 at least one day before the last date of online bid submission, which in fact is rather unusual in view of the fact that the last date of submission on the online bid i.e., 10.07.2023 was Monday and therefore, the preceding two (2) days being Saturday and Sunday, there was no possibility for the intending bidders to carry out the instruction. Therefore, there is a motive on the part of the respondent authorities to debar the bidders such as, the petitioners from participating in the tender process. Referring to the communication dated 07.07.2023 (Annexure - IV) written by the Direction, Medical Education, Training & Research, Naharlagun to the Chief Engineer, Central Zone-B, PWD, Pasighat, the learned counsel submits that the Director had asked the Chief Engineer to suspend the tendering process as was approved by the Minister of Health & Family Welfare, pending disposal of the complaint submitted by AARCA, but the latter proceeded with the tender process. He submits that the respondent authorities concerned were aware about the complaint made about non-publication of the tender notice in the local dailies but they continued to proceed with the tender process. The learned counsel submits that since the intending bidders who are also eligible such as, the petitioners have been deprived of the opportunity to participate in the

tender process, there fundamental rights under Article 14 of the Constitution of India has been violated. That even if a detailed advertisement was not published in the local newspaper, the respondent authorities concerned should have at least published the website address and the portal in the local newspaper from where intending bidders can participate. He therefore submits that NIT dated 22.06.2023 should be set aside and the respondents should be directed to publish a fresh tender notice. In support of his submission, he relies upon the following authorities:-

(1) M.L. Enterprise (M/S) -Vs- State of Arunachal Pradesh & Ors. 2018 (2) GLT 269.

(2) Ramana Dayaram Shetty -Vs- International Airport Authority of India & Ors. (1979) 3 SCC 489.

[4.] Mr. K. Potom, learned counsel for the petitioner in WP(C) No. 403(AP)/2023 referring to paragraph No. 21 of the writ petition submits that the NIT in question was an open tender and therefore, the same is a process of inviting bids for projects/goods/services in an open and transparent manner. The details of the project or requirements are publicly advertised and any entity meeting the required qualification can submit a bid. That open tendering process is designed to promote fair competition, a level playing field for all bidders, large or small. However, in the present case, there was no wide

publicity about the NIT and therefore, the petitioner has been deprived of participating in the tender process. He submits that as of now, the tender process has not been finalized and therefore, no prejudice will be caused to anyone if a fresh NIT is directed to be issued. He further submits that as per the established norms, 5% price escalation is the permissible limit but in the present case, the private respondents have quoted an amount which is much above the permissible limit. Therefore, even on this ground, a fresh NIT should be issued. The learned counsel further submits that CPWD manual is only a guideline and not a law enacted by the Parliament and therefore, the State Government is well within its power to regulate the tender procedure by issuing an appropriate notification. The notification dated 19.08.2020 which provides that the first priority is to be given to local entrepreneurs through normal tender having not been complied with while issuing the NIT dated 22.06.2023, the same should be cancelled and a fresh NIT be directed to be issued. He also submits that unless the impugned actions of the respondents are interfered with by this Court, the respondent authorities will resort to similar actions leading to uncertainty in the future. He thus submits that the NIT dated 22.06.2023 should be set aside and the respondents directed to issue a fresh NIT. In support of his submission, he relies upon the following authorities:-

- (1) Judgment dated 12.03.2021 passed by this Court in WP(C) No. 4495/2019 (Subudh Das -Vs- State of Assam & 4 Ors.).*

(2) Judgment dated 29.07.2019 passed by this Court in WP(C) No.

63/2019 (S.P.N Enterprise -Vs- State of Nagaland & Ors.)

[5.] Mr. S. Tapin, learned Senior Govt. Advocate submits that the NIT dated 22.06.2023 was floated for specialized work i.e., on Turn Key mode. He submits that as per the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development and Promotional) (Amendment) Act, 2020 (Act of 2020), for the value of work above Rs. 20 Crores, the same is open to all eligible registered contractors in appropriate class. Therefore, the petitioners cannot claim that the preference in this kind of specialized work should be given to local entrepreneurs. The learned Senior Govt. Advocate further submits that the General Financial Rules (GFR) is applicable to the state of Arunachal Pradesh wherein, it is clearly provided that advertisements are to be made through online mode by way of e-tendering. The learned Senior Govt. Advocate further submits that the publicity of tenders as provided by CPWD Manual, 2014 was by way of advertisement in the website/press and the same has been replaced by e-tendering in the CPWD Manual, 2019. The relevant provision under the CPWD Manual is paragraph 4.4 and 4.12 of the said Manual. In fact, Clause 4.12 provides that in exceptional cases, if press publicity is required to be given apart from website publicity, written permission has to be obtained from the next higher authority. The said provisions have also been retained in the CPWD Manual, 2022. The learned Senior Govt. Advocate submits

that as per the NIT dated 22.06.2023, the intending bidder submitting the bid has to satisfy the criteria laid down for eligibility to submit a bid but the petitioners have failed to show in their writ petitions that they possess and have the criteria laid down to be eligible to participate in the bidding process. As such, the petitioners cannot have any legitimate grievance against the respondent authorities. The NIT was published without any mala fide intention and as per the guidelines in the CPWD Manual and the GFR. Therefore, the NIT dated 22.06.2023 may not be interfered with by this Court and the writ petitions should be dismissed. In support of his submissions, the learned Senior Govt. Advocate relies upon the case of *Raunaq International Ltd. -Vs- I.V.R Construction Ltd. & Ors. (1999) 1 SCC 492*.

[6.] Mr. R.B. Phukan, learned counsel for the respondent No. 4 in WP(C) No. 376(AP)/2023 submits that the NIT dated 22.06.2023 being an open tender, anyone who has the capacity and interest to participate in the tender process are free to participate. The tender floated being in the Engineering, Procurement and Construction mode (EPC mode), the same requires specialized work. He submits that the petitioners having failed to participate in the tender process cannot claim that they have the expertise which can be equated with the capability and capacity of the respondent No. 4. He submits that the petitioners have in fact filed their writ petitions only to disrupt the tender process with intentions which are not bonafide. He submits that representation

was filed by AARCA on 06.07.2023 and writ petition on 29.07.2023. Court passed an interim order on 31.07.2023 but the writ petition itself was dismissed on 07.08.2023. Thereafter, the present two writ petitions came to be filed only to delay the process. He submits that for one reason or the other, the petitioners have only attempted to disrupt the tender process whereas, early execution and timely completion of the work concerned is in public interest. He submits that not only the time factor but the financial implication are the relevant factors to be considered before deciding to go for a fresh tender. He therefore submits that the NIT dated 22.06.2023 having been issued as per the norms and guidelines in this regard, the same may not be interfered with and the writ petitions should be dismissed. In support of his submissions, the learned counsel relies upon the case of *Tata Motors Limited -Vs- The Brihan Mumbai Electric Supply & Transportation Undertaking (BEST) & Ors. AIR 2023 SC 2717*.

[7.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record.

[8.] From the projection made by the parties, the issue to be decided is whether there is infirmity in the manner in which the NIT dated 22.06.2023 has been published i.e., by way of e-tender only and without making any paper publication. The learned counsels for the petitioners have relied upon the notification dated 19.08.2020 which was issued by the Chief Secretary to the

Govt. of Arunachal Pradesh providing that priority on procurement of goods and services shall be done locally through normal tender and that, only when items are not available locally through normal tender, the procurement shall be done through Government e-Market (GeM). It may be seen that the nature of the work which was tendered is for upgradation of the General Hospital at Pasighat to 300 bedded Hospital for an estimated cost of Rs. 99.03 Crores. The work tendered is also on a Turn Key and EPC mode. There is no dispute to the fact that the CPWD Manual is applicable to the state of Arunachal Pradesh. Clause 17.1 of CPWD Manual of 2014 provides for wide publicity of tenders. Clause 17.1 (1) provides that wide publicity should be given to notice inviting tenders in the most open and public manner possible by advertisement in the website/press and by notice in English/Hindi and the written language of the District concerned amongst others. However, in the CPWD Manual, 2019, the publicity of tenders is provided under Clause 4.12, which states that all tenders of any amount shall be invited through e-tendering system. Notice for all the works irrespective of their value shall be published on the website as instructed from time to time. Once published on the website, the tender notice will also become available through system link. It further provides that in exceptional cases, if press publicity is to be given apart from website publicity, written permission shall be obtained from the next higher authority. The same provision regarding publicity of tender has also been repeated in the CPWD Manual, 2022.

[9.] I have also perused the records produced by the learned Senior Government Advocate and it is seen that due process was followed in the finalization and uploading of the e-tender in the website and as per the guidelines in the CPWD Manual and the GFR. Against the e-tender notified, as many as four firms which include the private respondents were able to participate. Further, it may be seen that the request for cancellation of the e-tender submitted by AARCA was on 06.07.2023 and the last date for submission of online bid was 10.07.2023 at 1400 hrs. Therefore, the deficiency in wide publicity as alleged by the petitioners appears to be over-emphasized. The petitioners claiming to have the means and capacity to undertake the specialized work such as the present one (Turn Key and EPC mode) on one hand cannot on the other hand say that they are not aware of what is being notified in the government website. After all, they are in the line of business and for earning profit. It may also be noticed that during and after the Covid-19 pandemic, it has become all the more necessary for all establishments to function through online mode. Therefore, the claim to be depend on newspaper publication for participation in tender process and against the prescription of the CPWD Manual 2019 and 2022 cannot be accepted. It is noticeable in today's world that acquisition and use of smart phone is not a luxury but a necessity. With this device, one can have access to the internet in the palm.

[10.] The learned counsels for the petitioners have relied upon the case of

M.L. Enterprise (M/S) (supra) but however in that said case, the finding of the Court was that the work was executed without floating any NIT, which is not so in the present case. In *Tata Motors Limited* (surpa) the Apex Court at paragraph Nos. 52 & 53 held as follows:-

“52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in [Association of Registration Plates v. Union of India and Others](#), reported in (2005) 1 SCC 679.

53. The law relating to award of contract by the State and public sector corporations was reviewed in [Air India Ltd. v. Cochin International Airport Ltd.](#), reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any

relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under [Article 226](#) with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.”

[11.] The above ratio is found relevant and applicable to the present case as well. The initiation of fresh tender at this stage will not be in public interest particularly when this Court has come to a finding that there is nothing wrong with the process of e-tendering that was undertaken by the respondent authorities as per the provisions of the CPWD Manual.

[12.] The case of *S.P.N Enterprise* (supra) referred to by the learned counsels for the petitioners is also found to be not applicable to the present case in view of the fact that in that case, the notice for inviting tender was put up in the notice board of the office concerned and was not circulated in any form. Similarly, the case of *Subudh Das* (surpa) referred to by the learned counsel for the petitioners is also found to be not applicable as it was a case where the NIT

was published in a newspaper not widely circulated and the Court found it to be not acceptable. The facts in the present case are otherwise different and therefore, the said decision is found to be not applicable.

[13.] Thus, upon due consideration, I am of the view that that the petitioners cannot be said to have any legitimate grievance and accordingly, both the writ petitions are dismissed. Interim order/orders passed earlier shall stand merged with this order. Parties are to bear their own cost.

JUDGE

Comparing Assistant